ODGERS'
AUSTRALIAN SENATE PRACTICE

TWELFTH EDITION

Odgers'
Australian Senate Practice

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edited by

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The concurrence of a plurality of authorities in legislation is a necessary condition of truly constitutional government in any community, whether it is federal or unitary. If the whole legislative power is vested in a single authority it is a form of absolutism, whether the authority be a single man, or the majority of a single assembly. But if provision is made in the composition of the legislative authority for securing the concurrence of distinct majorities representing distinct social forces and interests, the government is constitutional.

Andrew Inglis Clark
Studies in Australian Constitutional Law, 1901

Historical experience, however, is not an unrelieved record of failure to deal with the problem of power. A number of societies have succeeded in constructing political systems in which the power of the state is constrained. The key to their success lies in recognizing the fact that *power can only be controlled by power.* This proposition leads directly to the theory of constitutional design founded upon the principle most commonly known as "checks and balances".

Scott Gordon
Controlling the State, 1999

TO

THE ELECTORS OF AUSTRALIA

who by their votes established and have sustained
constitutional government in the Commonwealth of Australia

and one group of their chosen agents and trustees

THE SENATORS

who hold a large portion of that trust

CONTENTS

CHAPTER 4
ELECTIONS FOR THE SENATE

CHAPTER 5
OFFICERS OF THE SENATE: PARLIAMENTARY ADMINISTRATION

CHAPTER 6
SENATORS

CHAPTER 7
MEETINGS OF THE SENATE

CHAPTER 8
CONDUCT OF PROCEEDINGS

CHAPTER 14
COMMITTEE OF THE WHOLE PROCEEDINGS

CHAPTER 15
DELEGATED LEGISLATION AND DISALLOWANCE

CHAPTER 16
COMMITTEES

CHAPTER 19
RELATIONS WITH THE EXECUTIVE GOVERNMENT

CHAPTER 20
RELATIONS WITH THE JUDICIARY

CHAPTER 21
RELATIONS WITH THE HOUSE OF REPRESENTATIVES

APPENDICES

ABBREVIATIONS

ACTR	Australian Capital Territory Reports
AIA	Acts Interpretation Act
ALJR	Australian Law Journal Reports
All ER	All England Law Reports
ALR	Australian Law Reports
APR	Atlantic Provinces Reports
ASP	*Australian Senate Practice* (1st-6th editions of this work)
CLR	Commonwealth Law Reports
ER	English Reports
F	Federal Reporter
FCA	Federal Court of Australia
FCR	Federal Court Reports
FLR	Federal Law Reports
FRLI	Federal Register of Legislative Instruments
HC	House of Commons Paper
HR(D)	House of Representatives (Debates)
J.	Journals of the Senate
KB	King's Bench
LIA	Legislative Instruments Act
MUP	Melbourne University Press
NSWLR	New South Wales Law Reports
NZLR	New Zealand Law Reports
OASP	*Odgers' Australian Senate Practice* (7th and subsequent editions of this work)
PP	Parliamentary Paper
QB	Queen's Bench
QBD	Queen's Bench Division
Qd R	Queensland Reports
SASR	South Australian State Reports
SD	Senate Debates
SO	Standing Orders of the Senate
US (in citations of judgments)	United States Reports
USLW	US Law Week
VP	Votes and Proceedings of the House of Representatives
VR	Victorian Reports
VSCA	Victorian Supreme Court, Court of Appeal
WAR	Western Australian Reports
WLR	Weekly Law Reports
s.	section
ss	sections

PREFACE

At the end of the preface to the eleventh edition of this work, it was noted that the then government had gained a party majority of one in the Senate in the 2007 general elections, and the possible effect of this on the performance by the Senate of its essential task of holding the executive government accountable was mentioned. A detailed study of Senate activity during the period between that majority taking effect and the following general election concluded, unsurprisingly, that the accountability function was diminished. It is almost a law of nature that executives will seek to avoid accountability, and that independent legislatures are needed to impose it. The structures and measures built up by the Senate over many years to achieve accountability, however, remained in place during that time. The party majority was lost in the general elections of 2007, and the Senate returned to what is now regarded as the normal situation of no party holding a majority. It is to be hoped that this situation will support the Senate's accountability role. This work, as with previous editions, seeks to perform the task of recording the Senate's accountability and other activities in the past as a guide to the future.

The period since the last edition saw several significant changes and precedents in the operations of the Senate.

The structure of the committee system, which is the mainstay of the Senate's accountability operations, was changed to revert to the pre-1994 structure of eight standing committees. This was not necessarily a negative development; as the history before 1994 indicates, the old structure was perfectly capable of serving the functions of the institution and of supporting the parliamentary activities of senators. Only six months after the change of government, however, more select committees had been appointed; the proliferation of select committees under the old system was one of the reasons for the 1994 change: it was intended to encourage more use of the standing committees for particular inquiries. History may be repeating itself.

The standing committees were employed, often to their full capacity, and set several precedents in their scrutiny of estimates and bills and inquiries into matters referred to them by the Senate. Innovative methods of referring bills were adopted to allow committees to begin their examinations as early as possible in the legislative process. As a result the amendment of bills in consequence of Senate committee scrutiny has sometimes occurred before the bills were actually received by the Senate.

There were some significant precedents and lower court judgments vindicating that immunity of the Senate and its committees known as parliamentary privilege, which supports the freedom of parliamentary debate and inquiry. The Committee of Privileges presented several significant reports, including one on mistaken court judgments in other jurisdictions about references to parliamentary proceedings outside the protected parliamentary sphere.

The problem of the execution of search warrants in the premises of senators was settled by agreement between the President and the government on a set of procedures to govern that

process. A judgment of a United States court upheld the view of the law taken by the Senate on which that agreement was based.

Parliamentary scrutiny and control of public finance was in issue in several contexts. Senate committees grappled with a new system of appropriations which undermined the long-standing agreement between the Senate and government about the content of appropriation bills and the ordinary annual services of the government. This matter had not been resolved at the time of writing, but those committees and the Senate itself have clearly indicated that it should be resolved in favour of the past arrangements which best suited parliamentary scrutiny. A significant High Court judgment on the legality of government expenditures clearly signalled to the Parliament that it must exercise the responsibility to ensure that public funds are appropriated in such a manner as to avoid improper or unexpected expenditure. The Finance and Public Administration Committee presented a significant report on transparency and accountability of Commonwealth public funding and expenditure, and the implementation of its recommendations would greatly improve parliamentary control of expenditure. The need for reform in this area was supported by several reports by the Australian National Audit Office detecting serious problems in the management of public expenditure.

One of the most venerable statutes of the Australian Parliament, the *Acts Interpretation Act 1901*, in so far as it related to parliamentary scrutiny and control of delegated legislation, was replaced by the *Legislative Instruments Act 2003* which came into operation in 2005 and which codified the law on the subject and greatly extended the scope of parliamentary control, while creating some further yet-to-be-resolved uncertainties.

There were procedural innovations. The procedure whereby a senator may raise a debate in the chamber on any delay in answering questions on notice was extended to estimates questions on notice and orders for the production of documents. This change expanded a very significant accountability mechanism which may be wielded by any senator.

There continued to be problems with claims by government to be immune from producing documents to the Senate and its committees, or rather non-claims, as in some instances the obligation on government to raise a public interest ground for not producing information appeared to be forgotten. The old misconception that general statutory secrecy provisions impinge on parliamentary inquiries briefly reappeared. Senate precedents and resolutions should by now have provided utmost clarity to these matters. The question of whether the government may be required to produce advice provided to government should now have been settled by proceedings in estimates hearings in 2008.

This edition appears when the country is entering upon an era of life-and-death policy issues and extremely difficult decisions. As always, there are demands for power to be concentrated in the hands of the central executive government, supposedly to allow it to solve the problems that must be confronted. As always, such demands are misconceived. In this era, scrutiny and accountability of government will be more vital than ever. The greater the policy issues and the more difficult the decisions, the more likely it is that mistakes will be made, and parliamentary scrutiny and control is essential to disclose and remedy those mistakes. Government itself is weakened by lack of accountability. The Senate and its processes

provide a large part of the scrutiny that will be required. The means by which it may do so are here recorded.

ACKNOWLEDGMENTS

As always, senators are the first to merit acknowledgement for their efforts in enhancing the Senate's role. The procedure for requiring explanation of unanswered estimates questions on notice and orders for documents, for example, was adopted because it was pursued by an individual senator seeking to find a solution to an accountability problem. Virtually all Senate staff make some contribution to this book, but those especially worthy of mention are Rosemary Laing, Andrea Griffiths, Cleaver Elliott, Richard Pye and Maureen Weeks. Thanks to Kay Walsh and Lynnette Eager for production.

Harry Evans
July 2008

Chapter 1

THE SENATE AND ITS CONSTITUTIONAL ROLE

THE PARLIAMENT of the Commonwealth of Australia, which is given the power to make laws for the Commonwealth by the Constitution, has two elected houses: the Senate and the House of Representatives.

There are two reasons for this division of the law-making body, the legislature, into two houses. Both reasons have a long history, pre-dating the framing of the Australian Constitution by elected conventions in the 1890s.

The first is expressed by the term bicameralism, the principle that making and changing the laws should require the consent of two different bodies. The requirement for the consent of two differently constituted assemblies is a quality control on the making of laws. It is also a safeguard against misuse of the law-making power, and, in particular, against the control of one body by a political faction not properly representative of the whole community.

Secondly, the division of the legislature into two houses allows the central legislature of the nation to reflect and secure its federal nature, that is, that it is a union of states, in which the responsibilities of government are divided between regional state legislatures representing the people of their regions and exercising regional powers, and a national legislature, representing the people of the whole country, exercising specified national powers. In such a nation, particularly a nation occupying a large geographical area, a central legislature elected by the people as a whole necessarily involves the danger that a majority within that legislature could be formed by the representatives of only one or two regions, leading to neglect of the interests of other regions and their consequent alienation from the central government. The solution to this problem is to have one house of the legislature elected by the people as a whole, representing regions in proportion to their population, and one house elected by the people voting in their separate regions, and representing those regions equally. This federal bicameral structure was invented by the framers of the Constitution of the United States of America in 1787, has been followed by federal states around the globe, and was followed by the framers of the Australian Constitution.

The Senate, bicameralism and federalism

When the Australian Constitution was drawn up in the 1890s, two principles were accepted by the framers of the Constitution as its foundations. These principles were not varied during the long process of amendment of the draft Constitution.

The first was that Australia would be a federal nation, formed by the union of the self-governing states, in which the people of each state would elect their state parliaments to exercise state responsibilities, and the people of the whole nation would elect a national parliament to exercise specified national responsibilities.

The second principle was that the national legislature, the Parliament of the Commonwealth, would consist of two houses, one representing the people as a whole and one representing the people voting by their states, and that the consent of both houses would be necessary for the passing of laws.

These principles were repeatedly stated during the debates on the draft Constitution:

> ....it is accepted as a fundamental rule of the Federation that the law shall not be altered without the consent of the majority of the people, and also of a majority of the States, both speaking by their representatives ... (Samuel Griffith, quoted by Richard Baker, Australasian Federal Convention, 23 March 1897, p. 28)

> ....the great principle which is an essential, I think, to Federation — that the two Houses should represent the people truly, and should have co-ordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent them as grouped in the states. Of course majorities must rule, for there would be no possible good government without majorities ruling, but I do not think the majority in South Australia should be governed by the majority in Victoria, or in New South Wales. .... If we wish to defend and perpetuate the doctrine of the rule of majorities, we must guard against the possibility of this occurring. (John Cockburn, Australasian Federal Convention, 30 March 1897, p. 340)

Senators were to represent the *people* of the states, not state governments. Suggestions that are occasionally made that senators should be appointed by state governments are therefore misconceived. Nor was it intended that senators vote in state groups or according only to their assessment of state interests; the function of ensuring that the legislative majority is geographically distributed does not require such behaviour.

The choice by the framers of the Constitution of a federal system also involved the national government consisting of three branches, the legislature (the law-making body), the executive (the body which administers the laws), and the judiciary (the body which interprets the laws, including the Constitution, and applies them to particular cases). The Australian Constitution therefore establishes as the legislature the Parliament of the Commonwealth of Australia, as the executive the monarch, represented in Australia by the Governor-General, and as the judiciary the High Court of Australia, with other federal courts established by the Parliament.

Unlike the framers of the United States constitution, however, the Australian founders did not confer the effective executive and legislative powers on separate bodies. Instead, they adopted the British system of responsible or cabinet government, in which the executive power, nominally held by the monarch represented by the Governor-General, is actually exercised by ministers who are also members of Parliament. It was envisaged, though not specified in the Constitution, that these ministers would hold office only so long as they had the support of a majority of the House of Representatives. This system, which had emerged in Britain only in the 50 years or so before the Australian Constitution was drawn up, had operated in each of the Australian states, and the founders wished to adopt it largely because of its familiarity.

A significant minority of delegates at the constitutional conventions wished to abandon this system of cabinet or responsible government at the national level and to confer the executive power on a separately elected body. One of their reasons for proposing this was that they contended that the federal system would be incompatible with the British system of cabinet or responsible government, because the federal system required equality of powers between the two houses of the legislature. Their apprehensions were subsequently realised, to the extent that, with the rise of highly disciplined political parties, the House of Representatives came to be completely controlled by the ministry with a party majority in the House.

In Australia's Commonwealth Parliament bicameralism is therefore a product of constitutional intent and design, not of evolutionary process. The Senate and the House of Representatives are creations of the same process of constitutional design. The design of the Senate followed the United States Senate in several aspects: equality of state representation; six year terms; and election of senators by rotation. It was, however, an innovatory design so far as the Senate was concerned. The Senate from the beginning was directly elected by the people, unlike its United States counterpart, which was indirectly elected until 1913.

The name "Senate" was carefully chosen. In the 1897 draft it was called the "States Assembly", for the reason that it was to be the house representing the states as distinct entities and the house which had the custody of the states' interests. At the Adelaide convention of 1897 the name "States Assembly" was struck out and the name "Senate" inserted (13 April 1897, pp 481-2). This restored the proposal of the 1891 draft. The name "Senate" is appropriate because, as was said in the debate on the amendment, its responsibilities affect the nation as a whole as well as of the constituent states. It has the further advantage of according its members the distinctive title of "senator".

A major effect of federalism is that the Parliament of the Commonwealth, like the United States Congress, is not even nominally a sovereign parliament: its powers are limited by the Constitution. The British and New Zealand Parliaments, on the other hand, are nominally sovereign in that, in theory, their power to legislate on any matter is unrestricted in the absence of limiting constitutions.

Bases of the two Houses

An effective bicameral system requires that the two houses of the legislature be constituted on different bases: if they are constituted in the same way they would be likely to have the same political colour and therefore not be an effective check upon each other. The federal system necessarily requires that the two houses be constituted on different bases to reflect and secure the federal character of the union. The two Houses of the Australian parliament therefore have different compositions.

The main differences between the Australian Houses derive from the representative base, method of election, and terms of office. The principal features of federal bicameralism as exemplified in the Commonwealth Parliament are:

- Effective equality of the Senate and the House in the making of laws and the performance of all other parliamentary responsibilities. The only qualification is that certain types of financial legislation must originate in the House of Representatives, and in some cases the Senate is limited to suggesting and, if necessary, insisting on amendments.

- Senators are elected on a state or territory basis, each state or territory voting as one electorate; membership of the House is based on single member electorates approximately equal in population.

- Each state irrespective of population is represented by 12 senators, each territory by 2 senators; representation in the House of Representatives is based on population.

- Distinctive methods of electing the two Houses. Senators are elected by a proportional method; the method of electing members of the House of Representatives is preferential.

- State senators are elected for terms of six years; half the senators from each state retire at three-yearly intervals. Members of the House of Representatives are elected for terms not exceeding three years. Except in the circumstances of simultaneous dissolution of both Houses, the Senate, in contrast to the House of Representatives, is a continuing House. The terms of territory senators end and begin at each election for the House of Representatives.

- Constitutional provision for resolution of disagreements between the Senate and the House over legislation originating in the House of Representatives. Such disagreements over legislation originating in the House may be resolved by simultaneous dissolution of both Houses. If, following new elections, the disagreement persists, the legislation in contention may be submitted to a joint sitting of both Houses.

Rationale of bicameralism

The principle of bicameralism has a long history. As well as being practised by many states since ancient times, it has also been expounded by the leading philosophers and practising politicians in the course of the development of modern nations.

Bicameralism is in practice necessary to achieve a parliament truly representative of the people. Bicameralism helps to improve and enhance the representative quality of a parliament and to ensure that it is representative in a way in practice not achievable in a unicameral parliament. Modern societies are complex and diverse; no systems of representation are, of themselves, capable of providing a truly representative assembly. Adequate representation of a modern society, with its geographic, social and economic variety, can be realised only by a variety of modes of election. This is best achieved by a bicameral parliament in which each house is constituted by distinctive electoral process. A properly structured bicameral parliament ensures that representation goes beyond winning a simple majority of votes in one election, and encompasses the state of electoral opinion in different phases of development.

Bicameralism is also an assurance that the law-making power is not exercised in an arbitrary manner. Such an assurance is of considerable practical significance in parliaments where the house upon which the ministry relies for its survival is liable to domination by rigidly regimented party majorities.

The rationale of bicameralism is expounded in clearest terms in *The Federalist*, the famous essays written in 1787-88 by Alexander Hamilton, James Madison and John Jay to explain the Constitution of the United States. This work, which was referred to by the Australian framers, warned that those administering government "may forget their obligations to their constituents, and prove unfaithful to their important trust ... a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient" (No. 62, Everyman ed., p. 317).

In so arguing *The Federalist* adopted the French philosopher Montesquieu's proposition that: "The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting" (*The Spirit of the Laws*, 1748, Hafner Press, 1949, p. 160). Montesquieu was aware of the implications of a single representative body liable to domination by the executive power, a condition observable in many assemblies of the British or Westminster type in which legislative and executive power are combined. He warned that "When the legislative and executive powers are united ... there can be no liberty" (*ibid.*, p. 151).

The Federalist also drew attention to the value of a second, reflective expression of representative opinion. Pointing to "the propensity of all single and numerous assemblies ... to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions", *The Federalist* urged the contribution of a second body, less numerous and able "to hold its authority by a tenure of considerable duration" (*ibid.*). Such a second body responds to "the necessity of some stable institution in the government".

The Federalist, in urging the utility of the second opinion, invoked not only arguments drawn from political prudence but also others deriving from the "whole system of human affairs, private as well as public":

> We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state. (*The Federalist*, No. 51, pp 264-5)

A philosopher who gave close attention to the question of bicameralism was John Stuart Mill in his great treatise, *Representative Government* (1861). Mill was acutely conscious of the limitations which a house elected on the basis of single member constituencies posed for representation. Mill, writing in a period prior to the rise of the organised political party and party discipline in Parliament, attached little weight to a number of the arguments for bicameralism of the type found in *The Federalist*. But the principal reason he offered for supporting a Parliament with two Houses is pertinent to any contemporary consideration of this issue:

> The consideration which tells most, in my judgment, in favour of two Chambers (and this I do regard as of some moment) is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should, in great affairs, be able, even temporarily, to make their *sic volo* prevail without asking any one else for his consent. A majority in a single assembly, when it has assumed a permanent character — when composed of the same persons habitually acting together, and always assured of victory in their own House — easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls makes it desirable there should be two Chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year. One of the most indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation: a readiness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views; and of this salutary habit, the mutual give and take (as it has been called) between two Houses is a perpetual school; useful as such even now, and its utility would probably be even more felt in a more democratic constitution of the Legislature. (Everyman edition, pp 325-6)

Mill thus shared the views of Montesquieu and *The Federalist* in identifying the virtue of the two Houses as a check on each other.

Bicameralism was addressed from a similar perspective by Walter Bagehot in another classic of political literature, *The English Constitution* (1867). While not an admirer of the principle of division of power exemplified by the American Constitution, Bagehot recognised the virtue of a second house not easily captured by a disciplined majority:

> A formidable sinister interest may always obtain the complete command of a dominant assembly by some chance and for a moment, and it is therefore of great use to have a second chamber of an opposite sort, differently composed, in which that interest in all likelihood will not rule.
>
> The most dangerous of all sinister interests is that of the executive government, because it is the most powerful. It is perfectly possible — it has happened, and will happen again — that the cabinet, being very powerful in the Commons, may inflict minor measures on the nation which the nation did not like, but which it did not understand enough to forbid. If, therefore, a tribunal of revision can be found in which the executive, though powerful, is less powerful, the government will be the better; the retarding chamber will impede minor instances of parliamentary tyranny, though it will not prevent or much impede revolution. (*The English Constitution*, in Norman St John-Stevas (ed), *The Collected Works of Walter Bagehot*, London, The Economist, vol. 5, pp 273-4)

The framers of the Australian Constitution inherited this collective wisdom. When they combined it with their decision that Australia should be a federal nation, they found the case for a strong second chamber irresistible:

> There are two essentials — equal representation in the Senate and for that body practically co-ordinate power with the House of Representatives. All those who recognise what are the essentials to a true union will admit these essentials. (John Gordon, Australasian Federal Convention, 30 March 1897, p. 326)
>
> We are not here to discuss abstract principles, we are not here to discuss the meaning of words; but I venture to think that no one will dispute the fact that in a federation, properly so called, the federal senate must be a powerful house .... We are to have two houses of parliament each chosen by the same electors .... We are to have, instead of a highly centralised government such as they

> have in Great Britain, a division of powers.... (Richard Baker, Australasian Federal Convention, 17 September 1897, pp 784, 789)

The Constitution reflected their conclusion that, in order to perform the representative role assigned to it, the Senate, like its United States counterpart, must have the power to veto and to suggest changes to any proposed law. It could not be merely a debating and delaying chamber.

Rationale of federalism

Federalism has been practised since ancient times, in the sense that small states have united by their governments appointing a central governing body and agreeing to carry out its decisions. Modern federalism, however, is quite different from those kinds of arrangements. It involves the people of the constituent states electing a national legislature, which has the power to make laws directly affecting the people of the states on defined subjects. This distinctive system, federalism as we now know it, was invented in 1787 by the framers of the Constitution of the United States. As it has been so widely copied elsewhere since that time, its distinctive features are often overlooked.

Apart from providing a way of persuading separate self-governing states to unite on the basis of retaining their separate identities, federalism has positive virtues, and the recognition of these virtues has contributed to its spread around the world.

The division of powers between regional and national governments has been seen as an additional safeguard of the rights of the people and against governments misusing their powers. If a bad government possesses all powers, all powers may be abused, but a national or regional government can use its powers, and the people can use their separate votes in electing those governments, to correct, to some extent, any misuse of the powers of either one.

This concept of federalism as first and foremost a safeguard was put by the framers of the United States Constitution:

> [In a federation] the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. (*The Federalist*, No. 51, pp 265-6)

Federalism, while allowing the union of nations occupying large territories, avoids the domination of government by any single group or interest. Again, the American founders put this point very cogently:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. (*The Federalist*, No. 10, p. 47)

Other advantages are attributed to federalism: the adaption of local policies to local circumstances; the ability of states to conduct experiments and innovations in policy without involving the whole country; a healthy competition between states for the best policies; more opportunities for citizens to participate in decision-making, to gain experience in government and to hold public office. It may be contended that these benefits may be obtained by any system of local or regional government. They are more likely to be secured, however, in a federal system in which the regional units have a constitutionally-guaranteed independent existence, and may not be terminated or controlled by a central authority.

As has been noted, federalism and bicameralism are linked because the federal character of a nation can be reflected in, and secured by, the bicameral legislature. Bicameralism and federalism both have the advantage of enabling legislative assemblies to be more effectively representative of large and diverse nations. The virtues of federalism, neglected for much of the 20th century, were rediscovered in the turmoil of recent decades:

> Federalism is resurfacing as a political force because it serves well the principle that there are no simple majorities or minorities but that all majorities are compounded of congeries of groups, and the corollary principle of minority rights, which not only protects the possibility for minorities to preserve themselves but forces majorities to be compound rather than artificially simple. (Daniel Elazar, *Exploring Federalism*, 1987, p. 2)

As the passages from the debates of the Australian founders quoted above indicate, they were well aware of the principle of compound majorities which is here identified as the essence of federalism. The same author wrote:

> As the dust settles in the 1990s there are more federations than ever including more people than ever. These are the foundation stones of the new paradigm. At present there are twenty-one federations containing some two billion people, or 40 percent of the total world population. They are divided into over 350 constituent or federated states (as against 180 plus politically sovereign states). ('From statism to federalism: a paradigm shift', *International Political Science Review*, 17:4, 1996, p. 426.)

As a geographically large country, with a diverse society, Australia has reaped the benefits of the federal system. Its people frequently take advantage of the expanded political rights given to them by the system, and invoke its safeguards, for example, by electing different political parties to state and Commonwealth governments, and to the two Houses at the Commonwealth level.

The Senate and representation

The framers of the Constitution determined that the Senate would best operate if it were directly elected by the people of the states. It was suggested at that time that the best method of election would be proportional representation, which is designed to ensure that representatives are elected in proportion to their support among the electors. This system was not written into the Constitution, however; instead it was left to the Commonwealth Parliament to determine the actual method of election. The system of proportional representation, which, as was suggested when the Constitution was drawn up, is the logical method for electing representatives of a large area such as a state, was not adopted until 1948, taking effect in the elections of 1949 (see Chapter 4, Elections for the Senate).

The Senate by its constitutional design enlarges the Parliament's capacity to represent the diversity of the Australian people by providing a balance to the numerical preponderance of the more populous states in the House of Representatives. As a consequence of the 1948 proportional method of electing senators, it does so in a fashion which more accurately reflects the state of electoral opinion in the nation. It corrects dysfunctions of the single member electoral system used for choosing the House of Representatives and thereby provides parliamentary representation for individuals and parties with significant voter support, which would be otherwise unrecognised in parliamentary terms except where such support is geographically concentrated.

The important role which the method of electing senators has in enhancing the representative capacity of the Commonwealth Parliament may be seen in the information in Table 1, which demonstrates that the party composition of the Senate almost invariably reflects the party disposition of voting in the electorate more closely than does the House of Representatives. As already observed, one effect of the Senate method is to remedy explicit deficiencies in the single member electorate system used for electing members of the House of Representatives.

Table 1 sets out, in abridged form, information concerning the relationship of percentage of the vote to percentage of seats in the Senate and the House of Representatives respectively for elections since 1949. While a direct correspondence between percentage of the vote and percentage of seats is rare, it is clearly the case, for almost all elections, that the correspondence between percentages of votes and of seats is closer in the Senate than in the House of Representatives. Moreover, it is almost never the case that the correspondence in the House of Representatives is closer than in the Senate.

The electoral system of the House of Representatives regularly awards a majority of seats, and government, to parties which secure only a minority of electors' votes, occasionally less than 40 percent, and on several occasions less than those of the major losing parties.

Table 1 suggests that, in a House of Representatives election, the imbalance between percentage of votes and seats is most marked in what is known as a "landslide" victory. In 1958, for instance, the Australian Labor Party (ALP) received 42.8 percent of the vote in the Senate election and 42.9 percent in the House election. In that election, the ALP secured 46.9 percent of the Senate places at issue, but only 37.9 percent in the House. Again, in 1975, 40.9 percent of the Senate vote secured 42.2 percent of the Senate places for the ALP; a higher percentage of the vote in the House of Representatives, 42.8 percent, brought the ALP only 28.4 percent of seats in the House. Confirming the propensity of the House of Representatives method of election to exaggerate majorities, in 1983 a 49.5 percent share of the House vote yielded 60 percent of the seats for the ALP; in the same election, 43.6 percent of the vote for the Liberal and National parties brought a 40 percent share of the seats in the House. In the Senate, an ALP share of 46.9 percent of places in the Senate reflected a 45.5 percent of the vote; in this case, the Liberal and National parties' 39.9 percent of the vote brought 43.8 percent share of places in the Senate. In their "landslide" victory of 1996, the Liberal and National parties secured 63.6 percent of the seats in the House with 47.3 percent of the vote; in the Senate their 44 percent of the vote delivered 50 percent of seats. In 1998 the Liberal and National parties secured a majority in the

House with less than 40 percent of the votes and fewer votes than the Labor Party; in the Senate their votes were more accurately reflected.

Complaints by governments that proportional representation makes it impossible for the winning party to secure a majority in the Senate were refuted by the 2004 election, in which the Liberal and National parties secured a Senate majority of one with 45 percent of votes, while their majority in the House was again exaggerated. Those majorities were lost in the 2007 election, when the Senate results again produced a more balanced outcome.

The state basis of Senate elections does not significantly exaggerate representation in the Senate. While there are cases where election of a single senator brings a measure of exaggeration, it is usually the case that the share of places secured by minor parties is less than their share of the vote. In the case of the Australian Democrats, it was only in 1984 that the reverse was conspicuously the case (a 7.6 percent share of the vote brought a 10.9 percent share of seats). In 1975 a one percent share of the vote brought the Liberal Movement one seat, that is, 1.67 percent of the places. In the 1990, 1993 and 1996 elections for the Senate, Green shares of the vote, 2.8, 2.9 and 2.4 percent respectively, brought 2.5, 2.5 and 2.5 percent shares of the seats contested. In 1998, 2001, 2004 and 2007 the minor parties generally were underrepresented, but still more accurately represented in the Senate than in the House. It thus appears that even the divergence of the populations of the various states and territories does not have a significant effect on the national representivity of the Senate.

A very clear example of the capacity of the Senate system to improve representation in the Commonwealth Parliament is party representation of Tasmanians. In the period from the simultaneous dissolutions of 1975 to the general election for the House and the Senate in 1987, notwithstanding a party share of the vote of from 40.3 percent (1983) to 45.1 percent (1980), no candidate endorsed by the Australian Labor Party for a House seat was successful. In the same period there were 4 to 5 Labor senators from Tasmania. In 1998, 2001 and 2007, this situation was reversed, with Tasmanian Liberal Party voters unrepresented in the House.

More generally, the Senate has provided opportunity for parliamentary representation for parties, groups and individuals enjoying significant voter support which goes unrecognised in the single member electorate system by which members of the House of Representatives are chosen. These include the Democratic Labor Party from 1955 to 1974, the Liberal Movement (1974-81), the Australian Democrats (1977-2008) and the Greens.

The effect of proportional representation on the representative character of the Senate is also illustrated by Table 2, which shows party affiliations in the Senate since 1901.

The representative character of the Senate has enabled it to uphold the responsibility of governments to Parliament. Much of the traditional doctrine on this question of responsibility derives from a period before the emergence of rigid parties and disciplined majorities within Parliament, most conspicuously in lower houses, the control of which is *the* condition of a ministry taking and maintaining office. In Australia this issue has added importance because there are few other national legislatures in which party voting is so disciplined as it is in the House of Representatives. This being so the need for alternative parliamentary avenues for holding a government to account is pronounced, and this need in Australia is supplied by its

elected Senate. Since 1949 there have been only four relatively short periods (1951-56, 1959-62, 1976-81, 2005-07) in which a ministry has had a majority in the Senate. Conversely, the Opposition party in the House of Representatives, irrespective of its partisan complexion, has not had a majority in the Senate (with the exception of 1949-51 and, in unusual circumstances, in 1974-75). Accordingly, it does not follow that a ministry lacking a secure majority in the Senate is automatically confronted by a hostile Opposition majority. Any attempt by an Opposition to achieve its partisan ends by use of its numbers in the Senate must, to succeed, have the support of other non-government senators. The Senate when functioning as a repository of and forum for responsibility is thus more than a mere venue for a clash between government and Opposition working on the basis of pre-determined numbers. Governments have therefore been held to account in the Senate more effectively than in a house where they are always supported by a party majority.

A decline of accountability accompanying ministerial control of both Houses of the Parliament may well in the long run be adverse to governments themselves as well as to the country generally. This was the lesson that many drew from the fall of the then government in 2007 after its period of majority in the Senate gained in the 2004 elections.

All free systems of government need checks and balances against any excessive concentration of power and, so far as the Australian system is concerned, the Senate is the most important of the constitutional checks and balances, the more so because it is an elected institution. Lack of control of the Senate can no doubt be inconvenient to a government and at times frustrating, but such considerations are secondary to the greater good of responsible checks and balances exercised by a second chamber elected by universal adult franchise and closely reflecting the diversity of electoral opinion in the nation.

(For a refutation of the often-made claim that proportional representation is incompatible with "efficiency" (usually defined in economic terms), see Arend Lijphart, 'Australian Democracy: Modifying Majoritarianism?', in *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate*, Papers on Parliament No. 34, Department of the Senate, 1999. It is not necessary to sacrifice accountability of government to achieve "efficiency".)

Functions of the Senate

The functions of the Australian Senate may be summarised as follows:

(1) As an essential of federalism, to ensure adequate representation of the people of all the states, the main elements being:

   (a) equal representation of the people of the Original States;

   (b) equal legislative powers: except for the financial initiative, powers which, in effect, are equal to those of the House of Representatives: the Senate cannot be compelled to pass any proposed legislation; except for certain financial bills it has unrestricted right of amendment; in respect of those money bills which it cannot

amend, the Senate has the right to make, and to insist on, requests to the House of Representatives for amendments.

(2) To balance domination of the House of Representatives by members from the more populous states whereby, of 150 members, 115 represent the three eastern states of New South Wales, Victoria and Queensland.

(3) To provide representation of significant groups of electors not able to secure the election of members to the House of Representatives.

(4) To review legislative and other proposals initiated in the House of Representatives, and to ensure proper consideration of all legislation.

(5) To ensure that legislative measures are exposed to the considered views of the community and to provide opportunity for contentious legislation to be subject to electoral scrutiny. The Senate's committee system has established a formal channel of communication between the Senate and interested organisations and individuals, especially through developing procedures for reference of bills to committees.

(6) To provide protection against a government, with a disciplined majority in the House of Representatives, introducing extreme measures for which it does not have broad community support.

(7) To provide adequate scrutiny of financial measures, especially by committees considering estimates.

(8) To initiate non-financial legislation. The Senate's capacity to initiate proposed legislation effectively means that the Parliament is not confined in its opportunities for considering public issues in a legislative context to those matters covered by bills brought forward by the executive government.

(9) To probe and check the administration of the laws, to keep itself and the public informed, and to insist on ministerial accountability for the government's administration. The informing function is well expressed in the following statement by Woodrow Wilson, President of the United States, 1913-21:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinise these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. (*Congressional Government*, 1885, Meridian, 1956, p. 193.)

(10) To exercise surveillance over the executive's regulation-making power. In the exercise of this function, either House may disallow a regulation made by the executive government, and the concurrence of the other House in the vote of disallowance is not necessary. This gives the Senate a special character not, in practice, enjoyed by the House of Representatives, where, because it is dominated by a disciplined majority supporting the government, the carrying of a disallowance motion is rare. It has been mainly in the Senate that the executive government's use of its regulation-making power has been effectively scrutinised.

(11) To protect personal rights and liberties which might be endangered if there were a concentration of unrestrained power in the House of Representatives. The protection of the rights and liberties of citizens is a feature of the Senate's consideration of proposed legislation, the executive's regulation-making power, and administrative decisions. Major avenues for meeting these responsibilities of the Senate are the Standing Committees for Scrutiny of Bills and Regulations and Ordinances.

(12) Because the Senate is rarely dominated by either of two major sides of Australian politics, to provide effective scrutiny of governments, and enable adequate expression of debate about policy and government programs. The significance of the Senate's role in these functions is that it is an elected and parliamentary forum. Other outlets for such debates in the community, for example, public conferences or press, radio and television, are not inherent institutions of democracy, though vital to it. As a parliamentary forum, moreover, the Senate is one place where a government can be, of right, questioned and obliged to answer. As such the Senate has been rightly seen as the safeguard of the Commonwealth.

Armed as it is by the Constitution with extensive powers, it is in the judgment of the Senate of the day to decide whether or not to insist on any of its legislative amendments disagreed to by the House of Representatives, or in certain cases to refuse to pass a bill at all.

As such power should be used circumspectly and wisely, factors which the Senate may take into account in reaching such decisions include:

(1) A recognition of the fact that the House of Representatives represents in its entirety, however imperfectly, the most recent choice of the people whereas, because of the system of rotation of senators and except in the case of simultaneous dissolution of the two Houses, one-half of the Senate reflects an earlier poll.

(2) The principle that in a bicameral parliament one house shall be a check upon the power of the other.

(3) Whether the matter in dispute is a question of principle for which the government may claim electoral approval. The Senate is unlikely to resist legislation in respect of which a government can truly claim explicit electoral endorsement, but the test is always likely to be the public interest.

(4) The right of the Senate to examine all measures of public policy.

Significant occasions of the exercise by the Senate of its functions are recorded in the relevant chapters of this work and in appendix 10, Chronology of the Senate, 1901-2008.

Legislative powers

As has been noted, the choice by the Australian founders of a federal system of government involved the limitation of the law-making powers of the national legislature to matters prescribed by the Constitution. The subjects on which the Commonwealth Parliament may legislate are listed in section 51 of the Constitution, and other sections also empower the Parliament to make laws on particular matters. Some matters are exclusively within the legislative power of the Commonwealth, that is, the states may not make laws in respect of those matters. Examples are customs and excise duties and bounties (s. 90) and the issuing of money (s. 115). Most subjects on which the Commonwealth Parliament can legislate are concurrent with state powers, that is, the states can also legislate in relation to them; this includes most of the subjects listed in section 51. When a law of the Commonwealth in relation to any of these subjects is inconsistent with a law of the state, the Commonwealth law prevails (s. 109). The Commonwealth is positively forbidden to legislate in relation to some matters, such as any establishment of religion (s. 116). Some subjects are not prescribed by the Constitution as subjects on which the Commonwealth can legislate, and those subjects, such as education, are left to the states. The Commonwealth Parliament may, however, legislate indirectly in relation to such subjects, for example, through its power to grant financial assistance to the states (s. 96).

The Constitution confers the legislative power of the Commonwealth on the two Houses of the Parliament and the executive government acting together. The effect of this is that each of the two Houses must agree to a proposed law (a bill) before it can become a law.

The only distinction between the powers of the Houses in relation to proposed laws is contained in section 53 of the Constitution, and relates to the initiation and amendment of proposed financial legislation. Briefly, the Senate cannot originate a taxing bill or an appropriation bill; amend a taxing bill or a bill appropriating money for the ordinary annual services of the government; or amend any bill so as to increase any proposed charge or burden on the people. The Senate may, however, at any stage return to the House of Representatives any of the bills which it cannot amend, with a request for amendment, proposed by any senator, and can insist on its requests. The rationale of these provisions is related to the system of cabinet government; they confer on the executive government in the House of Representatives the initiative in respect of financial proposals.

Whether or not the Senate has the power to amend a proposed law does not affect the basic feature of the legislative procedures of the Commonwealth Parliament, namely that a bill can become law only if supported by both Houses, and neither House can be compelled to pass a bill.

The exercise by the Senate of its legislative powers is covered by Chapters 12 and 13 on Legislation and Financial Legislation.

Other powers

In relation to powers other than legislative powers, the Constitution provides that the "powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth" (s. 49).

In 1987 the Parliamentary Privileges Act was enacted by the Parliament under this section. The powers conferred by section 49 and the statute are dealt with in Chapter 2, Parliamentary Privilege.

Composition of the Senate

The Senate consists of 76 senators, 72 of whom are elected by the people of the six states, 12 from each. The people of the Australian Capital Territory and the Northern Territory each elect two senators.

The Constitution, s. 24, authorises the Parliament to change the sizes of the two Houses, but they are linked by the provision that the number of members of the House "shall be, as nearly as practicable, twice the number of the senators". For this purpose, senators for the territories are not counted (*Attorney-General for NSW v Commonwealth* 1977 139 CLR 527). The effect of this provision is to maintain the role of the Senate of ensuring that the Commonwealth Parliament is broadly representative of the nation as a whole and not subject to excessive domination by members from the more populous states. This is of considerable practical importance if, following simultaneous dissolution of the two Houses, they remain in dispute over legislation and a joint sitting is required (see Chapter 21 for further consideration of this matter). Section 122 of the Constitution authorises the Parliament to grant representation to the territories.

From 1901 until 1949, the size of the Senate was 36, six from each state. From 1949 until 1975, it was 60, ten from each state. In 1975 the size of the Senate was increased to 64 by addition of four senators elected by the two major territories (two each). The size of the Senate was again increased in 1984 by increasing the number of senators from each state from ten to twelve. (The changes in the sizes of the Houses were accomplished by the Representation Acts; the provisions for territory senators are now in the Commonwealth Electoral Act, ss 40-44.)

The Constitution provides that in deciding the size of the Senate, "equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators" (s. 7). A state cannot be deprived of its equal representation in the Senate without the consent of its people (s. 128).

The Constitution states that senators shall be "directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate" (s. 7). No use has been made of the possibility of departing from the principle of each state voting as one electorate. Because of the improved representation of electors by the proportional method of election of senators instituted in 1948, the principle of each state voting as one electorate is now essential to the Senate's, and the Parliament's, effectiveness and should be retained. This principle is a protection against

"localism" in the election of senators. It also strengthens the bicameral quality of the Commonwealth Parliament by giving each House a distinctive system of election. The representational value of the Senate would be diminished not only if the representative base were to be subject to artificial manipulation, but, even more so, if single-member electorates were to be introduced, for it is in addressing the inadequacies of an electoral system on the single-member basis as used for the House of Representatives that the Senate is able to strengthen the representativeness of the Parliament as a whole. In this respect the compositional structure of the Australian Senate is, by design, superior to that of the United States Senate where, in the normal course, only one senator is elected in a state on each occasion.

The Constitution also states that, until the Commonwealth Parliament decides otherwise, the Queensland Parliament "may make laws dividing the State into divisions and determining the number of senators to be chosen for each division" (s. 7). This provision has never been used. In 1982 the Commonwealth Parliament passed a private senator's bill, the Senate Elections (Queensland) Bill 1981, removing from the Queensland State Parliament the right to divide Queensland for the purpose of electing senators.

When it was decided, in accordance with section 122 of the Constitution, to include senators elected by the Australian Capital Territory and the Northern Territory, the principle of proportional representation was retained by providing for election of two senators by each territory voting as a whole. Territory representation in the Senate accordingly recognises both majority and minority electoral strength. In the case of the ACT, for instance, since 1980 all House of Representatives members have usually been from the Australian Labor Party; in the Senate, however, one senator has been from each major party.

Casual vacancies

If the place of a senator becomes vacant before expiration of a term, for example, by death or resignation, the Constitution provides (s. 15) that the vacancy shall be filled by the state Parliament, both houses, in all cases except Queensland (which has a unicameral Parliament), sitting and voting together. Should the state Parliament not be in session, "the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens". (For further information see Chapter 4, Elections.)

As a result of an amendment to the Constitution passed in 1977, where a vacancy is left by a senator who, at the time of election, was publicly recognised by a particular political party as being an endorsed candidate of that party and publicly represented to be such a candidate, "a person chosen or appointed under this section [15] in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party".

The purpose of this provision is to maintain the integrity of the proportional method of voting introduced in 1948 so far as the filling of casual vacancies is concerned. From the inception of this system of voting until 1975 such vacancies as arose were, by convention, filled by people of the same party affiliation. In 1975, however, two casual vacancies, both involving senators from

the Australian Labor Party, one in New South Wales (arising from the resignation of Senator L.K. Murphy), one in Queensland (arising from the death of Senator B.R. Milliner), were filled by non-ALP candidates.

The current section 15 of the Constitution has not fully resolved the problem of filling casual vacancies caused by the death, resignation or disqualification of a senator in a manner which preserves the representational strength deriving from the proportional method of election. Further analysis of this aspect is contained in Chapter 4, Elections.

The decision of the electors in adopting a replacement section 15 of the Constitution in 1977 for filling casual vacancies is a clear demonstration of public support for the proportional method of composing the Senate embodied in the 1948 legislation. Other examples of support for this method may be found in its adoption for electing Legislative Councils in New South Wales in 1978, South Australia in 1975, Western Australia in 1989 and Victoria in 2003.

In order to preserve equality of state representation in the Senate, and to maintain proper representation of electoral opinion, the Senate has taken a close interest in prompt filling of casual vacancies when they arise. This matter is covered more fully in Chapter 4.

Chapter 4 also includes information about filling casual vacancies arising in the representation of the Australian Capital Territory and the Northern Territory.

Rotation of senators and terms of office

The term of senators from the states is six years commencing on 1 July following a periodical election. Six places from each state are contested at each alternate election. The Senate is thus a continuing chamber with no places being vacant except for casual vacancies.

The terms of senators elected in an election arising from a simultaneous dissolution date from 1 July preceding the election. Following such an election senators are divided into two classes: short-term senators whose terms expire on 30 June three years after their nominal date of commencement; and long-term senators whose terms expire on 30 June six years after their nominal date of commencement. It is the Senate itself which decides the method by which its members are divided into two classes and which senators are assigned to each class (Constitution, s. 13). For more details see Chapter 4, Elections.

The election of territory senators coincides with general elections for the House of Representatives, and their term expires and the new term begins on the day of the election (Commonwealth Electoral Act, s. 42).

The six year fixed term of senators derives in part from the Senate's character as a continuing House. It stems also from the view that an effective Parliament reflects the state of electoral opinion at different stages of its development rather than at a particular date. It is also a feature of the Senate's character contributing to its role as a House of review and reflection.

The six year term and the principle of rotation were based on comparable provisions in the Constitution of the United States concerning the United States Senate. The objectives of those

provisions as expounded by *The Federalist* were to counteract the dangers of instability which would arise if all places in the Congress were contested at biennial intervals, and to create conditions enabling some members of Congress to become expert in legislation and "the affairs and the comprehensive interests of their country" (*The Federalist*, No 62, p. 317). In the case of the United States Senate, with its special responsibilities concerning foreign relations, especially the ratification of treaties, the longer term was perceived to be an advantage (*ibid*., p. 318).

In the case of the Australian Senate the benefits of the distinctive arrangements for election and tenure are most readily observable in its extensive committee activity, in scrutiny of primary and subordinate legislation; in the twice-yearly examination of estimates; and in review of policy and administration.

The commencement date for Senate terms was originally 1 January; 1 July was fixed as the commencement date following amendment of the Constitution in 1906.

The provision for back-dating the commencement of senators' terms following a simultaneous dissolution preserves the Senate's continuity, with fixed terms for senators and a fixed starting point. It has, however, the effect of shortening the terms of both short and long-term senators by up to one year.

One incidental effect is that successive governments have brought forward dissolutions of the House of Representatives to coincide with periodical elections of senators, usually but not invariably those in the short-term class (1977 and 1984; 1955 was the exception). This effect of current constitutional provisions on the timing of elections could be reduced if the terms of state senators after simultaneous elections for the two Houses were deemed to commence on 1 July following such elections (see Chapter 4, Elections for the Senate, under Terms of state senators).

In the past there have been four attempts to secure amendment of the Constitution to provide that the term of a senator, barring the particular circumstances of a simultaneous dissolution of the two Houses, should be that of two terms of the House of Representatives. Such an amendment would change the term of a senator from a fixed to a maximum term.

Although these amendments were defeated by the electors on three occasions (1974, 1977, 1984), the Constitutional Commission of 1986-88 recommended that the proposal should be revived. The Commission did not offer any particular reason for resubmission of the matter, yet again, to the electors, merely stating that the reasons for so doing in the past "remain convincing" (*First Report*, PP 97/1988 (volume 2), p. 345). In 1988 the proposal, with maximum terms of four years, was again put to a referendum and again defeated, in this instance by one of the largest margins in the history of referendums in Australia.

The proposal, if adopted, would fundamentally alter the nature of bicameralism in the Commonwealth Parliament by removing one of its essential features, the principle of fixed, periodical elections, with a fixed, autonomous electoral cycle for the Senate. To lock the Senate into an electoral cycle dependent upon general elections for the House of Representatives, which can occur at any time, would significantly weaken its position as an independent house, and dilute its capacity to embrace electoral opinion which goes unrepresented in the method used for electing members of the House of Representatives. It would also remove a significant restraint on

governments holding early elections for partisan reasons. The overwhelming weight of argument supports retention of the present constitutional arrangements which allow for, but do not compel, holding periodical elections for the Senate simultaneously with general elections for the House of Representatives.

The nexus

The Constitution provides that the number of members of the House of Representatives "shall be, as nearly as practicable, twice the number of the senators" (s. 24). This not only ensures an appropriate balance between the Houses in terms of their representational roles; it also places limits on the extent to which the House of Representatives can prevail over the Senate in the event of a joint sitting following a simultaneous dissolution: essentially, a proposed law must be supported by something more than a bare majority in the House if it is to have a prospect of securing a majority in a joint sitting.

A proposal to alter the Constitution to remove this so-called nexus between the Senate and the House was rejected by the electors at referendum in 1967. The purpose of that proposal was to allow expansion of the size of the House without increasing the size of the Senate.

The Constitutional Commission of 1986-88, however, revived the proposal. The Commission's approach recognised that the nexus plays two roles: one in regulating (but not limiting) the size of the Parliament; the other in the procedures governing a disagreement between the Houses. Other methods were proposed for containing the size of the Parliament; these would place limits on the size of the Senate without any comparable limits on the size of the House of Representatives. To address the situation arising in the case of joint sittings the Commission proposed a special majority to take account of the effect which ending the nexus would have on voting in that context.

The Commission's analysis, however, did not include any consideration of the representational significance of the Senate, particularly its role in enabling opinion virtually excluded from the House of Representatives by the single member electorate system to be represented in Parliament. The Commission's approach was hostile to democracy in that it showed little concern for a role in Parliament for parties or individuals enjoying significant electoral support but unable to gain representation in of the House of Representatives.

Maintaining the Senate's capacity as a chamber broadly representative of both majority and minority electoral opinion in Australia is critical to its continuing legitimacy as a House with powers essentially equal to those of the House of Representatives, and to the role accorded to it in a joint sitting.

Another link between the two Houses is that, apart from provisions in the Constitution, electoral legislation for each House requires the support of both Houses. Thus, while in internal matters each House governs itself, elections for each House are governed by legislation. This is appropriate in a constitutional democracy.

Rules and orders

Section 50 of the Constitution authorises the Senate to make rules and orders with respect to the mode in which its powers, privileges, and immunities may be exercised and upheld, and the order and conduct of its business and proceedings. Standing orders and other rules made by the Senate embody procedures designed to ensure that parliamentary business, especially legislation, is conducted in an orderly, open and predictable manner devoid of surprise, haste or sleight of hand.

On 6 June 1901 the Senate adopted temporary standing orders which were, with some exceptions, the standing orders of the House of Assembly of South Australia. The reasons for the adoption of those particular standing orders were that the President of the Senate, a South Australian, was familiar with them; and that, having been used to general satisfaction by the convention which drafted the Constitution, more senators were acquainted with them than any other standing orders. The temporary standing orders remained in force until 1903. On 1 September of that year the permanent standing orders came into force. They were replaced by new standing orders adopted on 21 November 1989.

The standing orders of 1903 were intended, amongst other things, to embody the meaning and spirit of the Constitution concerning procedure and the relationship between the two Houses; to encompass what had been the universal practice in state parliaments, so that the standing orders were, as far as possible, a complete code of practice; to simplify procedure, including by abolition of procedures and practices (based on obsolete conditions) which had no effect or significance; and to provide standing orders identical to those of the House of Representatives, except in those cases where difference could not be avoided (Report of Standing Orders Committee, PP L7/1901). The 1989 standing orders updated and consolidated those of 1903 to accord with current procedures.

Broadly speaking, the standing orders were framed for the purpose of enabling the Senate to be master of its own procedure, but recognising the fundamental parliamentary rule that there should be safeguards against surprise and haste.

In interpreting the standing orders, a cardinal rule is that each standing order must be read in conjunction with the others (ruling of President Givens, SD, 11/6/1914, p. 2002). The practice of the Senate is that where there may be doubt with respect to the interpretation of a rule or order, the chair leans towards a ruling which preserves or strengthens the powers of the Senate and the rights of senators, rather than towards a view which may weaken or reduce the Senate's powers or senators' rights.

Except so far as is expressly provided, the standing orders do not in any way restrict the mode in which the Senate may exercise and uphold its powers, privileges, and immunities (SO 208). This provision saves for the Senate all powers, privileges, and immunities conferred on it by the Constitution. Where there is a clear direction in the Constitution as to the powers of the Senate, that direction overrides any standing order or practice of the Parliament (ruling of President Givens, SD, 15/7/1921, p. 10148-9).

When the standing orders were considered by the Senate, a motion was made to insert the following provision:

> In all cases not provided for hereinafter, or by Sessional or other Orders, resort shall be had to the rules, forms and practice of the Commons House of the Imperial Parliament of Great Britain and Ireland in force on 1 January 1901, which shall be followed as far as they can be applied to the proceedings of the Senate.

Although this rule had been included in the temporary standing orders adopted by the Senate in 1901, and a similar standing order was adopted by the House of Representatives, the Senate rejected the proposed new standing order by 18 votes to 5. It was rightly contended that the Senate, working under a new Constitution, ought to have its own practice and procedure.

The Senate's first President, Senator Richard Baker, explained the Senate's decision thus: "The avowed intention of the Senate in omitting the Standing Order was that in cases not positively and specifically provided for we should gradually build up 'rules, forms, and practices' of our own, suited to our own conditions". (PP S1/1904, p. 1).

The Senate's decision to omit the standing order necessarily meant that succeeding Presidents have found it necessary to give many rulings, not only in connection with interpretation of the standing orders, but in those instances where the standing orders are silent. As it is, the Senate has for its guidance the practice of other houses without the bondage of following procedure which may be unsuited to Australian conditions.

A President's ruling which has not been dissented from by the Senate is equivalent to a resolution of the Senate (ruling of President Baker, SD, 4/10/1906, pp 6089-90; rulings of President Gould, SD, 9/8/1907, pp 1690-1; 18/10/1907, p. 4909).

The Senate may at any time amend its standing orders, and the current standing orders have been amended, or added to, on many occasions since their adoption in 1989.

Any senator may submit to the Senate a substantive motion for the alteration of any standing order, or for the adoption of new standing orders. Such motion requires notice in the ordinary way. The motion being agreed to, the standing orders would be amended accordingly. The more usual practice, however, and one which makes use of the expertise of the Procedure Committee (before 1987 called the Standing Orders Committee), is to submit proposals to amend the standing orders to that committee, with a request to report on the proposals. Other committees often make recommendations for references of matters to the Procedure Committee. Alternatively, the committee may on its own initiative present a report recommending amendments to the standing orders, without a prior reference from the Senate.

A report from the Procedure Committee is usually considered, sometimes in committee of the whole, on a subsequent day. The advantages of consideration in committee of the whole are that each recommendation of the Procedure Committee may be considered *seriatim* and senators are able to speak to each question more than once until full understanding and agreement are reached (for procedure in committee of the whole, see Chapter 14). The committee of the whole may make amendments to the recommendations of the Procedure Committee. The resolutions of the committee of the whole are subject to adoption by the Senate. A report from the Procedure

Committee may be considered by the Senate, rather than in committee of the whole. Upon the order of the day being read for the consideration of the report, motions may then be moved to adopt recommendations of the committee. The Senate may make modifications to the recommendations of the Procedure Committee.

On the Senate agreeing to amendments to the standing orders, a motion is sometimes moved that the amended standing orders come into force on some future date. The merit of this practice is that senators have an opportunity of considering their effect. In the absence of such a motion, the new standing orders come into force immediately upon their adoption by the Senate.

In 1975 the Senate resolved that certain proposed amendments to the standing orders would operate initially as sessional orders and, unless otherwise ordered, that they would become amendments to the standing orders at the end of six months (11/2/1975, J.499, 860).

Sessional orders are orders which have effect only for a session of Parliament. They are used when the Senate wishes to try out new procedures on a temporary basis or otherwise wishes to make orders of limited duration.

The standing orders contain provisions allowing the suspension of the standing orders and other rules of the Senate where necessary to achieve particular purposes, subject to certain procedural safeguards (see Chapter 8, Conduct of Proceedings, under Suspension of standing orders). These provisions illustrate the way in which the Senate's rules seek to allow the majority of the Senate to act expeditiously to achieve its ends while ensuring that the rights of minorities are not put aside, even temporarily, without due deliberation.

TABLE 1: VOTES AND SEATS IN ELECTIONS, 1949–2007

	SENATE				HOUSE OF REPRESENTATIVES		
Election	**Party**	**% of vote**	**Seats**	**% of seats**	**% of vote**	**Seats**	**% of seats**
1949	ALP	44.9	19	45.2	46	48	39
	LP }	50.4	19	45.2	39.3	55	44.7
	CP }		4	9.5	10.8	19	15.4
1951	ALP	45.9	28	46.7	47.7	54	43.9
	LP }	49.7	26	43.3	40.5	52	42.3
	CP }		6	10	9.7	17	13.8
1953	ALP	50.6	17	53.1			
	LP }	44.4	13	40.6			
	CP }		2	6.3			
1954	ALP				50.1	59	48
	LP }				38.5	47	38.2
	CP }				8.5	17	13.8
1955	ALP	40.6	12	40	44.7	49	39.5
	LP }	48.8	13	43.3	39.7	57	46
	CP }		4	13.3	7.9	18	14.5
	ACL	6.1	1	3.3	5.1	—	—
1958	ALP	42.8	15	46.9	42.9	47	37.9
	LP }	45.2	13	40.6	37.1	58	46.8
	CP }		3	9.4	9.3	19	15.3
	DLP	8.4	1	3.1	9.4	—	—
1961	ALP	44.7	14	45.2	48	62	50
	LP }	42.1	12	38.7	33.5	45	36.3
	CP }		4	12.9	8.5	17	13.7
	DLP	9.8	1	3.2	8.7	—	—
1963	ALP				45.5	52	41.9
	LP }				37.1	52	41.9
	CP }				8.9	20	16.1
	DLP				7.4	—	—
1964	ALP	44.7	14	46.7			
	LP }	45.7	11	36.7			
	CP }		3	10			
	DLP	8.4	2	6.7			
1966	ALP				40	41	33
	LP }				40.1	61	49
	CP }				9.8	21	16.9
	DLP				7.3	—	—
1967	ALP	45	13	43.3			
	LP }	42.8	10	33.3			
	CP }		4	13.3			
	DLP	9.8	2	6.7			
	Others	2.4	1	3.3			

Election	SENATE				HOUSE OF REPRESENTATIVES		
	Party	**% of vote**	**Seats**	**% of seats**	**% of vote**	**Seats**	**% of seats**
1969	ALP				47	59	47.2
	LP }				34.8	46	36.8
	CP }				8.6	20	16
	DLP				6	—	—
1970	ALP	42.2	14	43.8			
	LP }	38.2	11	34.4			
	CP }		2	6.3			
	DLP	11.1	3	9.4			
	Others	5.6	2	6.3			
1972	ALP				49.6	67	53.6
	LP }				32	38	30.4
	CP }				9.4	20	16
	DLP				5.2	—	—
1974	ALP	47.3	29	48.3	49.3	66	51
	LP }	43.9	23	38.3	34.9	40	31.5
	CP }		6	10	10.8	21	16.5
	DLP	3.6	—	—	1.4	—	—
	LM	1	1	1.7	0.8	—	—
	Others	2.9	1	1.7	0.4	—	—
1975	ALP	40.9	27	42.2	42.8	36	28.4
	LP }	51.7	27	42.2	41.8	68	53.5
	NCP }		8	12.5	11.3	23	18.1
	DLP	2.7	—	—	1.3	—	—
	LM	1.1	1	1.5	0.6	—	—
	Others	3.6	1	1.5	1.7	—	—
1977	ALP	36.8	14	41.2	39.6	38	30.6
	LP }	45.6	16	47	38.1	67	54
	NCP }		2	5.9	10	19	15.3
	AD	11.1	2	5.9	9.4	—	—
	Others	4.9	—	—	1.4	—	—
1980	ALP	42.3	15	44.1	45.1	51	40.8
	LP }	43.5	13	38.2	37.4	54	43.2
	NP }		2	5.9	8.9	20	16
	AD	9.3	3	8.8	6.6	—	—
	Others	3.1	1	2.9	1.7	—	—
1983	ALP	45.5	30	46.9	49.5	75	60
	LP }	39.9	24	37.5	34.4	33	26.4
	NP }		4	6.3	9.2	17	13.6
	AD	9.6	5	7.8	5	—	—
	Others	3.2	1	1.6	1.7	—	—
1984	ALP	42.2	20	43.5	47.5	82	55.4
	LP }	39.5	17	37	34.4	45	30.4
	NP }		3	6.5	10.6	21	14.1
	AD	7.6	5	10.9	5.4	—	—
	NDP	7.2	1	2.2	—	—	—

	SENATE				HOUSE OF REPRESENTATIVES		
Election	**Party**	**% of vote**	**Seats**	**% of seats**	**% of vote**	**Seats**	**% of seats**
1987	ALP	42.8	32	42.1	45.8	86	58
	LP }	42	27	35.5	34.6	43	29
	NP }		7	9.2	11.5	19	12.8
	AD	8.5	7	9.2	6	—	—
	NDP	1.1	1	1.3	—	—	—
	Others	3.1	2	2.6	2	—	—
1990	ALP	38.4	15	37.5	39.4	78	52.7
	LP }	41.9	16	40	35	55	37.2
	NP }		3	7.5	8.4	14	9.5
	AD	12.6	5	12.5	11.4	—	—
	Greens	2.8	1	2.5	1.4	—	—
	Others	2.7	—	—	3.4	1	0.7
1993	ALP	43.5	17	42.5	44.9	80	54.4
	LP }	43	15	37.5	37.1	49	33.3
	NP }		4	10	7.2	16	10.9
	AD	5.3	2	5	3.8	—	—
	Greens	2.9	1	2.5	1.9	—	—
	Others	3.8	1	2.5	4.7	2	1.4
1996	ALP	36.2	14	35	38.8	49	33.1
	LP }	44	20	50	38.7	75	50.7
	NP }				8.6	19	12.9
	AD	10.8	5	12.5	6.8	—	—
	Greens	2.4	1	2.5	1.7	—	—
	Others	6.7	—	—	5.5	5	3.4
1998	ALP	37.3	17	42.5	40.05	66	44.59
	LP }	37.7	17	42.5	34.09	64	43.24
	NP }				5.65	16	10.81
	AD	8.46	4	10	5.11	0	0
	Greens	2.72	0	0	2.1	0	0
	ON	8.99	1	2.5	8.39	0	0
	Others	4.85	1	2.5	4.61	1	0.68
2001	ALP	34.2	14	35	37.84	65	43.3
	LP }	41.6	20	50	37.08	68	45.3
	NP }				5.93	14	8.7
	AD	7.2	4	10	5.41	0	0
	Greens	4.8	2	5	4.96	0	0
	ON	5.5	0	0	4.34	0	0
	Others	6.1	0	0	4.45	3	2.0
2004	ALP	35.01	16	40	37.63	60	40
	LP }	45.04	21	52.5	40.47	74	49.3
	NP }				6.23	13	8.7
	AD	2.1	0	0	1.24	0	0
	Greens	7.66	2	5	7.19	0	0
	FF	1.76	1	2.5	2.01	0	0
	Others	8.43	0	0	5.23	3	2

	SENATE				HOUSE OF REPRESENTATIVES		
Election	**Party**	**% of vote**	**Seats**	**% of seats**	**% of vote**	**Seats**	**% of seats**
2007	ALP	40.3	18	45	43.38	83	55.33
	LP }	39.77	18	45	36.28	55	36.67
	NP }				5.49	10	6.67
	AD	1.29	0	0	0.72	0	0
	Greens	9.04	3	7.5	7.79	0	0
	FF	1.62	0	0	1.99	0	0
	Others	7.98	1	2.5	4.35	2	1.33

(Information in this table is based on figures supplied by the Australian Electoral Commission. Reference was made to *Federal Election Results 1949-1993*, by Gerard Newman, Commonwealth Parliamentary Library, Research Paper No. 24, 1993.)

Abbreviations

ACL	Australian Labor Party (Anti-Communist)
AD	Australian Democrats
ALP	Australian Labor Party
CP	Country Party
DLP	Democratic Labor Party
FF	Family First
LM	Liberal Movement
LP	Liberal Party of Australia
NCP	National Country Party
NDP	Nuclear Disarmament Party
NP	National Party
ON	One Nation

TABLE 2: PARTY AFFILIATIONS IN THE SENATE, 1901–2007

In all cases the figures reflect the composition of the Senate after newly-elected senators have taken their seats.

1901	Labor 8	Freetraders 17	Protectionists 11		
1903	Labor 14	Freetraders 12	Protectionists 8	Tariff Reformers 1	Independent 1
1906	Labor 15	Freetraders 12	Protectionists 6	Tariff Reformers 1	Independent 2
1910	Labor 23	Fusion 13			
1913	Labor 29	Liberal 7			
1914(a)	Labor 31	Liberal 5			
1917	Labor 12	Nationalists 24			
1919	Labor 1	Nationalists 35			
1922	Labor 12	Nationalists 24			
1925	Labor 8	Nationalists 25	Country Party* 3		
1928	Labor 7	Nationalists 24	Country Party* 5		
1931	Labor 10	Country Party* 5	United Australia Party 21		
1934	Labor 3	Country Party* 7	United Australia Party 26		
1937	Labor 16	Country Party* 4	United Australia Party 16		
1940	Labor 17	Country Party* 3	United Australia Party 16		
1943	Labor 22	Country Party* 2	United Australia Party 12		
1946	Labor 33	Liberal 2	Country Party* 1		
1949(b)	Labor 34	Liberal 20	Country Party* 6		
1951(a)	Labor 28	Liberal 26	Country Party* 6		
1953(c)	Labor 29	Liberal 26	Country Party* 5		
1955	Labor 28	Democratic Labor 2	Liberal 24	Country Party* 6	
1958	Labor 26	Democratic Labor 2	Liberal 25	Country Party* 7	
1961	Labor 28	Democratic Labor 1	Independent 1	Liberal 24	Country Party* 6
1964(c)	Labor 27	Democratic Labor 2	Independent 1	Liberal 23	Country Party* 7
1967(c)	Labor 27	Democratic Labor 4	Independent 1	Liberal 21	Country Party* 7

1970(c)	Labor 26	Democratic Labor 5	Independent 3	Liberal 21	Country Party* 5				
1974(a)	Labor 29	Independent 1	Liberal Movement 1	Liberal 23	Country Party* 6				
1975(a)(d)	Labor 27	Independent 1	Liberal Movement 1	Liberal 27	National Country Party* 8				
1977	Labor 26	Independent 1	Liberal 29	National Country Party* 6	Australian Democrats 2				
1980	Labor 27	Independent 1	Liberal 28	National Country Party* 3	Australian Democrats 5				
1983(a)	Labor 30	Independent 1	Liberal 24	National Party* 4	Australian Democrats 5				
1984(e)	Labor 34	Nuclear Disarmament Party 1	Independent 1	Liberal 28	National Party* 5	Australian Democrats 7			
1987(a)	Labor 32	Nuclear Disarmament Party 2	Independent 1	Liberal 27	National Party* 7	Australian Democrats 7			
1990	Labor 32	Independent 2	Liberal 29	National Party* 5	Australian Democrats 8				
1993	Labor 29	Independent 4(f)	Liberal 30	National Party* 6	Australian Democrats 7				
1996	Labor 29	Independent 3(g)	Liberal 31	National Party* 6	Australian Democrats 7				
1998	Labor 29	Independent 3(h)	Liberal 31	National Party*4	Australian Democrats 9				
2001	Labor 28	Independent 5(j)	Liberal 31	National Party*4	Australian Democrats 8(j)				
2004	Labor 28	Independent 1(k)	Liberal 33	National Party*6	Australian Democrats 4	Greens 4			
2007	Labor 32	Independent 2(k)	Liberal 32	National Party 5	Greens 5				

* In May 1975 the name "Country Party" was changed to "National Country Party" and in October 1982 the name "National Country Party" was changed to "National Party of Australia".

(a) The elections of 1914, 1951, 1974, 1975, 1983 and 1987 followed simultaneous dissolutions.
(b) Senate increased from 36 to 60 senators.
(c) Senate election held separately from House of Representatives.
(d) Senate increased from 60 to 64 senators following the election of territory senators - 2 from each of Australian Capital Territory and Northern Territory.
(e) Senate increased from 64 to 76 senators.
(f) 2 Greens (WA), 1 Ind (Tas), 1 Ind (Tas) until 1995 ALP.
(g) 1 Green (WA), 1 Green (Tas), 1 Ind (Tas). After August 1996 Labor 28 Independent 4.
(h) 1 Green (Tas), 1 Ind (Tas), 1 One Nation.
(i) Labor 28, Independent 4 from October 2001.
(j) 2 Greens, 2 Independents (both Tas), 1 One Nation. After July 2002, 7 Australian Democrats, 6 Independents.
(k) 1 Family First.

Chapter 2

PARLIAMENTARY PRIVILEGE: IMMUNITIES AND POWERS OF THE SENATE

THE TERM "PARLIAMENTARY PRIVILEGE" refers to two significant aspects of the law relating to Parliament, the privileges or immunities of the Houses of the Parliament and the powers of the Houses to protect the integrity of their processes. These immunities and powers are very extensive. They are deeply ingrained in the history of free institutions, which could not have survived without them.

Parliamentary privilege and the Senate

The law of parliamentary privilege is particularly important so far as the Senate is concerned, because it is the foundation of the Senate's ability to perform its legislative functions with the appropriate degree of independence of the House of Representatives and of the executive government which controls that House.

Parliamentary privilege exists for the purpose of enabling the Senate effectively to carry out its functions. The primary functions of the Senate are to inquire, to debate and to legislate, and any analysis of parliamentary privilege must be related to the way in which it assists and protects those functions. Although the relevant law is the same for both Houses, and is analysed accordingly in this chapter, its particular significance for the Senate must constantly be borne in mind.

Constitutional basis

Section 49 of the Australian Constitution provides:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

The effect of this provision is to incorporate into the constitutional law of Australia a branch of the common and statutory law of the United Kingdom as it existed in 1901, and to empower the Commonwealth Parliament to change that law in Australia by statute. The framers of the Australian Constitution, unlike their United States counterparts, did not attempt to fix the law of parliamentary privilege in the Constitution, although, as will be seen, the law in the two federations has remained substantially the same. Even in Australia, notwithstanding the power to legislate in section 49, some aspects of that law may be constitutionally entrenched as essential to

a legislature, and therefore not amenable to change by statute (see *Arena v Nader* 1997 71 ALJR 1604).

The power of the Parliament to legislate under section 49 was employed by the passage of the *Parliamentary Privileges Act 1987*. The powers, privileges and immunities attaching to the two Houses under the section and the statute are extensive. The principal privilege, or immunity, is the freedom of parliamentary debates and proceedings from question and impeachment in the courts, the best known effect of which is that members of Parliament cannot be sued or prosecuted for anything they say in debate in the Houses. The principal powers are the power to compel the attendance of witnesses, the giving of evidence and the production of documents, and to adjudge and punish contempts of the Houses.

The *Parliamentary Privileges Act 1987* arose partly from a critical examination of parliamentary privilege as it existed under section 49. In 1984 a joint select committee of the Houses, after a comprehensive review of the subject, recommended a number of changes to the law and to the practices of the Houses in matters of privilege, partly based on earlier British reports and partly based on practices adopted by the Senate (Joint Select Committee on Parliamentary Privilege, Final Report, PP 219/1984; Report of the Select Committee on Parliamentary Privilege, HC 34, 1966-67; see also a review in 1977 by the Committee of Privileges of the 1967 recommendations, HC 417 1976-77).

The 1987 Act made the changes to the law recommended by the select committee, but with a number of significant modifications. The bill for the Act was introduced into the Senate by the President, the first such bill so introduced, in circumstances described below. In February 1988 the Senate passed resolutions (known as the Privilege Resolutions) making the suggested changes in its practices, again with modifications. (The texts of the Act and the resolutions are in appendices 1 and 2.) The House of Representatives has not adopted the resolutions. The changes made by the Act and the resolutions are outlined in this chapter in relation to the particular aspects of the law and practice affected.

Privileges: immunities

The term "privilege", in relation to parliamentary privilege, refers to an immunity from the ordinary law which is recognised by the law as a right of the Houses and their members. Privilege in this restricted and special sense is often confused with privilege in the colloquial sense of a special benefit or special arrangement which gives some advantage to either House or its members. Privileges in the colloquial sense, however useful or well-established they might be, have nothing to do with immunities under the law. The word "immunity" is best used in relation to privilege in the sense of immunity under the law, and is used here.

Relationship between immunities and powers

The immunities of the Houses and their members and the powers of the Houses, particularly the power to punish contempts, although referred to together by the term "parliamentary privilege", are quite distinct. The power of the Houses in respect of contempts is a power to deal with acts which are regarded by the Houses as offences against the Houses. That power is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of

that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law.

In the past, references to contempts as "breaches of privilege" led to the erroneous notion that each contempt is a violation of an immunity. Obvious offences against the Parliament were referred to as if they were violations of particular immunities, and immunities were distorted, or new supposed immunities were invented, to correspond to each contempt. Thus intimidation of witnesses was supposed to be a violation of freedom of speech, and assaults upon members were supposed to violate what was called the privilege of freedom from molestation. There was some doubt about treating obvious offences against the Parliament as contempts because the particular immunity which they violated was not readily apparent. For example, the unauthorised publication of in camera evidence is clearly an offence, but which particular immunity does it violate?

Similarly, it is sometimes said that because the Houses of the British Parliament resolved in the 18th century that reporting of their proceedings was a breach of privilege (i.e. a contempt), and because those resolutions were not rescinded until after 1901, it must technically be an offence for anyone to report the proceedings of the Houses of the Australian Parliament. This misconception also stems from the confusion between immunities and powers. Section 49 of the Constitution confers upon the Houses of the Australian Parliament power to declare acts to be offences and to punish those acts; it does not mean that acts which have been declared to be contempts in the United Kingdom are automatically contempts in Australia. Since the Australian Houses have not declared reporting of their proceedings to be a contempt, the resolutions of the British Houses are of no consequence, and the problem simply does not arise in Australia.

This confusion between immunities and powers is still so deeply entrenched in much discussion of parliamentary immunities and powers that it is very difficult to avoid it. The matter is discussed more fully in the 1967 House of Commons report, at pp 89ff, in the Senate submission to the 1984 joint committee, and in various advices to, and reports by, the Senate Privileges Committee.

Immunities and powers part of ordinary law

In Australia parliamentary immunities and powers are part of the ordinary law by virtue of section 49 of the Constitution. The only way in which the Houses can definitely alter their immunities or powers is by passing legislation, as authorised by that section. The courts uphold parliamentary immunities by preventing any violation of those immunities in the course of proceedings before the courts, and they uphold parliamentary powers, especially the power to punish contempts, in any test of the legality of the exercise of those powers.

This reflects the evolution of the law in the United Kingdom. The law in respect of the immunities and powers of the Houses of the British Parliament was originally formulated by the two Houses. They also claimed to be the only courts which could interpret and apply that law. The ordinary courts rejected this claim, and maintained that the law of parliamentary immunities and powers was part of the ordinary law and could be interpreted and applied by the courts.

There were some famous clashes between the Houses and the courts resulting from this difference of view. After the middle of the 19th century, however, the Houses tacitly abandoned their claim and acquiesced in the view of the courts that the law is indivisible. For their part, the courts accepted and adopted the law as it had been expounded by the Houses. It is now regarded as firmly established in Britain that parliamentary immunities and powers are part of the ordinary law and are interpreted and upheld by the courts. This means that many of the resolutions and other precedents belonging to that earlier period are now irrelevant. For example, the declaration by the British Houses in 1704 that they could create no new privileges is sometimes given great importance in discussions in Australia. That resolution, however, belongs to the period when the Houses regarded themselves as courts formulating their own law, and it is now of no significance, because only the courts can say what powers and immunities exist and what is their extent.

In a few rare cases in recent times the British House of Commons has determined the extent of parliamentary immunities. One instance was the Strauss case in 1957, in which the House decided, contrary to the finding of its Committee of Privileges, that the writing of a letter to a minister was not included in proceedings in Parliament. Had the question been determined in court, the court might have taken a different view; if a court had made the decision, it would have been binding as a matter of law, unless overturned by a higher court.

The law of parliamentary immunities and powers is therefore not different from other branches of the law. Law and parliamentary practice, however, are distinct. The Senate's Privilege Resolutions, for example, which regulate the practices of the Senate in relation to privilege matters, are not part of the law and are not subject to interpretation or application by the courts.

Executive privilege

Another use of the word "privilege", which is indirectly related to parliamentary immunities and powers, is in the expression "Crown privilege", more recently called "executive privilege" or "public interest immunity". This term refers to a claim of the executive government to be immune from being required to present certain documents or information to the courts or to the Houses of Parliament.

The courts have determined the law of executive privilege in respect of the courts, but only the Houses of Parliament can determine whether they admit the existence of such a privilege in relation to documents or information required by the Houses, or whether they will insist upon the production of documents and information which they require. The Senate has not conceded the existence of any conclusive executive privilege in relation to its proceedings. The matter is more fully discussed in Chapter 19, Relations with the Executive Government, under public interest immunity. For a comprehensive examination of the matter, see the 2nd report of the Committee of Privileges, 7 October 1975 (PP 215/1975); the speech by Senator the Hon. R.C. Wright in the Senate on 17 February 1977 (SD, pp 175-9); and the 49th Report of the Committee of Privileges, 19 September 1994 (PP 171/1994).

IMMUNITIES OF THE HOUSES

This chapter will now analyse the immunities of the Houses of the Parliament, the rationale of those immunities and the issues involved in the declaration of and changes to them which were made by the *Parliamentary Privileges Act 1987* (here referred to as "the 1987 Act").

Immunity of proceedings from impeachment and question

The immunity of parliamentary proceedings from impeachment and question in the courts is the only immunity of substance possessed by the Houses and their members and committees.

There are two aspects of the immunity. First, there is the immunity from civil or criminal action and examination in legal proceedings of members of the Houses and of witnesses and others taking part in proceedings in Parliament. This immunity is usually known as the right of freedom of speech in Parliament. Secondly, there is the immunity of parliamentary proceedings as such from impeachment or question in the courts.

This immunity is in essence a safeguard of the separation of powers: it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature (cf *US v Johnson* 1966 383 US 169; *Hamilton v Al Fayed* 1999 3 All ER 317).

Members of the Houses and other participants in proceedings in Parliament, such as witnesses giving evidence before committees, are immune from all impeachment or question in the courts for their contributions to proceedings in Parliament. As those contributions consist mainly of speaking in debate in the Houses and speaking in committee proceedings, this immunity has the significant effect that members and witnesses cannot be prosecuted or sued for anything they say in those forums. Thus the common designation of the immunity as freedom of speech. It has long been regarded as absolutely essential if the Houses of the Parliament are to be able to debate and to inquire utterly fearlessly for the public good. The immunity has a wider scope, however, and a question of interpretation of that wider scope led to the statutory declaration and codification of the immunity which is outlined below.

The other important effect of the immunity is that the courts may not inquire into or question proceedings in Parliament as such. The courts will not invalidate legislative or other decisions of the Houses on the grounds that the Houses did not properly adhere to their own procedures, nor will they grant relief to persons claiming to be disadvantaged by the improper application of those procedures. Even where a statutory provision relates to parliamentary procedure, such as the provisions for the disallowance of delegated legislation in Commonwealth statutes, the courts have held that specified procedural steps are not mandatory (*Dignan v Australian Steamships Pty. Ltd.* 1931 45 CLR 188). The two Houses are thus free to regulate their internal proceedings as they think fit.

The immunity is modified in Australia by constitutional law: where the Constitution provides that certain parliamentary procedures must take place for legislation to be validly enacted, as in section 57 of the Constitution, the High Court will inquire and determine whether those

procedures have been properly carried out to determine the validity of the resulting legislation (*Victoria v Commonwealth* 1975 7 ALR 1).

The immunity of parliamentary proceedings from question in the courts is regarded as necessary for the two Houses to carry out their functions without the fear of their proceedings being restricted or regulated by actions in the courts.

In the United Kingdom the immunity was given a statutory form in the Bill of Rights of 1689, which has been interpreted and applied by the courts in a number of cases. That body of law became part of the law in Australia by virtue of section 49 of the Constitution.

The Constitution of the United States provides that "Senators and Representatives ... for any Speech or Debate in either House ... shall not be questioned in any other Place" (Article I, s. 6). The immunity thus applies to members, not to proceedings, and only to speech or debate, and therefore appears at first sight to be much narrower than its United Kingdom equivalent. The provision has been interpreted, however, as conferring a wide immunity on members in respect of their participation in legislative activities (*US v Johnson* 1966 383 US 169; *US v Brewster* 1972 408 US 501; *Gravel v US* 1972 408 US 606). The immunity, because it is expressed to apply to members, does not protect congressional witnesses in respect of their evidence, which is a difference from the Australian law. Congressional witnesses are granted certain immunities by legislation, but they may be prosecuted for perjury.

Immunity of parliamentary proceedings from scrutiny in the courts was formerly supported by a parliamentary practice of not allowing reference to the records of those proceedings in the courts without the approval of the House concerned. This practice was sometimes mistakenly regarded as the full extent of the immunity which it was designed to protect. Because in recent times the courts have usually been scrupulous to observe the law and to refrain from questioning parliamentary proceedings, the practice was unnecessary, and was abolished by the Senate in 1988 (see below). As a residual safeguard, however, senators and Senate officers are required to seek the approval of the Senate before giving evidence in respect of proceedings of the Senate or a Senate committee (SO 183).

Statutory declaration of freedom of speech: background of the 1987 Act

The *Parliamentary Privileges Act 1987* was enacted primarily to settle a disagreement between the Senate and the Supreme Court of New South Wales over the scope of freedom of speech in Parliament as provided by article 9 of the Bill of Rights of 1689.

Article 9 is part of the law of Australia and applies to the Houses of the Commonwealth Parliament by virtue of section 49 of the Constitution. The famous article declares:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. (I Will. & Mar., Sess. 2, c.2, spelling and capitalisation modernised. The commas which appear in some versions are not in the original text.)

Two judgments by the Supreme Court of New South Wales in 1985 and 1986 interpreted and applied the article in a manner unacceptable to the Parliament.

The question which gave rise to these judgments was whether witnesses who gave evidence before a parliamentary committee could subsequently be examined on that evidence in the course of a criminal trial. The case in question was *R. v Murphy* (the first judgment was not reported; the second is in 64 ALR 498), involving the prosecution of a justice of the High Court for attempting to pervert the course of justice. The principal prosecution witnesses in the two trials had given evidence before select committees of the Senate, which had conducted inquiries to ascertain whether the justice should be removed from office by parliamentary address under section 72 of the Constitution (see Chapter 20 for an account of this case). The accused justice had also given evidence, in the form of a written statement, to one of the committees.

The view taken by the Senate, which submitted its claim to the trial judges, was as follows. Evidence as to what the witnesses or the accused said before the Senate committees could be admitted for the purpose of establishing some material fact, such as the fact that a person gave evidence before a committee at a particular time, if that fact were relevant in the trials. The evidence put before the committees could not be used in the trials for the purpose of supporting the prosecution or the defence, nor particularly for attacking the evidence of the witnesses or the accused whether given before the committees or before the court.

This view of the effect of article 9 was based upon history and judicial authority. The history of the establishment of freedom of speech makes it clear that the parliamentary intention was to exclude examination by the courts of parliamentary proceedings; in the words of Blackstone, that "whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates and not elsewhere" (*Commentaries on the Laws of England*, 1765, pp 58-9).

The claim of Parliament to exclude the courts from examination of parliamentary proceedings was historically closely linked with another claim, namely, that the courts should have no jurisdiction over that part of the law relating to parliamentary privilege. That claim has long since been abandoned by the British Parliament, and constitutionally could not even be pretended by the Australian Houses, but it is not the same immunity as is asserted in article 9 and is not an essential foundation of the article, which establishes a very broad immunity of parliamentary proceedings from examination in the courts.

The Senate's interpretation of article 9 was supported by a number of judgments which, while not dealing explicitly with the question of the examination of witnesses on their parliamentary evidence, gave weight to the interpretation urged by the Senate. The judgments in Britain and in Australia were consistent.

In Dingle's case (*Dingle v Associated Newspapers Ltd.* 1960 2 QB 405) it was held that it was not permissible to impugn the validity of the report of a select committee in court proceedings. In the Scientology case (*Church of Scientology of California v Johnson-Smith* 1972 1 QB 522) it was held that the privilege of freedom of speech was not limited to the exclusion of any cause of action in respect of what was said or done in Parliament, but prohibited the examination of parliamentary proceedings for the purpose of supporting a cause of action arising from something outside of those proceedings. In *R. v Secretary of State for Trade and others, ex parte Anderson Strathclyde plc* 1983 2 All ER 233 it was held that what was said in Parliament could not be used to support an application for relief in respect of something done outside Parliament.

In the Comalco case (*Comalco Ltd. v Australian Broadcasting Corporation* 1983 50 ACTR 1) it was held that, while evidence of what occurred in Parliament is not inadmissible as such, a court has a duty to ensure that the substance of what was said in Parliament is not the subject of any submission or inference.

These judgments, and others, indicated that article 9 prevents proceedings in Parliament being used to support an action or being questioned in a very wide sense. The Australian Houses were confident of the correctness of their view of article 9, not only as a matter of law, but because this wide protection is necessary for proceedings in Parliament to be genuinely free; as was stated by the Chief Justice in a judgment of the High Court, "a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences" (*Sankey v Whitlam* 1978 142 CLR 1 at 35).

There were two questions which might have been thought to be still unanswered in the interpretation of article 9. The first was whether evidence given by witnesses before a parliamentary committee receives the same protection as statements made by members in debate in Parliament. It has always been thought that evidence before a committee is as much a part of "proceedings in Parliament" as debates in the Houses, and this view was supported by older British and Australian cases. In *R. v Wainscot* 1899 1 WAR 77 it was held that a witness's evidence before a committee is not admissible against the witness in subsequent proceedings, and in *Goffin v Donnelly* 1881 6 QBD 307 it was held that an action for slander could not lie in respect of statements made in evidence before a committee. This question was not raised in the proceedings in *R. v Murphy;* the parliamentary claim that the evidence of witnesses is part of parliamentary proceedings was not questioned in the submissions or in the judgments.

The other question was whether some distinction could be drawn between evidence given by a defendant and the evidence given by witnesses. It might have been thought that a defendant, being the person in peril, civilly or criminally, in court proceedings, was perhaps more entitled to the protection of not having statements made before a committee used by the plaintiff or prosecution than those who were merely witnesses in the court proceedings. This interpretation was put forward by the defendant in both trials: it was claimed that the defence could examine prosecution witnesses on their parliamentary evidence for the purpose of attacking their court evidence, but that the parliamentary evidence could not be used against the defendant. This interpretation was rejected not only by the Houses but by the judges in both judgments, and no such distinction was drawn.

The effect of both judgments in *R. v Murphy* was that the prosecution and the defence made free use of the evidence given before the Senate committees for their respective purposes. The defendant and the prosecution witnesses were subjected to severe attacks using their committee evidence, attacks not only on their court evidence, but on the truthfulness of, and the motives underlying, their committee evidence. In this process the prosecution and the defence made use of evidence given in camera (that is, not in public) before the Senate committees, evidence which neither the committees nor the Senate had published or disclosed to them, and which, in the view of the Senate, they had no right even to possess. This use of the parliamentary evidence was allowed by both judgments.

In the first judgment Mr Justice Cantor proposed that the rationale of article 9 was to prevent harm being done to Parliament and its proceedings, and that this rationale provided a test to determine the use which could be made of evidence of parliamentary proceedings. He also appeared to consider that, in the application of this test, the importance of the evidence to the court proceedings should be weighed against the privilege of freedom of speech, so that the latter would not be an absolute prohibition but a consideration to be balanced against the requirements of the court proceedings. He also appeared to consider that this reasoning was not inconsistent with the previous judgments.

In the second judgment Mr Justice Hunt held that article 9 was restricted to preventing parliamentary proceedings being the actual cause of an action, but did not prevent evidence of those proceedings being used to support an action, either in providing primary evidence of an offence or a civil wrong, or in providing a basis for attacking the evidence of a witness or a defendant in the court proceedings. This reasoning was based upon an interpretation of the legislative purpose of article 9 and on a finding of the proper scope of parliamentary privilege as it relates to court proceedings, and explicitly declined to follow the earlier judgments cited.

The reasoning of the judges was not accepted by the Senate, and was criticised in documents laid before that House by its President. (These papers were later published: 'Parliamentary Privilege: Reasons of Mr Justice Cantor: an analysis' in *Legislative Studies*, Autumn 1986; 'Parliamentary Privilege: Reasons of Mr Justice Hunt: an analysis' in *Legislative Studies*, Autumn 1987.) It was pointed out that the second judgment would allow members of Parliament, as well as witnesses, to be called to account in court for their parliamentary speeches and actions and to be attacked and damaged for their participation in parliamentary proceedings, provided only that those proceedings were not the formal cause of the action.

The judgments, even in the absence of statutory correction, did not represent the law. It was unlikely that they would be followed by other courts, and subsequently there were contradictory judgments, including one by another judge of the Supreme Court of New South Wales.

In *R. v Jackson and others* 1987 8 NSWLR 116 a former New South Wales minister was charged with receiving bribes. Remarks made by him in the New South Wales Parliament were highly relevant to the case and the prosecution attempted to use them to assist in establishing his guilty motive and intention. The question of parliamentary privilege was argued again by the New South Wales Legislative Assembly, and the judge upheld the previously established interpretation of freedom of speech and declined to allow the admission of the statements made in Parliament. In doing so he explicitly rejected the reasons of Hunt J. which, as he said, pared article 9 down to the bare bone. In *R. v Saffron*, however, the District Court allowed in camera evidence of a select committee of the NSW Legislative Assembly to be subpoenaed and made available for the use of the defence (reasons for judgment in relation to a subpoena directed to the chairman of the National Crime Authority, 21 August 1987, not reported). In a South Australian case, *Australian Broadcasting Corporation and another v Chatterton* 1986 46 SASR 1, a judge of the Supreme Court of that state also upheld the traditional interpretation by not allowing a member's statements in Parliament to be used to support a submission on the intention of statements made outside the Parliament. The judge went so far as to suggest that the repetition outside Parliament by a member of the member's statements in Parliament was also privileged.

The erroneous New South Wales judgments were partly founded on several misconceptions about the nature of parliamentary privilege, for example, that the traditional interpretation would have it restrict any public criticism of parliamentary proceedings (for a judicial refutation of this misconception, see *Hamilton v Al Fayed* 1999 3 All ER 317).

Effect of the 1987 Act

The *Parliamentary Privileges Act 1987*, unprecedented in being introduced by the President of the Senate, was enacted for the express purpose of overturning the adverse court judgments. It made use of the legislative power under section 49 of the Constitution to enact the traditional interpretation of article 9.

The statutory declaration of the formerly established scope of freedom of speech was accomplished, in section 16 of the Act, in several stages. The first stage made it clear that the Australian Houses possessed the privilege of freedom of speech in the terms of the Bill of Rights:

> **(1)** For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

These terms were used because the Parliament was not legislating to provide for its freedom of speech in the future, but declaring what its freedom of speech had always been. The Houses did not wish to give any credence to the reading down of article 9, especially as the article is part of the law of other jurisdictions, including the Australian states. The provision is thus intended to cover past proceedings in Parliament, although, as will be seen, any intention to legislate with retrospective effect for court proceedings already commenced was disclaimed.

The next stage was to define what is covered by article 9 and protected by it, in other words, to define the scope of the expression "proceedings in Parliament", which had never been authoritatively expounded. This was done in the following terms:

> **(2)** For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means 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, and, without limiting the generality of the foregoing, includes —
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
>
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

This provision, while in general terms, clarifies several uncertainties about the scope of "proceedings in Parliament", particularly in relation to the status of parliamentary evidence and documents presented to a House or a committee.

The most important provision defines the meaning of "impeached or questioned". The relevant provision does not explicitly declare that members or witnesses may not be prosecuted or sued for their participation in parliamentary proceedings: that was regarded as beyond doubt and clearly provided by the terms of article 9. By its terms, however, the provision effectively prevents prosecution or suit for proceedings in Parliament. The provision indicates the wider operation of the article and draws the line between the proper and improper admission of evidence of parliamentary proceedings, in accordance with the principles set out above:

> **(3)** In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of —
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

The explanatory memorandum accompanying the bill explains that each of the three paragraphs contains a refinement of the meaning of "impeached or questioned". Paragraph (a) expresses the principal prohibition contained in article 9. It prevents, for example, a statement in debate by a member of Parliament or the evidence of a parliamentary witness being directly attacked for the purpose of court proceedings, or the motives of the member or the witness in speaking in Parliament or giving evidence being impugned. Thus, it cannot be submitted that a member's statements in Parliament were not true, or reckless, to support a submission that the member is an untruthful, or reckless, person.

Paragraph (b) prevents the use of proceedings in Parliament to attack the credibility, motives or intentions of a person even where this does not directly call into question those proceedings. This would prevent, for example, members' speeches in debate or parliamentary witnesses' evidence being used to establish their motives or intention for the purpose of supporting a criminal or civil action against them, or against another person. Thus a member's statements outside Parliament cannot be shown to be motivated by malice by reference to a member's statements in Parliament.

Paragraph (c) is intended to prevent the indirect or circuitous use of parliamentary proceedings to support a cause of action. This would prevent, for example, a jury being invited to infer matters from speeches in debate by members of Parliament or from evidence of parliamentary witnesses in the course of a criminal or civil action against them or another person. Thus a member's speech in Parliament cannot be used to support an inference that the member's conduct outside Parliament was part of some illegal activity. It is intended that this would not prevent the proving of a material fact by reference to a record of proceedings in Parliament which establishes that

fact, for example, the tendering of the Journals of the Senate to prove that a Senator was present in the Senate on a particular day.

The provision also prevents relying on parliamentary proceedings for the prohibited purposes. This was thought to follow necessarily from the principle that parliamentary proceedings cannot be used to support a cause of action.

The next provision prevents absolutely the admission in court proceedings of any evidence relating to parliamentary evidence taken in camera:

> **(4)** A court or tribunal shall not —
>
> (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
>
> (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

This provision arises from the use by the prosecution and the defence in *R. v Murphy* of transcripts of evidence taken in camera before one of the Senate committees and not subsequently published by the committee or the Senate.

Subsection (5) provides that in relation to proceedings in a court or tribunal so far as they relate to a question arising under section 57 of the Constitution or the interpretation of a statute, neither the Act nor the Bill of Rights shall be taken to restrict the admission in evidence of an authorised record of proceedings in Parliament or the making of statements, submissions or comments based on that record. This provision ensures that the section does not prevent courts examining parliamentary proceedings for the purposes of ascertaining the parliamentary intention in relation to the interpretation of a statute or of determining constitutional questions arising from disagreements between the two Houses.

Subsection (6) provides that parliamentary proceedings may be examined in court proceedings in relation to an offence concerning parliamentary proceedings. The Parliamentary Privileges Act itself, and some other Commonwealth statutes, create criminal offences, which may be prosecuted through the courts, for improper activities in relation to parliamentary proceedings, offences which, in the absence of the statutory provisions, could be dealt with only by the Houses as contempts of Parliament. Penalties are provided for such offences as the unauthorised publication of in camera evidence and improper influencing of parliamentary witnesses. Because the successful prosecution of such offences may well require the examination of proceedings in Parliament, it was necessary to make another exception in respect of them.

This provision illustrates a difficulty. By enacting criminal remedies to protect its proceedings, the Parliament, in effect, and, it may be said, unwittingly, has made an inroad on the immunity of its proceedings from question in the courts. The first such inroad was made by the British Parliament with a statute of 1892 for the protection of its witnesses. Thus, in order to prosecute

successfully the offence of tampering with a witness, it may well be necessary to adduce the witness's evidence and to draw an inference from that evidence as to whether the witness was improperly influenced. As a matter of fairness, it may then be necessary to allow the defence to examine the witness's evidence and to call it into question for the purposes of the defence. This is a significant modification of the immunity as it had previously been understood.

Finally, the Houses disclaimed the intention of legislating retrospectively for proceedings on foot:

> **(7)** Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

The effect of this provision was that, if some courts had persisted in interpreting article 9 narrowly, the Act applied only to future court proceedings, but to any use of any parliamentary proceedings.

Is the 1987 Act too restrictive?

The bill for the 1987 Act having been presented in the terms outlined, some senators were concerned that it was too widely drafted, and might be unduly restrictive of the rights of litigants and defendants (see the speech by the then Minister for Resources and Energy, Senator Gareth Evans, QC, SD, 17/3/1987, p. 813, referring to the speech by Senator Cooney at p. 809).

The question was not whether the bill actually represented the traditional established interpretation of article 9, but whether that interpretation might itself be unduly restrictive. This concern soon focused on the question of whether litigants and defendants should be able to make limited use of evidence given before parliamentary committees for the purposes of their court proceedings. There was no thought of speeches by members in Parliament being subjected to any examination in court, but there was a concern that the particular circumstances of the Murphy trials, where the accused and the principal witnesses had given evidence before parliamentary committees on the same matters as in their court evidence, might recur. Consideration was given to including in the relevant clause of the bill an exception which would allow a person who had given evidence before a parliamentary committee to be cross-examined in court on that evidence for the purpose of showing that the person's parliamentary and court evidence was inconsistent and that the person's court evidence was therefore unreliable. Such a use of parliamentary evidence, which would not involve questioning that evidence as such but merely comparing it with evidence given in court for the purpose of making submissions as to the reliability of the court evidence, might preserve the rights of litigants to the extent necessary and prevent any injustice which could be worked by the bill. Normally a witness can be cross-examined in relation to inconsistent prior statements, and evidence of inconsistent prior statements can be tendered.

This question of whether an exception should be made in the coverage of clause 16 to allow limited examination of a person's parliamentary evidence was considered during the bill's passage, and the conclusion was reached that it would be impossible to make such an exception without undermining the whole principle of the bill. (See the remarks by Senator Evans, *ibid*.)

There are strong arguments in support of that conclusion. In the first place, such an amendment would draw a distinction between evidence given before a parliamentary committee and other proceedings in Parliament, such as speeches or questions by members. It would create an anomalous situation whereby parliamentary evidence would be subject to examination in court but other proceedings in Parliament would not.

Another difficulty with such an amendment has already been suggested. If one party in a civil or criminal action were allowed to seek to undermine the evidence of a witness by using the witness's parliamentary evidence, as a matter of fairness the other party in the proceedings would have to be allowed to try to rebut that undermining of the witness's evidence by further use of the parliamentary proceedings. For example, if the defence in a criminal case were allowed to try to demonstrate that a witness's parliamentary evidence was inconsistent with the witness's court evidence, the prosecution would have to be allowed to try to rebut that contention, perhaps by showing that the questioning of the witness before the parliamentary committee was misleading or biased, or that the witness was not given proper opportunity to respond to questions put in the committee. This would open the way to the very impeaching and questioning of parliamentary proceedings which it is the aim of article 9 and the legislation to prevent.

Whenever a witness in court proceedings has given evidence or made any statement on the same subject in another forum, it is possible for counsel to claim that the prior evidence or statement was inconsistent with the court evidence, and to attack the witness on that basis. The possibility of such an attack on a witness is often dependent on accidental circumstances, such as the witness having made comments to the press before the legal proceedings. The whole purpose of the legislation being to prevent people being attacked on the basis of their participation in proceedings in Parliament, it was considered neither just nor desirable that witnesses should be subject to attack because they had previously given evidence to a parliamentary committee, perhaps under compulsion.

Parliamentary committees are not bound by the rules of evidence. A parliamentary witness, perhaps under compulsion, may be asked to express the witness's opinions, feelings, suspicions and doubts, and to give self-incriminating evidence. It would be unfair to allow a witness subsequently to be attacked in court proceedings on the basis of this evidence, which would not otherwise be admissible in the court proceedings.

Statements made in the course of parliamentary proceedings should be considered to be in the same category as statements subject to other forms of privilege recognised by the law. An example is legal professional privilege. A person may have made an inconsistent statement in communication with the person's legal adviser, but such a statement is privileged and the person cannot be cross-examined on it. The rationale of this legal professional privilege has been stated as follows:

> The unrestricted communication between parties and their professional advisers has been considered of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained. (Lord Langdale MR in *Reece v Trye* 1846 9 Beavan 316 at 319. The High Court has adopted this rationale, e.g., in *Attorney-General v Maurice* 1986 161 CLR 475, see particularly 490.)

Similar considerations apply in relation to what used to be called Crown or executive privilege. The freedom to speak frankly and freely in the course of parliamentary proceedings and the giving of parliamentary evidence should be considered of such importance as to give it the same absolute privilege.

Any injustice which might otherwise be caused by the exclusion of evidence protected by parliamentary privilege may be remedied by the court ordering a stay of proceedings. This has been clearly indicated by courts in Australia, New Zealand and the United Kingdom (*Rann v Olsen* 2000 172 ALR 395; *Prebble v Television NZ Limited* 1994 3 NZLR 1). (For a statutory reaction to the *Prebble* judgment in the UK, see below, under "Waiver" of privilege.) A criminal prosecution may be stayed if evidence is excluded because of public interest immunity (*R. v Lappas and Dowling*, ACT Supreme Court, ruling 26/11/2003, not reported), and the same principle would apply to evidence excluded because of parliamentary privilege.

The validity of section 16 of the 1987 Act was challenged in the Federal Court in *Amann Aviation v Commonwealth* 1988 19 FCR 223, but the judge found the Act to be a valid and clear declaration of the previous law. A similar challenge was rejected by the Supreme Court of South Australia in *Rann v Olsen* 2000 172 ALR 395. The latter judgment rejected the arguments, mooted in academic circles, that parliamentary privilege as explicated in the 1987 Act is inconsistent with the separation of the legislative and judicial powers or the implied right of freedom of political communication in the Constitution. (See also *Hamsher v Swift* 1992 33 FCR 545.) The Judicial Committee of the Privy Council of the United Kingdom, in a New Zealand case, also observed that the 1987 Act is a correct codification of the law (*Prebble v Television NZ Limited* 1994 3 NZLR 1). The interpretation of the immunity contained in the 1987 Act was expounded by the UK Court of Appeal in *Hamilton v Al Fayed* 1999 3 All ER 317 (see also the reasons for judgment of the House of Lords on appeal in the same case, 2000 2 WLR 609).

Contrary to academic misconception, findings by a court, on evidence lawfully before it, which indirectly call into question parliamentary proceedings (for example, a finding that a statement outside parliamentary proceedings was false, which would mean that a similar statement in the course of parliamentary proceedings was also false), are not prevented by parliamentary privilege (*Mees v Roads Corporation* 2003 FCA 306).

In a judgment in a defamation case, *Laurance v Katter* 1996 141 ALR 447, two judges of the Queensland Court of Appeal appeared to conclude that section 16 of the 1987 Act should be either read down or found invalid in order to allow a statement in the House of Representatives to be used to support an action for defamation. Settlement of this case in 1998 prevented a pending review by the High Court. This judgment is incoherent and not authoritative.

It has already been noted that, although the relevant provision in the United States Constitution is narrower in scope, it has been interpreted as conferring a wide immunity on the legislative activities of members. This supports the contention that the broad interpretation contained in the 1987 Act is appropriate for the protection of the legislative activities of the Australian Houses.

Activities incidental to proceedings

The 1987 Act did not explicitly extend the immunity of freedom of speech to activities of members not related to their participation in proceedings of the Houses and committees. This reflected a considered view that the extension of the immunity to such matters is not warranted. In relation to correspondence of members, it also conformed with the decision of the British House of Commons in the Strauss case, in which the House, contrary to the finding of its Privileges Committee, declared that members' correspondence with ministers is not part of proceedings in Parliament (this case was discussed in the Senate in 1958: SD, 16/9/1958, pp 322-4).

Members' activities may, however, be held to be part of proceedings in Parliament, and therefore absolutely privileged, if it can be shown that they are "for purposes of or incidental to" proceedings in a House or a committee, within the meaning of section 16 of the 1987 Act. For example, if a senator writes a letter seeking information for the purposes of a debate in the Senate, the writing of the letter could well be covered by that provision. The particular circumstances would probably determine the result. There are as yet no definitive court judgments.

It has been noted that in the United States the equivalent of parliamentary privilege has been held to cover the legislative activities of members, and this principle is followed where such activities are not actually part of proceedings in a house or a committee. Australian courts could, if the question arose, adopt similar reasoning.

In 1995 the Western Australian government appointed a royal commission to inquire into the circumstances surrounding the presentation of a petition to the Legislative Council of that state (Royal Commission into Use of Executive Power). At least some of the matters inquired into by the commission were incidental to the presentation of the petition and therefore protected by parliamentary privilege (see under Other tribunals, below). Unfortunately this aspect was not properly considered either by the commission or by the courts before which the commission's powers were challenged (see advices to the President of the Senate by the Clerk, presented to the Senate on 29/11/1995, J.4287).

Repetition of parliamentary statements

While statements made in the course of, or for purposes of or incidental to, parliamentary proceedings are protected by parliamentary privilege, the repetition of such statements not in those contexts is not so protected. Questions have arisen about what constitutes repetition, and the extent to which reference may be made to a protected statement to establish the meaning of an unprotected statement. The latter course is clearly prohibited by the law as elucidated by the 1987 Act. In the only relevant case in the federal sphere, two state judges appeared to think that the 1987 Act had to be either read down or held invalid to allow this to occur (*Laurance v Katter* 1996 141 ALR 447; for a further reference to this case, see above, under Is the 1987 Act too restrictive?). In other jurisdictions courts have held, wrongly, that such reference to protected statements may be made (*Beitzel v Crabb* 1992 2 VR 121; *Buchanan v Jennings* 2002 3 NZLR 145; *Erglis v Buckley*, 2004 2 Qd R 599; *Toussaint v AG of St Vincent and the Grenadines* 2007 1 WLR 2825).

The Senate Committee of Privileges presented a comprehensive report on this matter in June 2008, suggesting an amendment that could be made to the Parliamentary Privileges Act if the problem persisted and subject to a consideration of the issue across other jurisdictions (134th Report, PP 275/2008).

Provision of information to members

A question often asked is whether other persons, in providing information to members, are covered by parliamentary privilege. The answer to this question would also depend on the circumstances of the particular case and whether the provision of the information is "for purposes of or incidental to" proceedings in a House or a committee. If a person requests a senator to raise a matter in the Senate or a committee, or if a senator has in fact used information in parliamentary proceedings, such facts could determine whether the provision of the information is covered by the statutory expression.

The provision of information to members may attract a qualified privilege under the common law interest and duty doctrine (the provider and the recipient of the information each have an interest or a duty in giving or receiving the information).

It may also be held that there is a public interest immunity attaching to the provision of information to members of Parliament.

These questions have not been adjudicated, although there is at least one British judgment suggesting that the provision of information to members may attract the interest and duty principle (*R. v Rule* 1937 2 KB 375). (See also 'Protection of persons who provide information to members', paper by the Clerk of the Senate, 27th Conference of Presiding Officers and Clerks, July 1996.)

In its 67th report, presented in September 1997 (PP 141/1997), the Privileges Committee found that a contempt had been committed by the taking of action for defamation against a person for provision of information by the person to a senator for use in proceedings in the Senate. The committee found that the legal action was taken primarily to punish the person for giving information to a senator for the purpose of its use in Senate proceedings. The report identified circumstances in which the provision of information to a senator may be protected by the Senate's contempt jurisdiction. While the report provided an analysis of the relevant issues, it refrained from expressing any view about whether the provision of information to a senator, in these or other circumstances, is also protected against legal action by the law of parliamentary privilege, so that a court would dismiss such an action on the basis of that law. The committee did not recommend any penalty against the offender, but recommended that the Senate allow the legal proceedings to take their course. The Senate adopted the report on 22 September 1997 (J.2456). In April 2000 a judge of the Supreme Court of Queensland, in dismissing an application to terminate the legal proceedings on grounds of unreasonable delay and abuse of process, found that the provision of the information to the senator was not protected by parliamentary privilege, a finding unnecessary to the determination of the application. The confused reasoning of this judgment was criticised in advices provided by the Clerk of the Senate and a leading barrister which were reported to the Senate by the Privileges Committee (*Rowley v*

Armstrong, 12/4/2000, not reported; 92nd report of the committee, 29/6/2000, PP 150/2000). In September 2000 the Senate, on the recommendation of the Privileges Committee (94th report, PP 198/2000), authorised the President to brief counsel to assist the court in the event of the action being pursued (4/9/2000, J.3192).

In its 72nd report, presented in June 1998 (PP 117/1998), the Privileges Committee found that a university had committed a contempt in taking disciplinary action against a staff member because of his provision of information to a senator, who had laid the information before the Senate. The Senate adopted the report on 1 December 1998 (J.225).

In August 2006 the Legislative Assembly of Victoria, adopting the report of its Privileges Committee, resolved that a particular communication of information to a member by a constituent was a proceeding in Parliament, and that a contempt was committed by a firm of solicitors threatening legal action against the constituent. The offenders apologised. (Votes and Proceedings of the Assembly, 23/8/2006, pp 1148-9.)

Subpoenas, search warrants and members

Members have no explicit immunity as such against subpoenas or orders for discovery of documents issued by courts or tribunals or search warrants, which may be used to obtain access to documents held by members (for the service of subpoenas in the precincts, see under Matters constituting contempts, below; for the execution of search warrants in the precincts, see under Police powers in the precincts, below). The use before a court or tribunal of material obtained by subpoena, discovery or search warrant is of course restricted by the law of parliamentary privilege as has been indicated above.

There may be, however, an effective immunity from such processes for compulsory production of documents where the documents are so closely connected with proceedings in Parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings.

In *O'Chee v Rowley*, Queensland Court of Appeal, 1997 150 ALR 199, the court, influenced by an American precedent, *Brown and Williamson Tobacco Corp v Williams* 1995 62 F 3d 408, in effect held that documents created for purposes of or incidental to parliamentary proceedings could be immune from orders for discovery of documents, although there was some uncertainty about whether this extended to documents created by persons other than the senator concerned. This case was referred to in the 75th Report of the Committee of Privileges, PP 52/1999.

In *NTEIU v the Commonwealth* (19/4/2001, not reported) the Federal Court accepted submissions on behalf of the Senate and by the Australian Government Solicitor to the effect that certain documents were immune from production because they were matters done for purposes of and incidental to parliamentary proceedings. Similarly, in *Australian Communications Authority v Bedford*, the Federal Magistrates Court held that briefs prepared for Senate estimates hearings are immune from production in a criminal matter (28/3/2006, not reported). In *CPSU v the Commonwealth* a claim by the Commonwealth that a document prepared for Senate estimates hearings should not have been admitted into evidence in the Federal Court was not contested, and orders were made by consent to strike out references to the document in the evidence (11/7/2007, not reported). In *Niyonsaba v the Commonwealth*

the Commonwealth claimed immunity from production in the Federal Court for briefing notes for Senate question time and estimates hearings, and this claim was not contested (2007, not reported).

For a claim by the Auditor-General, uncontested, that draft Audit Office reports, prepared for the purpose of presentation to Parliament, are immune from discovery because of parliamentary privilege, see tabled letters from the Audit Office and the Clerk of the Senate, 12/11/2002, J.1026; 14/6/2005, J.656.

In *Crane v Gething* 2000 169 ALR 727, a case involving the seizure of documents under search warrant in the offices of a senator, a judge of the Federal Court found that the court did not have jurisdiction to determine whether parliamentary privilege prevented such a seizure, as the issue of search warrants is an executive act and not a judicial proceeding, and that only the House concerned and the executive may resolve such an issue. This finding was contrary to a submission made by the Senate, to the effect that parliamentary privilege protected from seizure only documents closely connected with proceedings in the Senate, and that the court could determine whether particular documents were so protected (the submission was tabled in the Senate: 13/3/2000, J.2423-4). This aspect of the judgment was not appealed and is unlikely to be regarded as authoritative. The documents in question were forwarded to the Clerk of the Senate in accordance with the order of the court (3/10/2000, J.3267). The Senate appointed a person to examine the documents to determine whether any were protected from seizure by parliamentary privilege, to return any so protected to the senator, and to provide the remainder to the police (5/12/2000, J.3726-7; 8/8/2001, J.4617; 27/8/2001, J.4761).

In 2002 the Privileges Committee reported on the execution of a search warrant by state police in the state office of a senator. The committee found that the police had taken appropriate steps to allow the senator to claim that any of the material seized was immune from seizure by virtue of parliamentary privilege (105th report of the committee, PP 310/2002). The committee subsequently reported that, following continuing disagreement between the senator and the police about the treatment of documents for which privilege was claimed, the same arrangement had been made to settle the matter as in the 2000 case (5/2/2003, J.1457; SD, pp 8573-4). The result of the examination of the documents was that they were all returned to the senator, as none were found to be within the scope of the search warrant (114th report of the committee, 20/8/2003, PP 175/2003).

A memorandum of understanding and Australian Federal Police Guidelines agreed to by the President, the Speaker, the Attorney-General and the Minister for Justice and Customs, governing the execution of search warrants in the premises of senators and members, were tabled and debated in March 2005. The documents provide that any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned. The agreement underlying these documents was the result of several years of effort by the Senate, successive Presidents and the Privileges Committee, arising from the committee's consideration of the cases referred to above. (9/3/2005, J.451, SD, pp 91-2.) An agreement of the same kind was entered into with the Tasmanian government in 2006 (15/8/2006, J.2496).

The US Court of Appeals ordered a similar arrangement for resolving claims of legislative immunity in a case involving documents seized in the office of a member of the House of Representatives under search warrant. In a subsequent judgment the court held that the search and seizure violated the legislative immunity, that the congressman should have been allowed to claim immunity for particular documents before they were seized, and that that claim should have been determined by the court so that immune documents would not fall into the hands of the law enforcement agencies. The court thereby came to a position identical to that argued by the Australian Senate in its submissions to the Australian Federal Court in 2000. (*US v Rayburn House Office Building, Room 2113* [Jefferson case], 28/7/2006, 3/8/2007, not reported; the Supreme Court declined to review this judgment on 1 April 2008).

Documents would not have to be in the possession of a senator to attract the immunity. For example, documents such as briefing notes provided by an adviser to a senator for the purposes of proceedings in the Senate or a committee and in the possession of the adviser would be immune from seizure from the adviser.

The "dominant purpose" test applied by the courts in respect of legal professional privilege (*Esso Australia Resources Ltd v Commissioner of Taxation* 1999 168 ALR 123) would probably also be applied to documents to determine their immunity under parliamentary privilege.

Not only may members of Congress not be compelled to produce documents within the sphere of their legislative activities, or to undertake searches of their files containing protected material, but even when it is known or conceded that an order will turn up non-protected documents, members may not be required to search their files simply on that basis (*Adams & Others v Federal Election Commission*, US District Court, 9/10/2002, not reported). In *US v Arthur Andersen*, US District Court 2002 (not reported), a subpoena directed by the defence in a criminal case to a House of Representatives committee was quashed on the same basis.

The New South Wales Legislative Council has asserted the immunity (Standing Committee on Parliamentary Privilege and Ethics, Report No. 28, 2004; Minutes of Proceedings, 4/12/2003, pp 493-5, 501; 24/2/2004, pp 520-1).

Prosecution of members

The words and actions of members are immune from impeachment and question by way of legal proceedings only in so far as they are part of proceedings in Parliament or are for purposes of or incidental to such proceedings. Members may be prosecuted for actions constituting criminal offences and falling outside this protected area.

This is so even where the actions concerned are clearly performed in the capacity of a member and are linked to the actions of a member in the course of proceedings in Parliament. For example, section 73A of the *Crimes Act 1914* made it an offence for a member to ask for or obtain a bribe in return for exercising the functions of a member in a particular way. If there were to be a prosecution of a member for this offence, say for receiving a bribe in return for asking certain questions in Parliament, the act prosecuted would be the receipt of the bribe; it would be

neither lawful nor necessary for the prosecution to tender evidence of what the member said or did in the course of proceedings in Parliament. This was confirmed by section 15E of the Act, which explicitly provides that parliamentary privilege is not affected by the Act. (This provision was subsumed by a provision of more general application in section 141.1 of the Criminal Code Act.) (In this connection see *US v Brewster* 1972 408 US 501; *R. v Greenway*, 1992, not reported, *Public Law*, Autumn 1998, pp 356-63.)

For the unlawful admission in evidence before a court of evidence given before a parliamentary committee, leading to the setting aside of an initial judgment, see *Commonwealth and Chief of Air Force v Vance* 2005 ACTCA 35 (23/8/2005).

For the unlawful cross-examination of a member of the House of Representatives, a defendant in a criminal case, on his statements in the House, which did not, however, change the outcome of the case, see *R. v Theophanous* 2003 VSCA 78.

A member may be prosecuted for an offence which has also been dealt with as a contempt of a House (cf *US v Traficant*, US Court of Appeals, 19/5/2004, not reported; Supreme Court declined to hear appeal, 10/1/2005.)

Circulation of petitions

Section 16 of the Act explicitly declares that the submission of a document to a House or a committee is part of proceedings in Parliament. In 1988 the Committee of Privileges considered the question of whether the circulation of a petition before its presentation to the Senate falls within the definition of proceedings in Parliament. The committee concluded that it did not. An influential factor in this conclusion was the fact that it is open to any petitioner to present a petition signed only by the petitioner, and the circulation of a petition is not essential for its presentation (11th report, PP 46/1988). **(See Supplement)**

Freedom of speech in state parliaments

In 1985 the Senate Standing Committee on Constitutional and Legal Affairs examined an opinion of the Commonwealth Solicitor-General which suggested that a valid Commonwealth statute, by express provision, could override the privilege of freedom of speech in state parliaments. The committee rejected this opinion, and expressed the view that freedom of speech in state parliaments is an essential part of a state constitution and cannot be overridden by a Commonwealth law (Report on Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments, PP 235/1985).

Other tribunals

The immunity of parliamentary proceedings from any impeachment or question applies in respect of other tribunals as well as the ordinary courts. This is expressly declared by the 1987 Act, which in section 16 refers to "any court or tribunal". Section 3 of the Act defines "tribunal" to include any person or body having the power to examine witnesses on oath, including a royal commission or other commission of inquiry. This reflects the terms of article 9 of the Bill of Rights of 1689, which refers to "any court or place out of Parliament".

Just as the wide definition of "impeached or questioned" does not exhaust the meaning of that phrase, the definition of "tribunal" does not exhaust the category of bodies before which parliamentary proceedings must not be impeached or questioned. This is because section 16 provides that article 9 has the effect of the provisions of the section "*in addition to any other operation*" (emphasis added). This means that it is open to a court to find that other activities, possibly not covered by the Act in itself, before other bodies, not included in the Act's definition of tribunal, are contrary to the law of parliamentary privilege as embodied in article 9. If, for example, a member's participation in parliamentary proceedings is used against the member in some sense before some body which, though not a tribunal within the statutory definition, has the power to impose some detriment on the member, a court could well hold that this is unlawful. The question would be determined by the nature of the body, of its proceedings and of the detriment imposed on the member. The court would have to distinguish between mere withdrawal of political support, which would not be unlawful, from anything in the nature of a penalty imposed on the member.

In this connection it should be noted that some procedures by which political parties impose party discipline on their members may well be unlawful when imposed because of the members' activities in Parliament, although this is generally accepted as part of the party system.

In 2002 the Privileges Committee reported on a case in which a senator's party had withdrawn his endorsement because he did not follow a party instruction on how he should cast his vote in the Senate. The senator had taken legal action against his party, and had settled this action after the party took certain steps required by him. The committee found that the actions of the party had been reckless and ill-judged, but in view of the settlement did not find a contempt of the Senate. (Case of Senator Tambling, 103rd report of the committee, PP 308/2002.)

In 1919 the Presiding Officers made statements in each House rejecting any attempt by a royal commission to inquire into the internal affairs of the Houses (for the terms of these statements, see ASP, 6th ed., at pp 1043-4). Although the matters into which it was apprehended the commission might inquire were not proceedings in the Houses as such, the case illustrates the extension of the principle to executive government-appointed commissions of inquiry. (See also documents tabled by the President, 4 May 1993, J.45, concerning an inquiry by a person appointed by the Attorney-General into matters the responsibility of a parliamentary department.)

In 1983 the Royal Commission on Australia's Security and Intelligence Agencies accepted, in the course of its proceedings, that it did not have the power to inquire into statements made in Parliament (Report of the Commission, 6 December 1983, PP 323/1983, p. 9).

The question has been raised whether the immunity operates in respect of private arbitration tribunals, which are usually established under a law of a state or territory and which operate by the parties contracting to be bound by their decisions. Most such bodies appear to fall within the definition of tribunal in the 1987 Act, in that they have the power to take evidence on oath, and therefore section 16 of the Act would apply. It would also appear not to be possible for the immunity as a matter of law to be negated by a contract.

Parliamentary privilege and statutory secrecy provisions

Parliamentary privilege is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information.

There are many statutory provisions, here generically designated as secrecy provisions, which prevent the disclosure of information thought to require special protection from disclosure. Usually these provisions create criminal offences for the disclosure of information obtained under the statute by officers who have access to that information in the course of duties performed in accordance with the statute.

Statutory provisions of this type do not prevent the disclosure of information covered by the provisions to a House of the Parliament or to a parliamentary committee in the course of a parliamentary inquiry. They have no effect on the powers of the Houses and their committees to conduct inquiries, and do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees.

The basis of this principle is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a House or a committee. That law was made clear by section 16 of the 1987 Act, which declares that the submission of a document or the giving of evidence to a House or a committee is part of proceedings in Parliament and attracts the wide immunity from all impeachment and question which is also clarified by the Act. It is also a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words. Section 49 of the Constitution provides that the law of parliamentary privilege can be altered only by a statutory declaration by the Parliament. These principles were set out in 1985 in a joint opinion of the then Attorney-General and the then Solicitor-General:

> Whatever may be the constitutional position, it is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away ..... In the case of the Parliament of the Commonwealth, s. 49 of the Constitution requires an express declaration. (Quoted in Report by the Senate Standing Committee on Constitutional and Legal Affairs, *Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments*, 30 May 1985, PP 235/1985, p. 2.)

These principles were called into question by advice given to the executive government by its legal advisers late in 1990. The context of the advice was the operations of the Parliamentary

Joint Committee on the National Crime Authority. The *National Crime Authority Act 1984* established a National Crime Authority with power to inquire into matters relating to organised crime. The Act also established a Joint Parliamentary Committee to oversee the Authority on behalf of the Parliament. The provisions establishing the committee were not initiated by the government, but were inserted into the act by an amendment made in the Senate. In the part of the Act establishing the committee there was a provision which limited the powers of inquiry of the committee, by providing that the committee was not to investigate a particular criminal activity or to reconsider the findings of the Authority in relation to a particular investigation. In another part of the Act there was a general secrecy provision, making it an offence for officers of the Authority to disclose information obtained in the course of their duties except in accordance with those duties. Members of the Authority claimed that the general secrecy provision prevented them providing information to the committee. They claimed that they could be prosecuted for providing information to the committee contrary to that provision, and at one stage they sought from the executive government immunities from prosecution under the section.

The committee sought advice from the Clerk of the Senate on this question. The advice was that the secrecy provision had nothing to do with the provision of information to the committee. Apart from the principles already enunciated, there were additional reasons for that advice. The general secrecy provision contained nothing to indicate that it had any application to the committee, and was not placed in the part of the act dealing with the committee. Moreover, the provision allowed the disclosure of information in accordance with the duty of officers, and it could readily be concluded that officers had a duty to cooperate with the committee which was statutorily charged with the task of overseeing the activities of the Authority.

Notwithstanding the cogency of these arguments, the government and its legal advisers came to the support of the Authority. An opinion of the Solicitor-General asserted that the secrecy provision prevented the provision of information to the committee. The opinion did not make it clear how the secrecy provision operated in relation to the committee's inquiries. It appeared to contemplate that the secrecy provision had no application while the committee was operating within its statutory charter, but that should the committee stray outside its statutory bounds the secrecy provision operated in some way to stop the committee's inquiries.

The great weakness of this argument was revealed by the question: If an officer of the Authority gave information to the committee, could the officer then be prosecuted under the secrecy provision? In the opinion, and in the subsequent government opinions to which reference will be made, this question was not answered. The government's advisers stopped short of claiming that a person could be prosecuted for presenting information to a parliamentary committee. Such a claim could not be maintained in the face of the law of parliamentary privilege, but if a prosecution could not be undertaken, how could the secrecy provision operate? As has been indicated, the secrecy provision, like most such provisions, worked by creating a criminal offence for the disclosure of information. If there is no offence for disclosing information to a parliamentary committee, the provision could not operate in relation to such a committee. It was also pointed out that if the Joint Committee strayed outside its statutory terms of reference, the legal remedy would be to restrain it directly, not to invoke the secrecy provision in some unspecified way. The Solicitor-General's advice appeared to contemplate that the remedy for a committee going beyond its terms of reference was that its proceedings would be deprived of the protection of parliamentary privilege. This is analogous to saying if the Parliament passes a bill

which is later found to be beyond its constitutional powers, its proceedings on the bill would be retrospectively stripped of their privileged status. Alternatively, if the presentation of evidence to the committee contrary to the secrecy provision remained privileged, would this mean that the provision could not be enforced against an officer who gave such evidence voluntarily, but operated only to restrain the committee where an officer objected to giving such evidence? These difficulties with the Solicitor-General's opinion were pointed out in a further advice to the committee.

In spite of all these considerations, the government expressed an intention of adhering to the advice of the Solicitor-General. The reaction in the Senate to this was that one of the Senate members of the committee introduced a bill to amend the National Crime Authority Act to make it clear that the secrecy provision had no application to inquiries by the committee (National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990).

In the advice to the committee it was pointed out that there are many general secrecy provisions in federal statutes, and the apprehension was expressed that if the Solicitor-General's opinion were to go unchallenged all of these provisions could be invoked to prevent inquiries by the Houses and their committees into a wide range of information collected by government and its agencies. It was also pointed out that not only secrecy provisions could be so invoked: once the principle that parliamentary privilege is not affected by a statute except by express words is abandoned, there is no end to the provisions which may be interpreted as inhibiting the powers of the Houses and their committees.

This apprehension soon proved to be only too well founded. Early in 1991 another government opinion, composed in the Attorney-General's Department, was presented to the Senate. This opinion contended that another general statutory secrecy provision inhibited the provision of information to a parliamentary committee. The opinion conceded that a person "probably" could not be prosecuted for giving information to a parliamentary committee contrary to the secrecy provision, without explaining how, if there could be no prosecution, the provision could operate. The opinion appeared to indicate that secrecy provisions are simply an excuse for officers who do not wish to answer questions before committees, but cannot be enforced if information is voluntarily provided.

Before there was time for the dispute to progress much further, yet another opinion of the Attorney-General's Department was produced in the Senate. This opinion related to another statutory secrecy provision, but came to the opposite conclusion. Contrary to the other government opinions, it asserted that the Senate could require the disclosure of information to one of its committees notwithstanding that that information was covered by a secrecy provision.

All of the opinions and advices were then drawn to the attention of the Senate, and the government was called upon to determine exactly where it stood on the question. In due course a second opinion of the Solicitor-General was produced. This opinion conceded that a general statutory secrecy provision does not apply to inquiries by the Houses or their committees unless the provision in question is so framed as to have such an application. The opinion contended that a secrecy provision could apply to parliamentary inquiries by force not only of express words in the provision but by a "necessary implication" drawn from the statute. It was just such a "necessary implication" which was found by the Solicitor-General in the National Crime

Authority Act to give the secrecy provision in that act an application to inquiries by the Joint Committee.

In an advice to the Senate by its Clerk on this opinion, it was pointed out that the doctrine of "necessary implication" still posed a residual threat to the powers and immunities of the Houses and their committees, because the government's legal advisers could find "necessary implications" when there was a desire to invoke a particular secrecy provision to inhibit a parliamentary inquiry. This is well illustrated by the "necessary implication" drawn from the National Crime Authority Act, which would not necessarily be drawn by any conscientious reader of the statute.

As an indication of lack of acceptance of the final government opinion, a private senator's bill was introduced into the Senate to declare, for the avoidance of doubt, that statutory provisions do not affect the law of parliamentary privilege except by express words. This residual question has not been resolved. The various opinions given on this matter were included in the explanatory memoranda accompanying the National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990, presented on 8 November 1990, and the Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991, presented on 9 September 1991. (See also 36th report of Committee of Privileges, 25 June 1992, PP 194/1992.)

In 1995 the government's advisers claimed that a clause in the Auditor-General Bill 1994 which would prevent the Auditor-General releasing certain information would be an implied restriction on the powers of the Senate and would prevent the provision of such information in response to an order of the Senate. It was also claimed that it would be unconstitutional for the Parliament to enact a provision to the effect that parliamentary powers and immunities are not affected by a statute except by express words. This claim was rejected by advice provided by the Clerk of the Senate. (See the 12th and 14th reports of 1995 of the Scrutiny of Bills Committee, PP 493/1995.) A revised version of the bill introduced in 1996 overcame this issue by explicitly providing for the effect of the clause on parliamentary inquiries.

Since 1991 the government has generally adhered to the view that a generic statutory secrecy provision does not affect parliamentary inquiries, with only occasional episodes of confusion on the point. For a statement by the government of the principle, see SD, 4/12/2003, pp 19442-3, in relation to the ASIO Legislation Amendment Bill 2003.

In estimates hearings in 2006 and 2007 officers of the Department of Employment and Workplace Relations attempted to suggest that a provision in the Public Service Act requiring officers to maintain confidentiality could be breached by the giving of evidence, but this position was rejected by the committee (Reports of the Employment, Workplace Relations and Education Legislation Committee, Budget Estimates 2006-07, p. 3 and Appendix A, PP 144/2006; Additional Estimates 2006-07, pp 14-15, PP 64/2007).

For an application of the principle that Parliament cannot be assumed to have indirectly surrendered by implication in a statute part of the privilege attaching to its proceedings, see *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* 2002 2 Qd R 8.

It is notable that in the United States the courts have consistently held that a statutory secrecy provision does not prevent the Houses of Congress or their committees requiring the production of the protected information (for example, *FTC v Owens-Corning Fibreglass Corp* 1980 626 F 2d 966).

Preparation and publication of documents

Each House of the Parliament and its committees possesses the power to prepare and publish documents, with absolute privilege attaching to the publication of the document and to the contents of the document. Paragraph 16(2)(d) of the 1987 Act provides that the formulation and publication of a document, and the document so formulated or published, by or pursuant to an order of a House or a committee is included in proceedings in Parliament and attracts the immunity declared by section 16 of the Act.

The Houses possessed this power under section 49 of the Constitution, which attracted to the Houses the provisions of the United Kingdom Parliamentary Papers Act 1840. This statute was passed in consequence of the decision of the Court of Queen's Bench in *Stockdale v Hansard* 1837 173 ER 319, 1839 112 ER 1112, which found that the British Houses did not have that power. In order to provide the machinery for the publication of documents by the Australian Houses, the *Parliamentary Papers Act 1908* provided for the privilege of documents ordered to be published by either House or a committee. That Act was superseded by the 1987 Act, which, unlike the 1908 Act, does not refer to a particular mode of publication, and which clarifies the extent of the privilege.

The prior publication by other means of a document which is subsequently published by order of a House or a committee is not protected by parliamentary privilege. Similarly the content of a document which has come into existence independently of proceedings in Parliament, for example, a report or letter which is exchanged between two or more parties and is subsequently submitted to a House or a committee, is not protected by parliamentary privilege. (For an application of this principle, see *Szwarcbord v Gallop* 2002 167 FLR 262.) **(See Supplement)**

For a claim by the Auditor-General, uncontested, that draft Audit Office reports, prepared for the purpose of presentation to Parliament, are immune from discovery because of parliamentary privilege, see tabled letters from the Audit Office and the Clerk of the Senate, 12/11/2002, J.1026; 14/6/2005, J.656.

The preparation and publication of a document by or pursuant to an order of a House includes such preparation or publication by a person other than a member of the House in accordance with such an order (for applications of this principle, see *R. v Parliamentary Commissioner for Standards, ex parte Al Fayed* 1998 1 All ER 93; *Hamilton v Al Fayed* 1999 3 All ER 317; *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* 2002 2 Qd R 8).

In 1992 the Attorney-General's Department provided an opinion which suggested that the reference to publication in paragraph 16(2)(d) of the 1987 Act covered only "internal" publication for the purposes of proceedings in Parliament. This opinion was contested by the Clerk of the Senate and was subsequently repudiated by an opinion of the acting Solicitor-

General. The latter opinion accepted that "publication" in the section includes publication to the public, and covers any subsequent publication of a document ordered to be published by a House or a committee.

In 2001 the government suggested that the Senate did not have power to order the publication on the Internet of a list of government contracts which it had ordered to be produced, a suggestion rejected, in effect, by the Senate and later tacitly abandoned (26/9/2001, J.4976; report of the Finance and Public Administration References Committee on accountability to the Senate in relation to government contracts, PP 212/2001; PP 367/2002; PP 610/2002; PP 23/2003; 27/9/2001, J.4994-5; 18/6/2003, J.1881-2).

Qualified privilege

The immunity of parliamentary proceedings from question or impeachment in the courts is absolute. This means that the immunity of a member from action for defamation in respect of what was said in parliamentary debate remains regardless of the motives in making the remarks in question.

Reports of parliamentary proceedings in newspapers and elsewhere may attract what the law knows as qualified privilege, that is, a privilege which may be lost on proof of malice or other improper motive in making the publication.

Qualified privilege is not a diluted extension of the absolute parliamentary immunity. The law relating to qualified privilege is a completely separate branch of the law, related to parliamentary immunities only because it has application in respect of reports of proceedings in Parliament. It also applies to other transactions totally unrelated to parliamentary matters, for example, relations between private societies and their members.

The law relating to qualified privilege is determined by the ordinary law of defamation of states or territories. Reports of parliamentary proceedings may also attract the implied freedom of political communication found by the High Court in the Constitution (*Lange v Australian Broadcasting Commission* 1997 189 CLR 520).

The 1987 Act, however, provides in section 10 a defence against defamation actions for all fair and accurate reports of proceedings in the Houses of the Commonwealth Parliament and their committees.

The privilege attaching to reports of parliamentary proceedings, including radio and television reports, is further discussed in Chapter 3 on the publication of proceedings.

Minor immunities

There are three minor immunities of members of the Houses of the Parliament and of witnesses and parliamentary officers. One of these is of virtually no significance, and the other two seldom arise. These are:

- immunity from arrest in civil causes
- exemption from service as a juror
- exemption from compulsory attendance in a court or tribunal.

The immunity from arrest in a civil cause is now of little significance. The potential for a person to be arrested and imprisoned by a civil, as distinct from a criminal, process is now extremely small, due to changes in the law and the narrow compass which the courts have given to purely civil causes by interpretation. The immunity extends to witnesses required to attend on parliamentary committees and to officers required to attend on the Houses or their committees.

In some countries the immunity extends to criminal matters, and a member may not be arrested or prosecuted without the consent of the relevant house. This may be regarded as a security against the obstruction of members by abuse of the processes of law, but in view of the general integrity of the criminal process in Australia, it would not seem to be appropriate here.

The other two minor immunities seldom arise in practice. There is good ground for retaining them, however: the principle that the Houses should have first right to the services of their members, witnesses and officers, and that those services should not be impeded by the requirements of legal proceedings before a court.

Section 14 of the 1987 Act codifies the immunities from arrest in a civil cause and from compulsory attendance before a court or tribunal. The Act restricts the immunities to five days before and five days after a meeting of a House or committee. Before the Act was passed these immunities operated for 40 days before and after a session, that is, in modern times, virtually permanently.

The immunity from being compelled to attend before a court or tribunal does not prevent a member, witness or officer attending voluntarily when requested to do so.

The exemption from jury service of members and officers of the Houses is regulated by the *Jury Exemption Act 1965*.

Detention of senators

While the immunity from arrest in a civil cause is of little significance, the Senate has insisted upon its right to be notified of the detention of a Senator in any cause.

In 1979 the Committee of Privileges considered a case in which a senator had been arrested and detained without any notification being given to the President. The committee reported that it was the right of the Senate to receive notification of the detention of any of its members, and recommended that the Senate pass a resolution asserting this right and setting out when notification is to be given (5^{th} report, PP 273/1979). The Senate passed the recommended resolution on 26 February 1980 (J.1153). The resolution requires any court, pursuant to the order of which a senator is detained in custody, to notify the President of the fact and the cause of the senator's detention.

In 1986 the committee considered a case in which a senator had been detained by police for a considerable period without being brought before a court. The committee recommended that the 1980 resolution be modified to impose an obligation upon police to notify the President of the fact and the cause of a senator's arrest where the identity of the senator is known (10th report, PP 433/1986). The Senate passed the recommended resolution on 18 March 1987 (J.1693-4).

POWERS OF THE HOUSES

There are three distinct powers adhering to the two Houses of the Parliament by virtue of section 49 of the Constitution: the power of the Houses to determine their own constitution; the power to conduct inquiries; and the power to punish contempts.

Power of the Houses to determine their own constitution

Each House of the Parliament has the power to determine its own constitution, in so far as it is not determined by constitutional or statutory law. In Australia, this power, though explicitly recognised in section 47 of the Constitution, is of limited significance because the Constitution and the statutory law provide for the qualification and disqualification of members of the Houses and a method whereby disputed elections may be referred to the High Court (see Chapter 4, Elections for the Senate, under Disputed returns and qualifications and Chapter 6, Senators, under Qualifications of senators).

Before 1987 each House could exercise the power of determining its own constitution by the expulsion of members who were regarded as unfit to remain members. The expulsion of a member did not of itself prevent the re-election of that member, since eligibility for election is determined by law.

The 1984 report of the Joint Select Committee on Parliamentary Privilege recommended that the power of a House to expel its members be abolished. The rationale of this recommendation was that the disqualification of members is covered by the Constitution and by the electoral legislation, and if a member is not disqualified the question of whether the member is otherwise unfit for membership of a House should be left to the electorate. The committee was also influenced by the only instance of the expulsion of a member of a House of the Commonwealth Parliament, that of a member of the House of Representatives in 1920 for allegedly seditious words uttered outside the House. This case had long been regarded as an instance of improper use of the power (see, for example, E. Campbell, *Parliamentary Privilege in Australia*, MUP, 1966, pp 104-5).

The recommendation, and the consequent provision in section 8 of the 1987 Act, was opposed in the Senate. It was argued that there may well be circumstances in which it is legitimate for a House to expel a member even if the member is not disqualified. It is not difficult to think of possible examples. A member newly elected may, perhaps after a quarrel with the member's party, embark upon highly disruptive behaviour in the House, such that the House is forced to suspend the member for long periods, perhaps for the bulk of the member's term. This would mean that a place in the House would be effectively vacated, but the House would be powerless to fill it. Other circumstances may readily be postulated. The Houses, however, denied themselves the protection of expulsion.

Power to conduct inquiries

Each House of the Parliament has the power to require the attendance of persons and production of documents and to take evidence under oath. This power supports one of the major functions of the Houses: that of inquiring into matters of concern as a necessary preliminary to debating those matters and legislating in respect of them. The power has long been regarded as essential for a legislature. The power is, in the last resort, dependent upon the power to punish contempts, in so far as that penal power is the means by which the Houses may enforce the attendance of witnesses, the answering of questions and the production of documents.

The power to conduct inquiries by compelling the attendance of witnesses, the giving of evidence and the production of documents is conferred by section 49 of the Constitution.

Inquiry powers also have another possible source. In the United States it was found that these powers are inherent in the legislature (see *McGrain v Daugherty* 1927 273 US 135).

Something of this inherent powers doctrine was adopted in a state. The New South Wales Court of Appeal in *Egan v Willis and Cahill* 1996 40 NSWLR 650 found that although the New South Wales Parliament lacks an equivalent of section 49 of the Constitution, the Legislative Council possesses an inherent power to require the production of documents and to impose sanctions on a minister in the event of non-compliance. The Council had made an order for documents and suspended the Treasurer from the Council when he failed to produce the required documents. The High Court rejected an appeal against this judgment, while not indicating whether the Council possesses full inquiry powers: *Egan v Willis and Cahill* 1998 158 ALR 527. The Court of Appeal subsequently found that claims of legal professional privilege and of public interest immunity could not protect the executive government against the Council's power: *Egan v Chadwick and others* 1999 46 NSWLR 563. The Council does not possess a general power to punish contempts. The limitation of the power of the Council in respect of documents recording the deliberations of cabinet, found by the Court of Appeal, would not apply to the Commonwealth Houses in the presence of the constitutional bases of their powers.

The power to conduct inquiries is usually not exercised by the Houses themselves, but is delegated to committees by giving those committees the power to require the attendance of witnesses and the production of documents. A major concomitant of that delegation is that proceedings in parliamentary committees are proceedings in Parliament, and the immunity from impeachment or question in the courts attaches to words uttered in committee proceedings by members and witnesses and to the production of documents to committees, as declared by the 1987 Act.

It is not determined whether the Houses can delegate their power to conduct inquiries to a person other than their own members, although there are some old precedents in Britain for such a delegation (see also under Preparation and publication of documents, above; see also Chapter 20, Relations with the Judiciary, under The second Senate committee).

The power may be confined to inquiries into subjects in respect of which the Commonwealth Parliament has the power to legislate. There is judicial authority for the proposition that the

Commonwealth and its agencies may not compel the giving of evidence and the production of documents except in respect of subjects within the Commonwealth's legislative competence (*Attorney-General for the Commonwealth v Colonial Sugar Refinery Co Ltd* 1912 15 CLR 182, 1913 17 CLR 644; *Lockwood v the Commonwealth* 1954 90 CLR 177 at 182-3), and, if the matter were litigated, the High Court might well hold that this limitation applies to the inquiry powers of Senate committees. The United States Supreme Court so held in relation to the Congress (see *Quinn v US* 1955 349 US 155). This would not mean that an inquiry would have to be linked with any particular legislation (cf *Eastland v US Servicemen's Fund* 1975 421 US 491).

Although the question has not been adjudicated, there is probably an implicit limitation on the power of the Houses to summon witnesses in relation to members of the other House or of a house of a state or territory legislature. Standing order 178 provides that if the attendance of a member or officer of the House of Representatives is required by the Senate or a Senate committee a message shall be sent to the House requesting that the House give leave for the member or the officer to attend. This standing order reflects a rule of courtesy and comity between the Houses, and as such it ought properly to be observed in relation to houses of state and territory parliaments. It may be that these limitations on the power to summon witnesses in relation to other houses have the force of law, and may extend to officers of state and territory governments. The basis of such a legal doctrine in relation to the states would be High Court judgments to the effect that the Commonwealth may not impede the essential functioning of the states. (For an examination by the High Court of what has come to be known as the "Melbourne Corporation doctrine", that the Commonwealth may not interfere with the governmental functions of states, see *Austin v Commonwealth* 2003 195 ALR 321.)

The Select Committee on the Australian Loan Council, in its interim report in March 1993 (PP 78/1993), accepted advice by the Clerk of the Senate that it could not summon as witnesses members of the House of Representatives and of the houses of state parliaments. The committee recommended that the Senate ask the various houses to require their members to attend and give evidence before the committee (the advice also indicated that the houses have the power so to compel their members, but that question also has not been adjudicated). The Senate passed a resolution and requests were sent to the various houses accordingly. The various houses declined to compel their members to attend. (5/10/1993, J.566; 7/10/1993, J.608; 20/10/1993, J.657; 21/10/1993, J.683; see also Chapter 17, Witnesses) Similar advice was provided to, and accepted by, the Select Committee on Unresolved Whistleblower Cases (Report, PP 344/1995, pp 138-40). For an instruction by the Senate to a committee to invite the Prime Minister and another minister to give evidence, see 9/3/1995, J.3063-4.

The Select Committee on the Victorian Casino Inquiry presented a report on 5 December 1996 indicating that it had decided not to continue its inquiry because of advice provided by the Clerk of the Senate and by Professor Dennis Pearce in relation to limitations on the Senate's powers to compel evidence from state members of parliament and other state office-holders. The committee's report provided a comprehensive analysis of this matter and copies of the advices (PP 359/1996).

(See Supplement)

In the United States the view is taken that each House of the Congress and their committees may summon members and officers of state governments, provided that this is for the purposes of

inquiries into matters within the legislative power of the Congress. The question has not been adjudicated, but there are precedents for the summoning of state officers and their responding. It must be noted, however, that differing constitutional provisions may reduce the persuasive value of the American law for Australian purposes; for example, article iv, section 4 of the US Constitution, whereby the United States guarantees to every state a republican form of government, gives the Congress a general power of supervision of state governments which the Australian Parliament does not possess.

The Supreme Court of the Province of Prince Edward Island, in Canada, held that officers of a federal government agency had no immunity from a summons issued by a committee of the Legislative Assembly of the province in the course of an inquiry into a matter within the legislative power of the province. This decision was not appealed and the officers subsequently appeared before the committee. (*Attorney General (Canada) v MacPhee* 2003 661 APR 164)

The power to summon witnesses and the power to require the production of documents are one and the same; any limitations on one therefore apply equally to the other.

The immunity of other houses' proceedings from impeachment and question before other tribunals (the Bill of Rights, article 9 immunity which most Australian Houses possess) is regarded as preventing any inquiries into their proceedings by the Senate or its committees (see the 54th report of the Committee of Privileges, PP 133/1995).

The inability to compel members of other houses has been regarded as preventing findings of contempt against them, except for Commonwealth ministers in that capacity (see Chapter 19, Relations with the executive government, under Ministerial accountability and censure motions). This principle might be held to be applicable to state and territory office-holders.

Possible and mooted limitations on the Senate's power to compel evidence were summarised in 'The Senate's power to obtain evidence and parliamentary "conventions"', paper by the Clerk of the Senate published by the Finance and Public Administration References Committee, September 2003.

Subject to the observance by the courts of parliamentary immunities, there is nothing to prevent judicial proceedings involving the same facts and circumstances as have been examined in a parliamentary inquiry (cf *Hamilton v Al Fayed* 1999 3 All ER 317; a different view of the particular case, though not of the law, was taken by the House of Lords on appeal, 2000 2 WLR 609; also *Mees v Roads Corporation* 2003 FCA 306).

For the application of the sub judice convention to inquiries by the Senate, see Chapter 10, Debate, under Sub judice convention, and Chapter 16, Committees, under Privilege of proceedings.

Rights of witnesses

Subject to what is said above about possible constitutional limitations, there is no limitation on the power of the Houses to compel the attendance of witnesses, the giving of evidence and the production of documents.

There are, however, safeguards against any misuse of this power. The Senate has a range of practices designed to safeguard the rights of witnesses and of people who may be accused of wrongdoing in the course of committee proceedings.

These practices were codified by the Privilege Resolutions, passed by the Senate on 25 February 1988. (The resolutions are contained in appendix 2 and were explained in an explanatory memorandum tabled in the Senate and incorporated in SD, 17/3/1987, pp 796-9.) The first of those resolutions provides a code of procedures for Senate committees to follow for the protection of witnesses. These procedures are based on practices adopted by Senate committees in the past, but under the resolution Senate committees are bound to adopt those practices.

The procedures confer a number of rights on witnesses, particularly the right to object to questions put in a committee hearing and to have such objection duly considered. Witnesses are to be supplied with copies of the procedures, and may appeal to the Senate if a committee fails to observe the procedures.

Section 12 of the 1987 Act provides statutory witness protection provisions. It is a criminal offence punishable by fine or imprisonment to interfere with a parliamentary witness. Section 13 makes it a criminal offence to disclose without authorisation parliamentary evidence taken in camera. This was thought to be a logical extension of the witness protection provisions (explanatory memorandum, p. 8).

A difficulty with this sort of provision has already been noted: the successful prosecution of the offences may well require a House to some extent to waive, in effect, the immunity of its proceedings from examination in the courts.

The rights and protection of witnesses are more fully set out in Chapter 17 on Witnesses.

Power to punish contempts

Each House of the Parliament possesses the power to declare an act to be a contempt and to punish such act, even where there is no precedent of such an act being so judged and punished. As was pointed out above, the power does not depend on the acts judged and punished being violations of particular immunities. This power to deal with contempts of either House is the exact equivalent of the power of the courts to punish contempts of court.

The rationale of the power to punish contempts, whether contempt of court or contempt of the Houses, is that the courts and the two Houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions.

Particular contempts are sometimes discussed as if they have been regarded as offences simply because they are affronts to the dignity of the Houses. This, however, is a misconception. Acts judged to be contempts in the extensive modern case law of both the Senate and the British House of Commons have been so judged and treated because of their tendency, directly or indirectly, to impede the performance of the functions of the Houses. Although the power to punish contempts was originally essentially discretionary, the types of acts liable to be treated as contempts were reasonably fully delineated by that case law, just as contempt of court has been delineated by the courts.

The power of the Houses to punish contempts was recognised and upheld by the courts as part of the ordinary law. This recognition lay in the refusal of the courts to release persons committed for contempt, and in the rule that the courts would not inquire into a parliamentary warrant for the committal of a person for contempt where the warrant did not specify the contempt (*R. v Richards ex parte Fitzpatrick and Browne* 1955 92 CLR 157; but this law is changed by the 1987 Act: see below, under Statutory definition of contempt).

Just as the power to conduct inquiries may not extend to members and officers of other houses of Australian legislatures, or to state office-holders, the power to punish contempts may similarly be limited (see under Power to conduct inquiries, above).

That the power of a legislature to punish contempts is regarded as inherent in the legislative function is best demonstrated by an examination of the American law. In the United States it has been held that each House of the Congress and of the state legislatures possesses the power to punish acts which obstruct the performance of the duties of a legislature in spite of the absence of any express provision in the United States Constitution; it is an inherent power, springing from the legislative function. The power is not impaired by the enactment by Congress in 1857 of a statute making it a criminal offence to refuse to answer a question or produce documents before either House or a committee. (It is now also a criminal offence to give false evidence to Congress.) A person already punished by either House for such a contempt may be prosecuted and convicted under the statute. The removal of an obstruction does not deprive the Houses of the power to punish the act causing the obstruction (*Jurney v MacCracken* 1935 294 US 125). Dealing with a case in 1972 concerning the punishment by a house of a state legislature of a person for contempt, Chief Justice Burger of the United States Supreme Court observed:

> The past decisions of this Court expressly recognising the power of the Houses of the Congress to punish contemptuous conduct leave little question that the Constitution imposes no general barriers to the legislative exercise of such power ... There is nothing in the Constitution that would place greater restrictions on the States than on the Federal Government in this regard. (*Groppi v Leslie* 1972 404 US 496)

In referring to “general barriers”, the Chief Justice was leaving aside other explicit constitutional limitations, such as those on the power of Congress to legislate and the requirement for due process.

It is clear that in enacting a statute for the punishment by ordinary criminal process of certain contempts, the Congress did not intend to renounce its inherent power; the reason for passing the statute was to enable the imposition of penalties not restricted to the life of any session of the Congress (*Quinn v US* 1955 349 US 155 at 169). The Houses of Congress now prefer to proceed

under the statute rather than under the inherent power, while keeping the inherent power in reserve, which avoids cluttering the proceedings of the Houses with allegations of contempt. (See M. Rosenberg and T. Tatelman, *Congress's Contempt Power: Law, History, Practice and Procedure*, CRS Report for Congress, 2007.)

Statutory definition of contempt

The 1987 Act contains what amounts to a statutory definition of contempt of Parliament:

> **4.** Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Enactment of this provision means that it is no longer open to a House, as it was under the previous law, to treat any act as a contempt. The provision restricts the category of acts which may be treated as contempts, and it is subject to judicial interpretation. A person punished for a contempt of Parliament could bring an action to attempt to establish that the conduct for which the person was punished did not fall within the statutory definition. This could lead to a court overturning a punishment imposed by a House for a contempt of Parliament.

The 1984 report of the Joint Select Committee on Parliamentary Privilege had recommended a non-enforceable review by the High Court of a punishment for contempt imposed by a House. This recommendation was not adopted because such a provision would be unconstitutional, in that it would amount to conferring an advisory jurisdiction on the High Court (explanatory memorandum accompanying the bill as passed by the Senate, p. 6).

The Senate therefore chose an enforceable judicial review, but a review on a restricted ground. The provision nonetheless opens the way for a court to determine whether particular acts are improper and harmful to the Houses, their members or committees. This means that it will not be possible for the Commonwealth Houses to treat as contempts some acts traditionally so treated in the past. For example, it is doubtful whether the Houses could treat the serving of a writ or other legal process in the precincts on a sitting day as a contempt.

Section 9 of the Act provides that if a House imposes a penalty of imprisonment upon a person, the resolution of the House and the warrant shall set out particulars of the offence. Even without the definition of contempt, this has the effect that a court could determine whether the ground for imprisonment is sufficient in law to amount to a contempt (*R. v Richards ex parte Fitzpatrick and Browne* 1955 92 CLR 157 at 162).

Defamation of the Houses and their members

The 1987 Act provides that it is not a contempt to defame or criticise the Houses, their committees or members:

> **6.** (**1**) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

> (**2**) Sub-section (1) does not apply to words spoken or acts done in the presence of a House or a committee.

Controversy in the past about the power of the Houses to punish contempts concentrated not on the question of whether the acts regarded as contempts should be treated as offences, but whether the Houses should have the power to judge and punish those offences, an issue which is addressed below. The offence of defamation of the Houses or of their members was the exception to this: there was some dispute about whether such defamation ought to be regarded as an offence at all.

The rationale of treating defamation of the Houses or of their members as a contempt was not, as was sometimes supposed, to protect the dignity and good name of Parliament and its members, but to prevent published attacks which, by undermining the respect due to Parliament as an institution and diminishing its authority, tend to obstruct or impede the Houses in the performance of their functions. To constitute a contempt a reflection upon an individual member had to relate to the member's capacity as a member and tend to obstruct the performance of the member's duties. This rationale was not always clearly observed, even by parliamentary authorities, and houses of parliaments with the power to punish contempts did not always display the discretion and judgment which ought to accompany that great power. Some defamations, however, are capable of meeting the test for them to be treated as contempts. An authoritative exposition of the parliamentary law in this area was contained in the chapter entitled 'Defamation as Contempt of Parliament', by L.A. Abraham, in *Wicked, Wicked Libels*, ed. M. Rubinstein, London, 1972. (Contrary to a common misconception, the Fitzpatrick and Browne case was not about defamation of a member but attempted intimidation of a member: see H. Evans, 'Fitzpatrick and Browne: Imprisonment by a House of Parliament', in H.P. Lee & G. Winterton, eds, *Australian Constitutional Landmarks*, 2003.)

Criticism of the treatment of defamatory statements as contempts was based on the proposition that individual members have the same civil remedies available to them as other citizens, and the powers of the Houses should not be invoked as a substitute for such civil remedies.

The 1984 report of the Joint Select Committee on Parliamentary Privilege recommended that it be explicitly provided by statute that defamation of a member or a House may not be punished as a contempt. The select committee made its recommendation notwithstanding submissions that there may be instances in which it is legitimate for defamation or criticism of a House or a member to be treated as a contempt. In the report of the Select Committee of the British House of Commons on Parliamentary Privilege in 1967 one such instance was identified: the allegation of bias against a presiding officer of a House. A submission attached to the report quoted W.E. Gladstone to support a contention that this offence cannot be left to civil action for correction (HC 34, 1967-8, submission of Louis Abraham at p. 203). Shortly before the 1987 Act was passed, the House of Representatives had in fact punished one of its members for criticism, made outside the House, of the Speaker (HR Debates, 24 February 1987, pp 580-7). It appears that it is no longer possible to deal with such conduct, however gross the defamation.

Matters constituting contempts

One of the 1988 Privilege Resolutions of the Senate sets out, for the guidance of the public, acts which may be treated by the Senate as contempts.

The resolution, Resolution 6, is set out in appendix 2. As the preamble to the resolution indicates, it is not intended to be an exhaustive or all-inclusive list of contempts, but provides guidance on the types of acts which may be treated by the Senate as contempts, and does not derogate from the Senate's power to determine that particular acts constitute contempts.

The formulation covers all the traditional contempts, but as has already been noted is subject to the statutory restriction of the category of contempts provided by the 1987 Act. This is significant in relation to one provision of the resolution: paragraph (6) relating to the service of writs in the precincts. It has already been observed that this contempt may not meet the test of section 4 of the Act. The other contempts set out in the resolution clearly meet that test.

The Committee of Privileges has reported to the Senate on a number of matters giving rise to allegations that contempts may have been committed. Most of these reports have been presented since the Privilege Resolutions were adopted. The reports, and the action taken on them by the Senate, provide a body of case law showing how the power to adjudge and punish contempts is exercised.

A full list of reports of the Privileges Committee and the action taken by the Senate in relation to each report is shown in appendix 3.

It is significant that only in the following cases has the Privileges Committee reported, and the Senate determined, that contempts were committed.

1971 unauthorised publication of draft committee report (1st report of committee PP 163/1971)

1981 harassment of a senator (6th report of committee PP 137/1981)

1984 unauthorised publication of committee evidence taken in camera (7th report of committee PP 298/1984)

1989 adverse treatment of a witness in consequence of the witness's evidence (21st report of committee PP 461/1989)

1993 charges laid against a witness in consequence of the witness's evidence (42nd report of committee PP 85/1993)

1994 threats made to a witness by an unknown person (50th report of committee PP 322/1994)

1995 unauthorised disclosure of submission to a committee by an unknown person (54th report of committee PP 133/1995)

1997 legal action taken against a person to penalise the person for providing information to a senator (67th report of committee PP 141/1997) (for the significance of this case, see above under Provision of information to members)

1998 disciplinary action taken by a university against a person in consequence of the person's communication with a senator (72nd report of committee PP 117/1998) (see also above under Provision of information to members)

1998 unauthorised disclosures of committee documents (74th report of committee PP 180/1998)

2000 unauthorised disclosure of a draft committee report (84th report of committee PP 35/2000)

2000 disciplinary action taken by a local government body against an employee in consequence of his participation in proceedings of a committee (85th report of committee, PP 36/2000)

2001 unauthorised publications of documents provided to committees (99th and 100th reports of committee, PP 177/2001, 195/2001).

In only two cases, those of 1971 and 2001, were penalties imposed by the Senate, and the penalties were reprimands. In the other cases no penalty was imposed, the committee usually concluding that no further action should be taken by the Senate, usually because of apologies offered or other remedial action by the persons concerned. In some cases the person responsible could not be identified. In all other cases referred to it the committee concluded that contempts had not been committed, often because of the lack of a culpable intention on the part of persons concerned. This record reinforces what is said elsewhere in this chapter: the power to deal with contempts has been exercised with great circumspection. The record also shows that the Senate's investigation of privilege matters has been confined to serious matters potentially involving significant obstruction of the Senate, its committees or senators.

The Privileges Committee now regards a culpable intention on the part of the person concerned as essential for the establishment of a contempt. This is in contrast to contempt of court: certain contempts of court can be proved and punished without there being any culpable intention on the part of the perpetrator. (See, for example, the 64th report of the committee, PP 40/1997.) (See also report of the United Kingdom House of Commons Standards and Privileges Committee, HC 447 2003-04, for a contempt found, against a minister (the Lord Chancellor), in the absence of a culpable intention.)

The committee has found that contempts have been committed by public officials due to ignorance of parliamentary processes, and in 1993 the Senate adopted a recommendation that officers should have training in those processes to avoid such problems (21/10/1993, J.684; resolution reaffirmed, with requirement that departments report on compliance, 1/12/1998, J.225-6; 42nd, 64th, 73rd, 89th reports of the committee, PP 85/1993, 40/1997, 118/1998, 79/2000). Officers of Telstra, then a statutory, government-controlled corporation, were also required to undertake such training (5/8/2004, J.3836-7; report by Telstra, 7/3/2005, J.398).

Contempts and criminal offences

Some contempts are also criminal offences, and there is nothing to prevent proceedings for contempt being undertaken before, during or after criminal proceedings for the same acts. This

has not happened, however, and is unlikely to occur in practice, because the Senate would be likely either to choose between contempt proceedings and a prosecution in the courts or to refrain from employing its contempt jurisdiction if a prosecution is in the offing or in train.

Conversely, an act which has been dealt with as a contempt could also be prosecuted as a criminal offence (cf *US v Traficant*, US Court of Appeals, 19/5/2004, not reported; Supreme Court declined to hear appeal, 10/1/2005).

In 1997 the Senate had occasion to consider whether it should investigate a possible contempt by a senator, the making of allegedly false statements to the Senate, while police were investigating the subject matter of those statements. The senator's statements could not be the subject of court proceedings because they were protected by parliamentary privilege. Nonetheless the Senate, while referring the statements to the Privileges Committee, determined that the committee's inquiry should not begin until after the conclusion of the police investigations and any consequent legal proceedings (7/5/1997, J.1855-6).

Criticisms of the power of the Houses to deal with contempts

The common criticisms of the power of the Houses to deal with contempts under the present law fall into four groups: the lack of specification of offences; the alleged impropriety of the Houses acting as judges in their own cause; the alleged unsuitability of the Houses to act as judicial bodies; and the effect on the rights of accused persons.

First, it is contended that offenders are given little guidance as to the acts likely to constitute contempts and to be visited with punishment. It is therefore said that the power to punish contempts should be replaced by a codification containing specific offences. The enactment of section 4 of the *Parliamentary Privileges Act 1987* and the specification by the Senate by resolution of the acts which may be treated as contempts have largely overcome this criticism.

The lack of complete codification is a feature of the law of contempt of court. So far as is known, the complete codification of the law of contempt of court has not been achieved in any common law jurisdiction. The difficulty which occurs in any attempt to enumerate contempts is that it is the effect or tendency of an act (to interfere with the course of justice or to obstruct the work of the Houses) which constitutes the offence, and it is therefore impossible to specify with precision all acts which constitute contempts. Codification has to rely on catch-all offences, that is, provisions referring to any obstructive act, as in section 4 of the 1987 Act and paragraph (1) of the Senate's resolution.

In contempt of Parliament, as in contempt of court, the case law and authoritative expositions of it do in fact provide a good guide to acts which may be held to be offences. The Senate Committee of Privileges has now established a substantial body of case law which, together with the Senate's Privilege Resolutions, provide as much guidance as is reasonably possible.

The second major criticism of the power of the Houses to punish contempts is that in exercising this power the Houses are acting as judges in their own cause, contrary to the principles of natural justice. Again, the same difficulty arises with contempt of court: no incongruity is seen in courts judging and punishing such contempts. The fact that there is a right of appeal in respect of

contempt of court does not affect the matter: the appeal is to another court. Moreover, there is just as effective an appeal in respect of a contempt of Parliament, from the Privileges Committee to the whole House. Just as the courts are the best judge of what interferes with the administration of justice, the Houses may be the best judge of acts which interfere with the performance of their functions and obstruct their members in the performance of their duties.

Thirdly, it is said that in judging and punishing contempts of Parliament, the Houses are exercising a judicial function, and as political bodies they are unfit to exercise a judicial function. It is clear that the Houses *are* political bodies and that they are by constitution not adapted to act as courts of law, but the very premise of this criticism is questionable. The question of what acts obstruct the Houses in the performance of their functions may well be seen as essentially a political question requiring a political judgment and political responsibility. As elected bodies, subject to electoral sanction, the Houses may be seen as well fitted to exercise a judgment on the question of improper obstruction of the political processes embodied in the legislature.

Fourthly, it is said that in dealing with alleged contempts, the Houses do not allow to accused persons the normal rights allowed by the processes of the ordinary law. There is validity in this criticism. The Houses were originally not bound to recognise any rights of accused persons at all.

This criticism has been largely overcome in the Senate by the adoption of procedures for privilege inquiries and proceedings before the Privileges Committee. These procedures are outlined below.

Should the power to deal with contempts be transferred to the courts?

The criticisms of the power of the Houses to deal contempts, though significantly met by the 1987 Act and the Privilege Resolutions of the Senate, lead to the question of whether the power to deal with contempts should be transferred to the ordinary courts. According to the most commonly expressed idea, this would be done by the enactment of a statute specifying offences which would cover acts which have been declared to be contempts of Parliament.

The question of transferring the power to deal with contempts to the courts could be discussed separately from the question of the statutory identification of offences: theoretically it would be possible to enact a statute specifying offences against the Parliament but leaving the two Houses with the power to deal with those offences, and it would also be possible to transfer the power to deal with contempts to the courts without specifying the acts which constitute contempts as specific criminal offences. For all practical purposes, however, the proposal that a statute be enacted specifying criminal offences corresponding to contempts and the proposal that the courts should be empowered to deal with contempts may be regarded as one and the same proposition, since in practice each would necessarily involve the other. Some acts which have been regarded as contempts of Parliament are already criminal offences.

It has already been observed that while the Houses of Parliament, in Britain and Australia, have been judges in their own cause, they have on the whole been lenient judges. Few people have actually been punished for contempts in modern times. If contempts were to be dealt with by a court applying statutorily specified offences and penalties, offenders who would otherwise be dismissed with a reprimand and a warning by a House of the Parliament would probably be

convicted and punished by a court. If cases were sent to the courts by the Houses, the Houses would be relieved of responsibility for conviction and punishment of offenders, and such conviction and punishment would be surrounded by the sanctity of court proceedings. The Houses might be more inclined to send cases to the courts and more convictions might result. The great advantage of the present system is that the Houses exercise their powers only in really important cases.

If the Houses were to decide whether to send cases to the courts, they would need to have some procedures for preliminary investigation of allegations to enable them to determine whether such allegations should go to the courts. Inevitably, such procedures would be viewed as committal proceedings, and would attract any criticisms levelled at the way in which the Houses deal with contempts. These criticisms would have even more force because it would be clear that the judgment and punishment of contempts would be a judicial process, and not a matter of political judgment as suggested earlier. In other words, the transfer to the courts of the power to adjudge and punish contempts could have the very effect which it seeks to avoid: that of forcing the Houses to behave as if they were judicial bodies, in the pre-trial procedures. Moreover, inevitably the argument would be raised that the preliminary proceedings in the Houses could prejudice a fair trial.

Any proposal that the Houses surrender the power to punish contempts would have to be carefully considered in relation to the power to commit persons for preventative and coercive reasons. When a disorderly person is removed from the galleries of the Houses and detained until the end of the sitting, the purpose of the detention is not to punish the offender but to prevent the continuance of the offence. When a recalcitrant witness is committed to custody, the purpose is not punishment but to compel the answering of the questions or the production of the documents which the witness has refused to answer or produce. The importance of preventative committal is obvious, and the coercive element of committal for contempt has been recognised by the courts in all common law jurisdictions, including the United States, where it is seen as vital to the ability of the Congress to legislate (*Quinn v US* 1955 349 US 155 at 161). Theoretically, the power to impose preventative or coercive committal could be retained while giving up to the courts the power actually to punish contempts. The important point is that it would be extremely difficult to transfer to the courts the power to impose preventative or coercive custody, and that it is therefore difficult to sustain the supposed principle that the Houses should not have the power to imprison offenders.

The importance of preventative action is illustrated by the destruction of documents which might constitute evidence in a parliamentary inquiry, which is regarded as a particularly dangerous offence, as it may radically obstruct an inquiry and prevent the discovery of the facts of a matter, and one particularly worthy of resolute action by the legislature. The punishment after the event of other kinds of contempts, such as interference with witnesses, may provide a sufficient remedy, and the harm done can be corrected to a certain extent, for example, by recalling a witnesses. The destruction of evidence, however, cannot be corrected after the event; the offender may be punished, but the evidence is lost. The legislature may therefore be justified in taking remedial action even in advance of complete proof of the offence. A case of destruction of documents provided an occasion on which a House of the United States Congress exercised its power to punish contempts directly rather than prosecute offenders in the courts. A statute of 1857 provides for the prosecution of witnesses who

refuse to give evidence, but this procedure is not likely to effect a remedy against destruction of documents, which requires swift preventative action. Thus in 1934, when it appeared that a witness and other persons had allowed the destruction of documents from a file relevant to an inquiry by a Senate committee into air mail contracts, the Senate ordered the arrest and detention of the offender. This action was contested in the courts. The witness conceded that the Senate had the power to punish obstructive acts as contempts, but argued that, as the destruction of the documents had already occurred before the arrest, and relevant documents had been produced, there was no obstruction of the Senate which could still be punished. The Supreme Court held that a House may punish as a contempt an act of a nature to obstruct the legislative process even though the obstruction had been removed or its removal was no longer possible, and the creation of the statutory offence punishable through the courts did not impair this power of the Houses (*Jurney v MacCracken* 1935 294 US 125 at 147-8, 151). It is well established that, in particular circumstances, a contempt may be committed by the destruction of documents even in advance of a requirement that they be produced. This is illustrated by contempt of court, which operates on the same principles as contempt of Parliament. It is a contempt to destroy documents which are relevant to legal proceedings regardless of whether the documents have been formally required to be produced. This is on the same principle applying to interference with witnesses: it is possible to interfere with a witness in advance of the witness being called to give evidence, for example, by threatening a witness in relation to evidence which the witness might give (*Registrar of Supreme Court v McPherson* 1980 1 NSWLR 688).

If statutory criminal offences were to replace completely contempts of Parliament, this would raise the difficult question of how the Houses would deal with contempts by their members. The powers of the Houses to discipline their members would seem to provide a far more effective and simple remedy for contempts by members than prosecutions under a criminal statute. It would be anomalous for a House to direct that a prosecution be instituted against one of its members for a contempt when a swifter and more flexible cure is at hand in the procedures of the House. Proceedings in a court may be protracted while the offending member continues to sit and vote in the House concerned, or, if not, an undesirable vacancy in representation may be created.

Similarly, minor contempts, particularly those committed in the sight of a House, may best be dealt with summarily under the powers presently possessed by the Houses. Thus, if a person creates a disturbance in the public galleries, it is a far more effective remedy to have the offender held in custody until the end of the sitting and excluded from the building for a period, than to go through the cumbersome mechanisms of arresting, charging, releasing on bail, and prosecuting the accused. Moreover, as is pointed out above, the present remedy is more effective in preventing repetition of the offence.

Because of the cogency of the arguments here set out, both the 1967 report of the Select Committee on Parliamentary Privilege of the House of Commons and the 1984 report of the Joint Select Committee on Parliamentary Privilege of the Commonwealth Houses recommended that the Houses retain their power to deal with contempts.

Penalties for contempts

Section 7 of the 1987 Act empowers either House to impose fixed terms of imprisonment and fines for contempts of Parliament. The Act provides that a fine is a debt due to the Commonwealth.

Among the powers adhering to the Houses under section 49 of the Constitution before the 1987 Act was the power to imprison offenders for contempt of Parliament.

A problem which existed until 1987 was that a House could imprison an offender only for the duration of a session, which depends upon the prorogation of the Parliament or the dissolution of the House of Representatives or of both Houses by the Governor-General.

Another difficulty which existed until 1987 in respect of penalties was the doubt about the power of the House of Commons, and therefore of the Commonwealth Houses, to impose fines. It was suggested that because the House of Commons had not imposed a fine for many years the courts might hold that the power to impose fines no longer existed. The Senate Committee of Privileges in its 1st report in 1971 did not accept this argument, and recommended that the Senate consider imposing fines for future offences (PP 163/1971. The Senate adopted this report. See also the 8th report of the Committee of Privileges, PP 239/1985). The 1967 House of Commons report accepted the claim that the power to fine had lapsed, and recommended that the power be statutorily revived, while the 1977 report recommended that the power to imprison should be abolished. These recommendations were not adopted.

The 1987 Act removed these difficulties by codifying the power to impose penalties.

As has already been noted, the Senate imposed penalties for contempts only twice, and the penalties were reprimands. In other cases the Senate found that contempts were committed, but took no further action.

There has been only one case of a penalty of imprisonment imposed by a House of the Commonwealth Parliament. In 1955 the House of Representatives imprisoned two persons for attempting to intimidate a member. The action of the House was examined and upheld by the High Court (*R. v Richards ex parte Fitzpatrick and Browne* 1955 92 CLR 157; the law expounded in this case is changed by the 1987 Act: see above under Statutory definition of contempt). (For this case, see also H. Evans, 'Fitzpatrick and Browne: Imprisonment by a House of Parliament', in H.P. Lee & G. Winterton, eds, *Australian Constitutional Landmarks*, 2003.)

Houses of state parliaments which possess the power to punish contempts have occasionally exercised that power. On 24 June 1999 the Legislative Council of Western Australia imposed a fine of $1 500 on a public servant who failed to appear before a committee when summoned. In April 2006 the New Zealand House of Representatives imposed a substantial fine on a television company for the contempt of penalising a witness.

Resolution 8 of the Senate's Privilege resolutions, and standing order 82, require seven days' notice of any motion in the Senate to determine that a person has committed a contempt, or to impose a penalty for a contempt.

It is a fundamental principle that one House of the Parliament has no authority over the members of the other House except in the immediate conduct of its own proceedings or those of its committees (for example, if a member of one House is appearing as a witness before a committee of the other House — for such occasions see Chapter 17 on Witnesses). A House therefore cannot impose any penalty on a member of the other House. A contempt by a member can be dealt with only by the member's own House. (Rulings on matters of privilege of President Sibraa, 17/5/1988, J.711; of President Beahan, 19/9/1994, J.2151; 22/9/1994, J.2219. See also statement by Senator Chamarette, SD, 30/3/1995, pp 2490-1.)

An alleged contempt by a minister acting in the capacity as a minister, however, may be investigated by the Senate, even though the minister is a member of the other House and therefore cannot be compelled to give evidence or punished by the Senate, and the Senate cannot inquire into proceedings in the House. (See 51st report of the Committee of Privileges, PP 4/1995; in its 60th report, PP 9/1996, the committee dealt with a statement by a minister when it was not clear that the statement was an exercise of ministerial functions; see also reference to the committee 2/10/1997, J.2611-2; determination by President Reid, SD, 23/10/1997, pp 7901-2.)

PROCEDURAL MATTERS

Raising of matters of privilege

A senator raises a matter by writing addressed to the President. The President considers the matter and rules whether a motion relating to the matter should have precedence. In so ruling the President is required to have regard to the principle that the Senate's power to deal with contempts should be used only in cases of improper acts tending substantially to obstruct the Senate, its committees or its members, and to the availability of another remedy. (SO 81; Privilege Resolutions nos 4 and 7.)

The President gives precedence to a motion relating to a matter of privilege if the matter is capable of being regarded by the Senate as meeting the first of the prescribed criteria, and if there is no other remedy readily available. For a full list of matters of privilege raised under the procedures and the rulings of the President on those matters, see appendix 4.

The motion arising from a matter of privilege is to allow the Privileges Committee to investigate a matter. No other motion can be given precedence. That committee then investigates the matter and reports to the Senate.

This is an appropriate procedure. A committee is better fitted than the whole Senate to undertake an inquiry. It has no power to act itself, but can only make recommendations to the Senate. The system whereby a recommendation is made to the Senate by a committee provides, in effect, an appeal procedure, in that the Senate is not bound to accept the findings or recommendations of the committee.

Another of the Privilege Resolutions (no. 3) provides criteria for the Senate and the Privileges Committee to take into account when determining whether a contempt has been committed, similar to the criteria provided for the President but incorporating reference to the intention of any offender and the defence of reasonable excuse.

Standing orders 81 and 197 allow for the normal procedures for raising matters of privilege to be dispensed with and for a matter of privilege to be laid before the Senate at once if such a matter arises suddenly in relation to proceedings before the Senate.

It is a fundamental principle that a matter of privilege is a matter for the Senate, and should not be dealt with in committee of the whole. A matter of privilege arising in committee of the whole is therefore reported to the Senate.

"Waiver" of privilege

From time to time suggestions are made of a House or its members "waiving their privilege", for example, by allowing the examination of particular parliamentary proceedings by a court in a particular case. Such suggestions are misconceived. It is not possible for either a House or a member to waive, in whole or in part, any parliamentary immunity. The immunities of the Houses are established by law, and a House or a member cannot change that law any more than they can change any other law.

This was clearly indicated by a case in the Senate in 1985. A petition by solicitors requesting that the Senate "waive its privilege" in relation to evidence given before a Senate committee was not acceded to, principally on the ground that the Senate does not have the power to waive an immunity established by law (SD, 16/4/1985, pp 1026-30).

The enactment of the 1987 Act made it clear that privilege could not be waived (see *Hamsher v Swift* 1992 33 FCR 545).

In 1996 the British Parliament passed an amendment of the Defamation Act to provide that, in a defamation action, a person could waive the protection of parliamentary privilege in so far as it protected that person. This provision was passed without proper consideration of the inroad which it made on the law of parliamentary privilege, and under the misapprehension that the main effect of the *Prebble* judgment (see above, under Is the 1987 Act too restrictive?) was to prevent members of parliament suing journalists for defamation. This amendment of the law has no effect at the federal level in Australia. (For a judicial construction of the provision, see *Hamilton v Al Fayed* 1999 3 All ER 317, and the same case in the House of Lords on appeal, 2000 2 WLR 609.)

Proceedings before the Privileges Committee

Resolution 2 of the Privilege Resolutions of 1988 prescribes procedures to be followed by the Privileges Committee in inquiring into matters referred to it, and confers rights on all persons involved in those inquiries.

A witness before the Committee of Privileges is given the right to be accompanied by counsel and to cross-examine other witnesses in relation to evidence concerning the witness. The committee has to ensure, as far as practicable, that a person is informed of any allegations made against the person before the committee and is given the right to be present during the hearing of any evidence containing anything adverse to the person. Witnesses are also given the right to make submissions in relation to the committee's findings before those findings are presented to the Senate. The provisions for the protection of witnesses in ordinary committee inquiries also apply to the Privileges Committee, but the special provisions prevail to the extent of any inconsistency.

Noting that the lack of procedures for the protection of persons accused of contempts before privileges committees has always been one of the most significant grounds of criticism of the law and practice of parliamentary privilege, the 1984 report of the Joint Select Committee on Parliamentary Privilege recommended that special procedures be adopted for protection of persons in privileges committee inquiries. The committee recommended, in effect, the adoption of the criminal trial model, which would involve giving a person alleged to have committed a contempt the protections available to an accused person in criminal proceedings.

The Senate resolution did not adopt this recommendation, for the reason that in a privileges committee inquiry it is not always clear what is the charge or who is the accused. A privileges committee combines the functions of a preliminary investigative agency and a court of first hearing in a criminal matter, so that a witness may, in the course of the inquiry, become the accused.

Because of this the resolution adopts what might be called the commission of inquiry model. It gives to all persons appearing before the Privileges Committee greater rights than are possessed by persons appearing in court proceedings.

The Privileges Committee has conducted most of its inquiries under these procedures, because most of the cases referred to the committee have arisen since the resolution was passed in 1988. In its successive general reports to the Senate, the committee reviewed the procedures and found that they worked successfully.

Abuse of parliamentary immunity: right of reply

One of the Privilege Resolutions of 1988 (Resolution 5) provides an opportunity for a person who has been adversely referred to in the Senate to have a response incorporated in the parliamentary record. A person aggrieved by a reference to the person in the Senate may make a submission to the President requesting that a response be published. The submission is scrutinised by the Privileges Committee, which is not permitted to inquire into the truth or merits of statements in the Senate or of the submission, and provided the suggested response is not in any way offensive and meets certain other criteria, it may be incorporated in *Hansard* or ordered to be published.

The resolution refers only to responses by natural persons, and does not contemplate responses by corporations or other bodies. The Senate has, however, accepted responses from board members and staff of a corporation on the basis that they claimed to be adversely affected by

references to the corporation (80th report of the Privileges Committee, adopted 21/10/1999, J.1986). Similarly, foreigners are not precluded from exercising the right of reply (65th, 132nd reports of the committee, PP 48/1997, 173/2007, adopted 25/3/1997, J.1759; 17/9/2007, J.4389).
(See Supplement)
The remedy can, in favourable circumstances, be exercised speedily. On 28 June 2001 a submission was received by the President, referred to the Privileges Committee, considered by the committee, reported on by the committee and published by the Senate, all on the same day (28/6/2001, J.4458).

The availability of this remedy does not prevent a senator presenting directly a response by persons adversely reflected upon in debate (see SD, 8/9/2003, p. 14399).

Resolution 5 was opposed in the Senate and was agreed to only after a division, with cross-party voting by senators. The main grounds of the opposition were that persons referred to in the Senate had the normal political avenues open to them to respond, the suggested procedures could be over-used and the President and the Privileges Committee could be unduly occupied by these submissions.

These criticisms have not been justified by experience so far, as many cases of such responses have been dealt with by the Privileges Committee and the Senate without the apprehended difficulties.

Another of the Privilege Resolutions (Resolution 9) enjoins senators to exercise their freedom of speech responsibly.

These resolutions were adopted after a great deal of attention had been given to the possibility that members of the Parliament may abuse the absolute immunity which attaches to their parliamentary speeches by grossly and unfairly defaming individuals who have no legal redress and who, if they are not themselves members, have no forum for making a widely-publicised rebuttal. Much of the controversy about this matter was generated by attacks in other houses by members upon other members, which, if made in the Senate, would have been ruled out of order under standing order 193, which forbids offensive references to members of the Commonwealth Parliament or of state or territory parliaments.

Unless the absolute immunity of parliamentary proceedings is to be modified, which would defeat the purpose of that immunity, the solution to this problem of the possibility of the abuse of freedom of speech lies in the way in which the Houses of Parliament regulate their proceedings through their own procedures. In any proposals for new forms of such internal regulation there is a danger of a majority using procedures designed to prevent defamation of individuals as a means of suppressing embarrassing or inconvenient debate. The remedy which has been favoured, therefore, is giving aggrieved individuals a right of reply. This is the remedy adopted by the Senate's resolution.

The Senate's procedures have, since their adoption, also been adopted by many other houses.

Persons reflected upon adversely in committee proceedings have a right to respond to such evidence (see Chapter 17, Witnesses).

Reference to Senate proceedings in court proceedings

One of the Privilege Resolutions (no. 10) declares that the permission of the Senate is not required for reference in court proceedings to proceedings in the Senate, and abolishes the former practice of petitioning for permission, while enjoining the courts to have regard to the restrictions imposed upon them in relation to the use which may be made of evidence of parliamentary proceedings.

PARLIAMENTARY PRECINCTS

Section 15 of the 1987 Act declares, for the avoidance of doubt, that, subject to the law relating to parliamentary powers and immunities, a law in force in the Australian Capital Territory applies in the parliamentary precincts according to its tenor.

The *Parliamentary Precincts Act 1988* defines the parliamentary precincts, provides that the Presiding Officers have management and control of the precincts, and makes other provisions for the administration of the precincts.

For many years before these two Acts were passed discussion of parliamentary privilege was bedevilled by confusion of questions relating to the immunities of the Houses, their committees and members with questions relating to the parliamentary precincts. There is no connection between the precincts of Parliament, however defined, and the ordinary law or the law relating to parliamentary immunities. Many people were confused into thinking that there was some such connection; in particular, there was a persistent idea that the ordinary law did not apply in the precincts.

There was never any ground for doubt that the ordinary criminal law applied in the parliamentary precincts, however defined, as it applies anywhere else in the jurisdiction: *Rees v McCay* 1975 26 FLR 228, and the authorities referred to in that case.

Words or acts which might otherwise constitute criminal offences are immune from prosecution if they are said or done in the course of proceedings in Parliament. This, however, has nothing to do with the parliamentary precincts. The immunity adheres to words spoken or acts done outside the precincts, for example, words spoken in the proceedings of a committee sitting anywhere in the country, or an assault committed by an officer of either House while carrying out a lawful order of that House for the arrest of a person anywhere in the country.

The issue was further confused by the fact that it is an essential element of some criminal acts that they be done in a public place; that is, such acts are offences only if they are committed in a public place. There was some doubt about whether the courts regarded any part of Parliament House as a public place. Again, this had nothing to do with the precincts, although the courts might have regard to the question of what are the precincts in determining whether a particular act was done in a public place. Most criminal offences do not depend for their status as offences upon their being done in a public place.

It was an element of some contempts of Parliament that they were done in the parliamentary precincts; that is, the acts concerned were contempts only if they were done in the precincts. For example, it was long held to be a contempt for any authority to attempt to execute any criminal or civil process in the parliamentary precincts on a sitting day. The powers of the Houses to deal with contempts do not, however, depend upon any declaration of the precincts.

Thus the declaration of what are the parliamentary precincts is an administrative matter, which has no connection with the operation of either the ordinary law or the law of parliamentary immunities.

The whole matter was therefore cleared up and placed beyond doubt by the 1987 and 1988 legislation.

Police powers in the precincts

Section 15 of the 1987 Act indicates that the police may exercise in the precincts the powers which they possess under the ordinary law.

By long-established practice, however, police do not conduct any investigations, make arrests, or execute any process (e.g., search warrants) in the parliamentary precincts without consultation with the Presiding Officers.

Section 8 of the Parliamentary Precincts Act provides for the Australian Federal Police to arrest and hold in custody persons required to be detained by order of either House, under general arrangements agreed to by the Presiding Officers and the minister responsible for the police.

Section 9 provides for members of the Australian Protective Service to perform functions in the precincts in accordance with general arrangements made between the Presiding Officers and the minister responsible for the service.

Section 10 provides for the functions of the Director of Public Prosecutions in relation to offences committed in the precincts to be performed in accordance with general arrangements agreed to by the Presiding Officers and the Director of Public Prosecutions.

Arrangements made under these provisions were laid before the Senate on 28 February 1989 (J.1384).

See also above, under Subpoenas, search warrants and members, for the execution of search warrants in the premises of senators.

In 1978 the Committee of Privileges examined security measures for Parliament House introduced by the Presiding Officers. The Committee considered that the measures did not affect the powers or immunities of the Senate (3rd report, PP 22/1978).

Chapter 3

PUBLICATION OF SENATE PROCEEDINGS

AS NOTED IN CHAPTER 1, the Australian Parliament does not possess sovereign powers; it is subject to the Constitution, which only the people can change, so that sovereignty is in fact as well as technically vested in the people.

It is in accordance with this constitutional relationship that the procedures of the Senate are designed to ensure that its operations are communicated to the public to the maximum extent possible. Also, many activities of the Senate, such as committee hearings, are designed to inform the public as much as the Senate, and have their influence through their impact on public opinion as well as on the decisions of the legislators.

Proceedings public

Since the establishment of the Senate all of its proceedings have been conducted in public. The standing orders contemplate that the Senate may meet in private session (SO 175(2)(a)), but this could occur only by a deliberate decision of the Senate.

Documents laid before the Senate are automatically published (SO 167; see also Chapter 18, Documents).

Provision is made in the Senate chamber for public galleries, for a press gallery and for facilities for radio and television broadcasting.

Any person may attend in the public galleries and observe the proceedings. Visitors in the galleries are required to refrain from any interruption to proceedings or discourtesy to the Senate, particularly any interjection or demonstration of support or dissent in relation to the proceedings (ruling of President Givens, SD, 2/12/1914, p. 1237; statement by President McMullin, 25/3/1969, p. 599; by President Sibraa, 8/12/1993, pp 4162-3). A person who wilfully disturbs a meeting of the Senate may be guilty of a contempt (see Chapter 2, Parliamentary Privilege, under Power to punish contempts). The chair may order disorderly persons to withdraw from the galleries (see SD, 13/6/1923, p. 16; 10/5/1973, pp 1508, 1514-5; 17/10/1973, p. 1307; 18/5/1976, p. 1670). The Usher of the Black Rod, subject to any direction by the Senate or the President, may take into custody any person who causes a disturbance in or near the chamber (SO 175(4)).

Only senators and officers attending on the Senate may be present on the floor of the chamber when the Senate is meeting. The President may, by leave of the Senate, invite distinguished visitors to take a seat in the chamber (SO 174, 175). This procedure is used for visiting presiding officers of foreign or state parliaments. The practice is for the President to inform the Senate of

the presence of the visitor and announce that, with the concurrence of the Senate, the President proposes to invite the visitor to take a seat in the chamber.

Journalists who are members of the Parliamentary Press Gallery are provided with a gallery behind and above the President's chair and a soundproofed media workroom above that gallery. Membership of the Press Gallery, granted by the Presiding Officers, entitles a member to admission to the gallery and, subject to arrangements agreed upon by the Presiding Officers and the Gallery Committee, to press office facilities.

Members of the Gallery must abide by conditions which cover such matters as behaviour within the parliamentary precincts, and non-compliance with the conditions by members of the Gallery may result in restrictions on an individual's or organisation's rights of access to Parliament House. A press gallery pass may be withdrawn by the Presiding Officers for breaches of the conditions applying to membership of the Press Gallery.

Places are reserved for advisers to the government and senators in the chamber. Advisers attending on senators are required to behave with decorum and not disturb proceedings (ruling of President Sibraa, 8/12/1993, J.942; statement by chair 22/2/1994, J.1289). Subject to that requirement, senators are entitled to have whomever they choose as their advisers in their advisers' benches (SD, 2/12/2005, p. 10).

Reporting of proceedings

The Journals of the Senate, signed by the Clerk and published, are the official record of the proceedings of the Senate. The debates of the Senate are recorded by the Parliamentary Reporting Staff and are published in the transcript of debate known as Hansard. These documents are further described below.

Proceedings may also be reported by the media. Fair and accurate reports of proceedings are immune from suit for defamation (s. 10, *Parliamentary Privileges Act 1987*).

Broadcasting of proceedings

Proceedings of the Senate and its committees are widely broadcast through electronic media.

Proceedings of the Senate, and proceedings of its committees when they are televised, are available live in sound and visual images on the Internet, in accordance with an authorising resolution (31/8/1999, J.1606).

Live radio and television broadcasts of proceedings occur through the Australian Broadcasting Corporation (ABC) radio broadcasts, the televising of question time, and the internal and subscription television service provided by the house monitoring system.

The proceedings of the two Houses of the Parliament have been broadcast on radio since 1946 by the ABC, as required by the *Parliamentary Proceedings Broadcasting Act 1946*. Question time in the Senate has been televised by the ABC since August 1990. These were originally all live telecasts, but since the House of Representatives approved the television coverage of question

time in that House, some are re-broadcast. All proceedings in the Senate and in some of its committees are broadcast on radio and television within Parliament House and to external subscribers by the house monitoring system.

Apart from these live broadcasts, radio and television stations are also permitted to use recorded excerpts of Senate proceedings. Resolutions of the Senate first passed on 13 December 1988 and 31 May 1990 (the latter amended on 18 October 1990 and 9 May 1991) set out rules for the use of excerpts, the principal rule being that excerpts are to be used only for the purposes of fair and accurate reports of proceedings.

A resolution of 23 August 1990 authorised Senate committees to permit the broadcasting of their public proceedings, subject to similar rules, and a resolution of 13 February 1991 permitted persons other than television stations to make use of video recordings of Senate proceedings. An order first passed on 14 October 1991 permitted the broadcasting of estimates committee hearings. These provisions were consolidated into a set of broadcasting orders passed on 13 February 1997.

Proceedings of Senate committees conducting public hearings in Canberra are broadcast by radio and television on the house monitoring system, and excerpts are used by the media, in accordance with the order relating to committees. All estimates hearings and most other hearings of Senate committees are televised within Parliament House, and excerpts may be used by broadcasters and other individuals. Resources determine how many committee hearings are broadcast on the house monitoring system and recorded for later use. Committees may also permit other broadcasters to cover their proceedings when they meet outside Canberra. Any coverage must conform with any conditions set by the committees, which must not be inconsistent with the rules adopted by the Senate.

The televising of Senate proceedings was initiated by a motion moved by an Opposition senator. On 30 May 1990, Senator Vanstone gave notice that she would move to permit the televising of question time for a trial period. The Senate resolved the following day to proceed with the trial, but referred to the Procedure Committee the conditions relating to it (31/5/1990, J.193). The Procedure Committee recommended that no changes should be made, but that the conditions should be tried and reviewed in the light of experience (*First Report of 1990*, August 1990, PP 436/1990, p. 1). Two modifications to the order were subsequently made. On 18 October 1990 reference to a trial period was omitted (18/10/1990, J.361), and on 9 May 1991 the condition prohibiting the broadcasting of the adjournment debate was omitted (9/5/1991, J.1006).

Broadcasting and privilege

A publication of a record or report of the proceedings of the Senate or its committees, where the publication occurs by an order of the Senate or a committee, attracts absolute parliamentary privilege (*Parliamentary Privileges Act 1987*, s.16; see Chapter 2, Parliamentary Privilege, under Preparation and publication of documents). As noted in this chapter, various publications are ordered by the Senate or by committees. Apart from the live publication of proceedings on the Internet, however, broadcasts of proceedings do not occur by an order of the Senate or a committee, in that the relevant resolutions permit the use of excerpts selected by the media.

The Parliamentary Proceedings Broadcasting Act confers immunity from legal action on the radio broadcast of proceeding by the ABC, although the terms of the Act are not confined to that particular broadcast.

The Transport and Communications Legislation Amendment Bill 1991, introduced by the government, included provisions to amend the Parliamentary Proceedings Broadcasting Act to extend to the televising of the proceedings of the two Houses and their committees the absolute privilege provided by the Act to radio broadcasts of the proceedings of the Houses. In the proceedings on the bill in the Senate on 14 November 1991, the provisions in question were struck out of the bill with the agreement of all parties. It was pointed out that the absolute privilege given to radio broadcasts was enacted when the only broadcast of proceedings was the virtually continuous radio broadcast by the then Australian Broadcasting Commission. When television stations were authorised to televise extracts of proceedings of the Houses and their committees, the question of extending absolute privilege to those broadcasts involved different issues. It was also pointed out that section 10 of the Parliamentary Privileges Act provides privilege for all fair and accurate reports of parliamentary proceedings, and that this cover is probably as much as is appropriate for the televising of extracts. Edited television extracts could constitute highly unfair and inaccurate reports of proceedings and should not have absolute privilege.

Journals of the Senate

The Journals of the Senate are the official record of proceedings in the Senate. The Clerk records all proceedings in the Journals, which are signed by the Clerk. The publication of the Journals for public meetings of the Senate is authorised by standing order 43(1), and therefore attracts absolute privilege.

A Journal is published for every sitting day. It records, among other things, all notices of motion, resolutions, tabling of documents, proceedings on bills including amendments moved to bills, petitions, messages received from the House of Representatives or the Governor-General, divisions and attendance of senators. The Journals are produced from the minutes kept by the Clerk and the sound and vision record of proceedings. A proof Journal of a day's proceedings is printed for distribution on the next day. A final Journal is produced after any necessary corrections are made. A limited number of bound sets of the final Journals is produced for the official record. Proof and final Journals are also entered in an information systems database which provides a useful facility for research, and on the Internet.

Material recorded in the Journals of the Senate and in the official record of debates (Hansard) may be considered in the interpretation of a provision of a statute to ascertain the meaning of the provision, under section 15AB of the *Acts Interpretation Act 1901*.

Notice Paper

The Notice Paper, which is published for each sitting day, is the list of all business outstanding before the Senate, including bills not finally passed, motions to be moved, motions moved but not finally dealt with, questions on notice and inquiries before committees. (For further details on the Notice Paper and the categories of business listed in it, see Chapter 8, Conduct of Proceedings.) The Notice Paper includes a guide to its use. The full Notice Paper appears on the

Internet and an abbreviated version is issued in printed form each sitting day. The publication of the Notice Paper is authorised by standing order 43(2), and is therefore absolutely privileged.

Hansard

Debates in the Senate are recorded and published in Parliamentary Debates, more commonly known as Hansard. A proof Daily Hansard is produced, in which errors of transcription may be corrected. Corrected Hansards are then incorporated in a paper bound Weekly Hansard and finally are bound in hard covers for the record. Hansard is also entered in a database for ease of access and electronic searching, and on the Internet.

The publication of Hansard is authorised by standing order 43(3), and is therefore absolutely privileged.

Soon after they deliver a speech, senators receive a copy of the transcript from Hansard. Senators may make necessary corrections to the transcript, but changes altering the sense or introducing new matters are not admissible. The President has control over requests for alterations to Hansard. Following an incident in 1989 in which a minister was censured by the Senate for deleting words appearing in the Daily Hansard, the Senate resolved that the President should "enforce strictly the rule that senators" corrections to Hansard must not have the effect of deleting from the record words actually spoken in debate so as to alter the sense of words spoken' (7/4/1989, J.1522). In a subsequent statement, the President informed the Senate of the procedures for dealing with requests for alterations to the transcript or to the Daily Hansard. The President had asked that "where there is any doubt as to whether the request comes within the established rules", the matter be referred to him (SD, 7/4/1989, p. 1186).

Although Hansard is a record of debate, to save time or to illustrate a point senators often ask to incorporate material in Hansard. This material may include quotations, documents, tables or graphs. As there is no provision in the standing orders for the incorporation of material in Hansard, this is done by leave of the Senate, that is, unanimous consent of senators present. Senators will generally ascertain of senators from other parties whether there is likely to be objection before seeking leave for incorporation.

For the expungement of matter from Hansard, see Chapter 10, Debate, under Rules of debate.

Committee proceedings

Most Senate committees are authorised to meet in public or in private session; the only exceptions are standing committees examining estimates, which must hear all their evidence in public and publish all documents received by them.

Committees usually hear evidence in public and publish all documents laid before them, but occasionally evidence is taken in private session and documents withheld from publication, usually for the protection of witnesses. Committees deliberate in private session (SO 36).

The hearing of witnesses before Senate committees must be recorded in a transcript of evidence (SO 35(2)). Transcripts of public hearings are published, and committees may order the

publication of transcripts of in camera hearings. In either case the publication is absolutely privileged.

Provision is made in standing order 25(16) for the publication of a Daily Hansard of the public hearings of the legislative and general purpose standing committees. Provision is also made in relation to committees examining estimates for a Hansard report to be circulated as soon as practicable after each day's proceedings (SO 26(7)). Resolutions appointing other committees usually authorise the publication of their Hansards.

The transcript or other record of a committee hearing, including a sound recording, belongs to the committee. The question of senators' access to the sound recordings of committee proceedings arose on 29 November 1990, when a senator asked the President about access to tape recordings of a joint parliamentary committee. The President's response setting out the procedures relating to access was as follows:

> The responsibility for the transcription of the proceedings of parliamentary committees rests with Hansard. When a transcript is completed, Hansard forwards that transcript in electronic and hard copy form to the committee, which undertakes the printing and distribution of that transcript. The committee subsequently advises Hansard of any suggested corrections to the transcript. Any request to Hansard for access to a tape-recording of the proceedings of a committee or an unproofed version of the transcript is referred by Hansard to the committee for decision. Usually that decision is advised to Hansard by the committee secretary after consultation with the committee chairman. This is what occurred in relation to the matter raised by Senator Vanstone. The principle is that transcripts, both proofed and unproofed, are the property of the committee and it is a matter for each committee to determine access to that material and advise Hansard accordingly. (SD, 4/12/1990, pp 4880-1)

The Senate, however, may make orders in relation to records of committee proceedings. On 6 December 1990 a senator moved that the Principal Parliamentary Reporter be directed to make available to members of the Parliamentary Joint Committee on the National Crime Authority the Hansard sound recording of the public hearing of that committee held on 21 November 1990, in the absence of a transcript of those sound recordings. That question was passed without debate (6/12/1990, J.518).

See also Chapter 16, Committees, under Conduct of proceedings, Disclosure of evidence and documents. For the expungement of matter from committee transcripts, see Chapter 17, Witnesses, under Protection of witnesses.

Other publications

Other documents are produced to report proceedings in the Senate and to inform senators and others of particular matters dealt with during proceedings. Those documents include:

> *Order of Business*, issued each sitting day; sets out the business expected to be considered on that day
>
> *Dynamic Red*, produced electronically each sitting day and constantly updated to record business transacted by the Senate as it occurs, with links to relevant documents

Senate Daily Summary, produced after each sitting day and recording all significant transactions in the Senate, including committee reports tabled

Business of the Senate, published twice a year and cumulated annually; contains statistical and other data summarising the work of the Senate

Work of Committees, a twice-yearly and cumulative account of the activities of Senate committees, with statistical data

Bills List, published fortnightly with daily updates during sitting periods; lists all bills currently before the Parliament and summarises the purpose of the bills, the numbers and outcomes of amendments proposed to the bills, the stage reached in their consideration, assent dates and statute numbers

Delegated Legislation Monitor, updated during sittings; summarises the effects of the instruments of delegated legislation tabled during the sitting week and notes the dates the instruments were tabled and made; supplemented by *Disallowance Alert* (daily) and *Scrutiny of Disallowable Instruments* (weekly in sittings) giving information on disallowance actions in the Senate and matters raised by the Regulations and Ordinances Committee (see Chapter 15, Delegated Legislation and Disallowance)

Questions on Notice Summary, tabled at the beginning of each sitting period; lists questions which are asked (by number only), the dates they were asked and answered and relevant references in Hansard

Scrutiny of Bills Alert Digest, tabled each sitting week; summarises the bills considered by the Scrutiny of Bills Committee that week and draws attention to provisions which the committee considers may contravene the principles contained in its terms of reference; the committee follows up in its reports on matters raised in the digests.

Internet publication

In addition to the publication of Senate and committee proceedings in sound and visual images on the Internet (see above, under Broadcasting of proceedings), all of the documents mentioned in this chapter are available on the Internet (resource locater: http://www.aph.gov.au/senate).

First page, Journals of the Senate—No. 3—14 February 2008

1 **MEETING OF SENATE**

The Senate met at 9.30 am. The President (Senator the Honourable Alan Ferguson) took the chair and read prayers.

2 **PETITION**

The following petition, lodged with the Clerk by Senator Siewert, was received:

From 170 petitioners, requesting that the Senate take action to have the Dampier Archipelago in Western Australia included in the World Heritage List.

3 **NOTICES**

Senator Bartlett: To move on the next day of sitting—That the following bill be introduced: A Bill for an Act to establish an Office of National Commissioner for Children and Young People, and for related purposes. ***National Commissioner for Children Bill 2008***. (*general business notice of motion no. 26*)

The Leader of the Australian Greens (Senator Bob Brown): To move on the next day of sitting—That the Senate—

(a) notes that 23 February 2008 marked the 6th year that Ingrid Betancourt has been held hostage by the Revolutionary Armed Forces of Colombia (FARC); and

(b) calls on the FARC to release Ms Betancourt and all its hostages. (*general business notice of motion no. 27*)

4 **SELECTION OF BILLS—STANDING COMMITTEE—REPORT NO. 1 OF 2008**

The Chair of the Selection of Bills Committee (Senator O'Brien) tabled the following report:

SELECTION OF BILLS COMMITTEE

REPORT NO. 1 OF 2008

1. The committee met in private session on Wednesday, 13 February 2008 at 7.15 pm.
2. The committee resolved to recommend—That the Alcohol Toll Reduction Bill 2007 be ***referred immediately*** to the Community Affairs Committee for inquiry and report by 18 June 2008.

The committee recommends accordingly.

3. The committee considered a proposal to refer the ***provisions*** of the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 to a committee, but **was unable to agree on the referral of the bill**.

Kerry O'Brien

Chair

14 February 2008.

Senator O'Brien moved—That the report be adopted.

The Minister for Human Services (Senator Ludwig) moved the following amendment:

At the end of the motion, add "and, in respect of the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, the provisions of the bill be referred to the Education, Employment and Workplace Relations Committee for inquiry and report by 17 March 2008".

Debate ensued.

First page, Senate Notice Paper—No. 11—14 May 2008

BUSINESS OF THE SENATE

Notices of Motion

Notice given 20 March 2008

1 **Senator Mason:** To move—That Amendment 2 to the Commonwealth Grant Scheme Guidelines No. 1, made under section 238-10 of the *Higher Education Support Act 2003*, be disallowed. [F2008L00559]

Fourteen sitting days remain, including today, to resolve the motion or the instrument will be deemed to have been disallowed.

2 **Leader of The Nationals in the Senate (Senator Scullion):** To move—That the Road User Charge Determination 2008 (No. 1), made under the *Fuel Tax Act 2006*, be disallowed. [F2008L00713]

Fourteen sitting days remain, including today, to resolve the motion or the instrument will be deemed to have been disallowed.

Notice given 13 May 2008

*3 **Senator Murray:** To move—That the following matters be referred to the Finance and Public Administration Committee for inquiry and report by the first sitting Thursday of August 2008:

(a) the *Lobbying Code of Conduct* issued by the Government;

(b) whether the proposed code is adequate to achieve its aims and, in particular, whether:

(i) a consolidated code applying to members of both Houses of the Parliament and their staff, as well as to ministers and their staff, should be adopted by joint resolution of the two Houses,

(ii) the code should be confined to organisations representing clients, or should be extended to organisations which lobby on their own behalf, and

(iii) the proposed exemptions are justified; and

(c) any other relevant matters.

GOVERNMENT BUSINESS

Orders of the Day

1 **Telecommunications (Interception and Access) Amendment Bill 2008—** (*Minister for Human Services, Senator Ludwig*)

Second reading—Adjourned debate (*adjourned, Senator Ludwig, 13 March 2008*).

Chapter 4

ELECTIONS FOR THE SENATE

THE POWERS AND OPERATIONS of the Senate are inextricably linked with the manner of its election, particularly its direct election by the people of the states by a system of proportional representation. This chapter therefore examines the bases of the system of election as well as describing its salient features.

The constitutional framework

The Constitution provides that "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate" (s. 7). Each Original State had initially six members of the Senate and now has twelve. The Parliament is authorised to increase the number of senators elected by each state subject to the qualification that "equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators" (s. 7). Senators representing the states are elected for terms of six years, half the Senate retiring at three yearly intervals except in cases of or following simultaneous dissolution of both Houses (ss 7 and 13; see further below). A state may not be deprived of its equal representation in the Senate by any alteration of the Constitution without the consent of the electors of the state (s. 128).

Bases of the constitutional arrangements

The constitutional foundations for composition of the Senate reflect the federal character of the Commonwealth. Arrangements for the Australian Senate correspond with those for the United States Senate in that each state is represented equally irrespective of geographical size or population; and senators are elected for terms of six years. Both Senates are essentially continuing Houses: in Australia half the Senate retires every three years; in the United States, a third of the Senate is elected at each biennial election. A major distinction is, however, that the United States Senate can never be dissolved whereas the Australian Senate may be dissolved in the course of seeking to settle disputes over legislation between the two Houses (Constitution, s. 57; see Chapter 21).

An important innovation in Australia was the requirement that senators should be "directly chosen by the people of the State". Direct election of United States senators was provided in the constitution by an amendment which took effect in 1913, prior to which they were elected by state legislatures.

The innovatory character of Australia's Senate is also illustrated by contrasting it with the Canadian Senate created by the *British North America Act 1867*. The provinces are not equally

represented in the Canadian Senate; and senators are appointed by the national government, initially for life and now until age 75. Composition on this antiquated basis has deprived the Canadian Senate of the legitimacy deriving from popular choice and has meant, in practice, that the Canadian Senate has not contributed either to enhancing the representivity of the Canadian Parliament (the more desirable because of the first-past-the-post method of election used in the House of Commons) nor to assuaging the pressures of Canada's culturally and geographically diverse federation. Prominent proposals for reform of Canada's Senate in recent decades have included equality of representation for provinces and direct election of senators.

The principle of equal representation of the states is vital to the architecture of Australian federalism. It was a necessary inclusion at the time of federation in order to secure popular support for the new Commonwealth in each state especially the smaller states. It ensures that a legislative majority in the Senate is geographically distributed across the Commonwealth and prevents a parliamentary majority being formed from the representatives of the two largest cities alone. In contemporary Australia it acknowledges that the states continue to be the basis of activity in the nation whether for political, commercial, cultural or sporting purposes. Many organisations in Australia, at the national level, are constituted on the basis of equal state representation or with some modification thereof; this includes the two nation-wide political parties. By contrast, very few nation-wide bodies are organised on the principle of the election and composition of the House of Representatives. Indeed, in Australia's national life, a body such as the House of Representatives is, if not an aberration, at least relatively unusual. This demonstrates that in Australia federalism is organic and not simply a nominal or contrived feature of government and politics.

Constitutional provisions governing composition of the Senate thus remain as valid for Australia in the 21st century as they were in securing support for the Commonwealth in the nation-building final decade of the 19th century.

In addition to senators elected by the people of the states, the Constitution also provides, in section 122, that in respect of territories, the Parliament "may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit". Since 1975 the Northern Territory and the Australian Capital Territory have each elected two senators. The particular arrangements for election and terms of territory senators are set out in detail below.

The principles of direct election by the people and equal representation of the states are entrenched in the Constitution and cannot be altered except by means of referendum and with the consent of every state (s. 128). On the other hand, the principle of choosing senators "by the people of the State, voting ... as one electorate" is susceptible to change by statutory enactment. It is, however, essential to the effectiveness of the Senate as a component of the bicameral Parliament.

As explained in Chapter 1, the Senate, since present electoral arrangements were introduced in 1948, taking effect from 1949, has been the means of a marked improvement in the representivity of the Parliament. The 1948 electoral settlement for the Senate mitigated the dysfunctions of the single member electorate basis of the House of Representatives by enabling additional, discernible bodies of electoral opinion to be represented in Parliament. The

consequence has been that parliamentary government of the Commonwealth is not simply a question of majority rule but one of representation. The Senate, because of the method of composition, is the institution in the Commonwealth which reconciles majority rule, as imperfectly expressed in the House of Representatives, with adequate representation.

Proportional representation applied in each state with the people voting as one electorate has been twice affirmed. In 1977, the people at referendum agreed to an amendment to the Constitution so that in filling a casual vacancy by the parliament of a state (or the state governor as advised by the state executive council), the person chosen will be drawn, where possible, from the party of the senator whose death or resignation has given rise to the vacancy. A senator so chosen completes the term of the senator whose place has been taken and is not required, as was previously the case, to stand for election at the next general election of the House of Representatives or periodical election of the Senate. The previous arrangement had the defect of, on occasions, distorting the representation of a state as expressed in a periodical election. The Constitution thus reinforces a method of electing senators which is itself only embodied in the statute law. The present combination of statute and constitutional law serves to underline and preserve the representative character of the Senate.

If the statute law were amended so as to abandon the principle of state-wide electorates for choosing of senators in favour of Senate electorates, this would not only have the defect of replicating the House of Representatives system, which by itself is an inadequate means of even trying to represent electoral opinion fairly, but would invalidate the special method of filling a casual vacancy now provided for in section 15 of the Constitution. Single member constituencies would probably be unconstitutional, as they would result in only part of the people of a state voting in each periodical Senate election. There are grounds for concluding that anything other than state-wide electorates and proportional representation would be unconstitutional (cf resolution of the Senate, on an urgency motion, 15/2/1999, J.428-9).

The second affirmation of state-wide electorates for the purpose of electing the Senate may be found in the decision of the Commonwealth Parliament, on the basis of a private senator's bill, to remove the authority of the Queensland Parliament to make laws dividing Queensland "into divisions and determining the number of senators to be chosen for each division" (Constitution, s. 7; Commonwealth Electoral Act s. 39, added in 1983).

The irresistible conclusion of any analysis of basic arrangements for election of senators is that, for reasons of principle and practice, these features are essential: direct election by the people; equality of representation of the states; distinctive method of election based on proportional representation as embodied in the 1948 electoral settlement for the Senate; elections in which each state votes as one electorate; and filling of casual vacancies according to section 15 of the Constitution.

Terms of state senators

Except in cases of simultaneous dissolution, senators representing the states are elected for terms of six years. Terms commence on 1 July following the election.

The terms of senators elected following a dissolution of the Senate (Constitution, s. 57) commence on 1 July preceding the date of the general election. Following a general election for the Senate, senators are divided into two classes. Unless another simultaneous election for both Houses intervenes, those in the first class retire on 30 June two years after the general election; those in the second class retire on 30 June five years after the general election. The method of dividing senators is described below.

The provision for dating a senator's term from 1 July preceding simultaneous general elections for both Houses has been seen to be the source of a problem stemming from the preference of governments, for financial reasons as well as others of party advantage, to avoid separate dates for a general election of the House of Representatives (the term of which is governed by the date of the simultaneous dissolution) and an ensuing periodical election for half the Senate. The consequence in most cases has been to hold an "early" general election of the House to coincide with the next periodical Senate election (1903; 1955; 1977; 1984; 1987 (the latter a simultaneous dissolution)). An instance where an "early" general election for the House was not subsequently held in order to synchronise with the next periodical election for the Senate was May 1953; the 1955 general election for the House is the only occasion when an "early" general election has been called to coincide with election of senators to fill the places of second class (long term) senators elected following simultaneous elections for both Houses.

Elections arising from simultaneous dissolutions of August 1914 and July 1987 did not give rise in significant form to the issue of keeping elections for the two Houses synchronised because of the close proximity of the commencing dates for Senate and House terms in the relevant circumstances. The early dissolution of the House of Representatives in November 1929 had, in the event, no effect on synchronisation of Senate and House elections because another early dissolution, occasioned by defeat of the Scullin Government on the floor of the House, was needed in December 1931, a date when a periodical election for the Senate was convenient.

The House of Representatives was prematurely dissolved in 1963; as a consequence there was a periodical election for the Senate the following year. Subsequently there were general elections for the House in 1966, 1969 and 1972, and periodical elections for the Senate in 1967 and 1970. This sequence of unsynchronised elections ended with the simultaneous dissolutions of April 1974.

The case for synchronisation of elections for the two Houses is more a question of convenience and partisan advantage than one of institutional philosophy. Financial considerations simply buttress arguments of party advantage. In a truly bicameral system there is no requirement at all for synchronisation of elections. Proposals to make this a requirement of the Australian Constitution have four times failed at referendum (1974, 1977, 1984, 1988), even though "expert" opinion continues to favour a constitutional amendment of this character (First Report of the Constitutional Commission, Vol. I, April 1988, PP 96/1988, pp 345-8).

If there is to be change, a more practical approach would be an alteration of the Constitution to provide that the terms of senators elected in a simultaneous dissolution election should be deemed to commence on 1 July following (rather than preceding) the date of election. Provided that the House of Representatives was not subsequently dissolved within two years of election, synchronisation of a general election for the House and a periodical election for the Senate could

be restored with relative ease. Such a proposal, if adopted, would remove the current defect in simultaneous dissolution arrangements of circumscribing the standard six-year term for senators by anything up to one year. This approach would, on the other hand, avoid the two major deficiencies posed by simultaneous election proposals: the augmented power placed in the hands of a prime minister by extending executive government authority over the life of the House of Representatives to half the Senate; and diminishing bicameralism by irrevocably tying the electoral schedule for the Senate to that of the House of Representatives. Effective bicameralism requires that the second chamber should have a significant measure of autonomy in its electoral cycle, as well as distinctive electoral arrangements. (See H. Evans, 'A modest proposal addressing the question of "too many elections"', *The House Magazine*, 15 May 1991.)

Periodical elections

As already noted, under the Constitution each state is represented by a minimum of six senators. This number has been twice increased, in 1948 (taking effect at the 1949 elections) to 10, and in 1983 (taking effect in the election of 1984) to 12. The Senate's size also increased after 1975 following election of two senators each by the Australian Capital Territory and the Northern Territory. The size of the Senate was 36 from 1901 until 1949; 60 from 1950 to 1975; 64 from 1976 to 1984; and 76 since 1985. The places of half of the senators for each state are open to election each three years, under the system of rotation. Electoral arrangements for territory senators are described below.

Senate terms of six years commence on 1 July following election. The commencement date was originally 1 January but was altered by referendum in 1906.

Section 13 of the Constitution provides that a periodical election for the Senate must "be made" within one year before the relevant places in the Senate are to become vacant. The relevant places of senators become vacant on 30 June. This means that the election must occur on or after 1 July of the previous year.

The question which arises is whether the whole process of election, commencing with the issue of the writs, must occur within one year of the places becoming vacant, or whether only the polling day or subsequent stages must occur within that period, so that the writs for the election could be issued before 1 July.

This question has not been definitely decided. In *Vardon v O'Loghlin* 1907 5 CLR 201, the question before the High Court was whether, the election of a senator having been found to be void, this created a vacancy which could be filled by the parliament of the relevant state under section 15 of the Constitution. The Court found that this situation did not create a vacancy which could be filled by that means, but that the senator originally returned as elected was never elected. A contrary argument was raised to the effect that, under section 13 of the Constitution, the term of service of a senator began on 1 January [now 1 July] following the day of his election, and it would lead to confusion if it were held that the subsequent voiding of the election, perhaps a year or more after the commencement of the term, could not be filled as a vacancy under section 15. In dismissing this argument, the Court, in the judgment delivered by Chief Justice Samuel Griffith, made the following observation:

> It is plain, however, that sec. 13 was framed *alio intuitu*, i.e., for the purpose of fixing the term of service of senators elected in ordinary and regular rotation. The term "election" in that section does not mean the day of nomination or the polling day alone, but comprises the whole proceedings from the issue of the writ to the valid return. And the election spoken of is the periodical election prescribed to be held in the year at the expiration of which the places of elected senators become vacant. The words "the first day of January following the day of his election" in this view mean the day on which he was elected during that election. For the purpose of determining his term of service any accidental delay before that election is validly completed is quite immaterial.

This part of the judgment has been taken to indicate that, in interpreting the provision in section 13 whereby the periodical Senate election must be made within one year of the relevant places becoming vacant, the Court would hold that the whole process of election, not simply the polling day or subsequent stages, must occur within that period. This question, however, has not been distinctly decided. It would still be open to the Court to hold that only the polling day or subsequent stages must occur within the prescribed period, and there are various arguments which could be advanced to support this interpretation. The view that the requirement that the election "be made" within the relevant period means only that the election must be *completed* in that period is quite persuasive.

If it were decided, however, to hold a periodical Senate election with only the polling day or subsequent stages occurring within the prescribed period, there would be a risk of the validity of the election being successfully challenged and the election held to be void. This would lead to the major consequence that the whole election process would have to start again. It may be doubted whether the Court would favour an interpretation which would bring about this consequence.

Section 13 of the Constitution, as has been noted, also provides that the term of service of a senator is taken to begin on the first day of July following the day of the election. In this provision, the term "day of …. election" clearly means the polling day for the election. This is in accordance with the finding in *Vardon v O'Loghlin*. The day of election is polling day provided that the election is valid; if the election is found to be invalid then no election has occurred and the question of what is the day of election does not arise.

Issue of writs

Writs for the election of senators are issued by the state governor (Constitution, s. 12). The practice is for the governors of the states (when the elections are concurrent) to fix times and polling places identical with those for the elections for the House of Representatives, the writs for which are issued by the Governor-General.

In practice, the Prime Minister informs the Governor-General of the requirements of section 12 of the Constitution, which provides that writs for the election of senators are issued by the state governors, observes that it would be desirable that the states should adopt the polling date proposed by the Commonwealth, and requests the Governor-General to invite the state governors to adopt a suggested date. Theoretically, a state could fix some date for the Senate poll other than that suggested by the Commonwealth, provided it is a Saturday. Different states, too, could fix different Saturdays for a Senate poll.

This power vested in the states to issue writs for Senate elections, fixing the date of polling, gives expression to the state basis of representation in the Senate.

The Constitution provides that, in the case of a dissolution of the Senate, writs are issued within ten days from the proclamation of the dissolution (s. 12).

The Governor-General issues the writs for elections of territory senators.

Electoral rolls

Rolls for an election are closed at 8 pm on the third working day after the date of the writ. A claim for enrolment or transfer of enrolment received between the close of rolls and polling day, and that was delayed in the post by an industrial dispute, is regarded as having been received before the rolls closed.

Nomination

Nominations close at least 10 days but not more than 27 days after the issue of the writ.

A candidate for election to either House of the Parliament must be at least 18 years old; an Australian citizen; and an elector entitled to vote, or a person qualified to become such an elector (Commonwealth Electoral Act, s. 163).

A person meeting the three qualifications may be disqualified for several reasons. Members of the House of Representatives, state parliaments or the legislative assemblies of the Australian Capital Territory or the Northern Territory cannot be chosen or sit as senators (Constitution, s. 43; Commonwealth Electoral Act, s. 164). Members of local government bodies, however, are explicitly declared to be eligible (Commonwealth Electoral Act, s. 327(3)). Others disqualified under the Constitution, section 44, are:

- anyone who is a citizen or subject of a foreign power;
- anyone convicted and under sentence, or subject to be sentenced, for an offence punishable by Commonwealth or state law by a sentence of 12 months or more;
- anyone who is an undischarged bankrupt;
- anyone who holds an office of profit under the Crown; and
- anyone with a pecuniary interest in any agreement with the Commonwealth Public Service (except as a member of an incorporated company of more than 25 people).

A person convicted of certain electoral-related offences is disqualified for 2 years (Commonwealth Electoral Act, s. 386).

For cases of the disqualification of senators and senators elect, see Chapter 6, Senators, Qualifications of senators).

No one may nominate as a candidate for more than one election held on the same day. Hence it is not possible for anyone to nominate for more than one division for the House of Representatives, or more than one state or territory for the Senate, or for both the House and the Senate (Commonwealth Electoral Act, s. 165).

Nominations must be made by 12 noon on the day nominations close and the onus is on candidates to ensure nominations reach the electoral officer in time. Candidates may withdraw their nominations at any time up to the close of nominations, but cannot do so after nominations have closed.

Nominations of candidates for the Senate, made on the appropriate nomination form (or a facsimile of the form), are made to the Australian Electoral Officer for the state or territory for which the election is to be held.

A candidate may be nominated by 50 electors or the registered officer of the registered political party which has endorsed the candidate. Nomination of a candidate of a registered political party not made by the registered officer must be verified. Sitting independent candidates require only one nominee.

Nomination forms are not valid unless the persons nominated consent to act if elected; declare that they are qualified to be elected and that they are not candidates in any other election to be held on the same day; and state whether they are Australian citizens by birth or became citizens by other means, and provide relevant particulars. Candidates in a Senate election may make a request on the nomination form to have their names grouped on the ballot paper.

For an endorsed Senate group for which a group voting ticket is to be lodged the registered officer may request that the party name or abbreviation (or for a group endorsed by more than one registered party, a composite name) be printed on the ballot paper adjacent to the group voting square.

A deposit must be lodged with each nomination. The deposit, payable in cash or banker's cheque only, is $1000 for a Senate nomination or $500 for a House of Representatives nomination.

The deposit is returned in a Senate election if, in the case of ungrouped candidates, the candidate's total number of first preference votes is at least four percent of the total number of formal first preference votes; or, where the candidate's name is included in a group, the sum of the first preference votes polled by all the candidates in the group is at least four percent of the total number of formal first preference votes.

Where the number of nominations does not exceed the number of vacancies, the Australian Electoral Officer, on nomination day, declares the candidates elected.

If a nominated candidate dies before the close of nominations, the nomination period is extended by a day.

In a Senate election, if any candidate dies between the close of nominations and polling day, and the number of remaining candidates is not greater than the number of candidates to be elected, those candidates are declared elected. However, if the remaining candidates are greater in number than the number of candidates to be elected, the election proceeds. A vote recorded on a Senate ballot paper for a deceased candidate is counted to the candidate for whom the voter has recorded the next preference, and the numbers indicating subsequent preferences are regarded as altered accordingly.

In a House of Representatives election, if a candidate dies between the close of nominations and polling day, the election in that division is deemed to have wholly failed and does not proceed. A new writ is issued for another election in that division, but this supplementary election is held using the electoral roll prepared for the original election.

The statutory provisions regarding death after the close of nominations of a nominated candidate for the Senate could seriously prejudice the prospects of a political party unless a sufficient number of candidates is nominated to avoid disadvantage in the event of a death.

The constitutionality of the statutory requirements for the registration of a political party (500 members, no overlapping membership with other parties) was upheld in *Mulholland v Australian Electoral Commission*, 2004 209 ALR 582.

Polling

Polling takes place on a Saturday between the hours of 8 am and 6 pm.

The Divisional Returning Officer for each electoral Division arranges for appointment of all polling officials for the Division and makes all necessary arrangements for equipping polling places with voting screens, ballot boxes, ballot papers and certified lists of voters.

Candidates are prohibited from taking any part in the actual conduct of the polling. They may appoint a scrutineer to represent them at each polling place. The scrutineer has the right to observe the sealing of the empty ballot box before the poll commences at 8 am; observe the questioning of voters by the officer issuing ballot papers; object to the right of any person to vote; and observe voting by illiterate voters and voters in hospitals and prisons and those with disabilities.

Voting

Voting is compulsory for all electors with the exception of those living or travelling abroad, itinerant electors and electors located in the Antarctic. Some prisoners are excluded from voting. The penalty for failing to vote without a valid and sufficient reason is $20 or, if the matter is dealt with in court, a fine not exceeding $50.

Electors may vote at any polling place in the House of Representatives electorate for which they are enrolled, or at any polling place in the same state or territory (absent voting). Under prescribed circumstances electors may vote by post or cast a pre-poll vote.

Special arrangements are also made for ballots to be cast by eligible voters in hospitals, prisons and remote locations including Antarctica, and those travelling or residing abroad.

The ballot paper

A ballot paper for a Senate election has two parts, each reflecting particular methods of registering a vote. Electors may select one or other method.

Where groups of candidates or individual incumbent senators have registered group or individual voting tickets, a series of boxes is printed on the top part of the Senate ballot paper above the candidates' names. If the voter wishes to adopt the registered preference ordering of one of these tickets, a number 1 is placed in the box for the chosen group or incumbent senator and the rest of the ballot paper is left blank. (For the constitutional validity of this method of voting, see *Abbotto v Commonwealth Electoral Commission* 1997 144 ALR 352; *Ditchburn v Australian Electoral Officer for Queensland* 1999 165 ALR 147.)

Alternatively, where the voter wishes to indicate preferences among all Senate candidates on the bottom part of the ballot paper, the voter must place a number 1 in the square opposite the name of the candidate most preferred, and give preference votes for all the remaining candidates by placing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite their names so as to indicate an order of preference for them. The top part of the ballot paper is left blank.

Counting the vote

At the close of the poll each polling place becomes a counting centre under the control of an assistant returning officer who will have been the officer-in-charge of that polling place during the hours of polling.

Only ordinary votes (not postal, pre-poll or absentee votes) are counted at the counting centres on election night. Votes for the House of Representatives are counted before Senate ballot papers, as there is usually considerable time before the Senate terms begin. Ballot papers are sorted by the polling officials according to the formal first preference votes marked and the results are then tabulated and sent to the Divisional Returning Officer. Results are relayed through a computer network to the National Tally Room in Canberra where progressive figures are displayed on the tally board and on computer terminals. When scrutiny of ordinary votes at each counting centre ends, ballot papers are placed in sealed parcels and delivered to the Divisional Returning Officer. Other votes are counted at the office of the Divisional Returning Officer after election night.

Candidates may appoint scrutineers who are entitled to be present throughout the counting of votes. The number of scrutineers for a candidate at each counting centre is limited to the number of officers engaged in the counting.

Formal voting in a Senate election

The tests which apply to acceptance of a Senate ballot paper as formal are complicated because a Senate vote can be recorded either by numbering of preferences in the normal way or by recording a ticket vote. Additionally, a ballot paper may be accepted as formal even where the voter has erroneously attempted to record both types of votes. Thus three distinct cases may arise.

One possible case is the ticket vote recorded on its own. The voter is supposed to record such a vote by placing a single number 1 in one, and only one, of the squares printed in the ticket voting section in the top part of the Senate ballot paper. Specific allowance is made, however, for voters who deviate slightly from this requirement. A tick or a cross is accepted as equivalent to the number 1.

A second possibility is the preferential vote recorded on its own (on the bottom part of the Senate ballot paper). In this case, specific allowance is again made for voters who may have difficulty in fulfilling their obligations. A ballot paper is formal if:

- a first preference is shown by the presence of the number 1 in the square opposite the name of one, and only one, candidate (ticks or crosses are not acceptable substitutes for a number 1 in this case); and

- in a case where there are ten or more candidates, there are, in not less than 90 percent of the squares opposite the names of candidates on the ballot paper, numbers which form a sequence of consecutive numbers beginning with the number 1 without repetitions, or numbers which would be such a sequence with changes to not more than three of them; or

- in a case where there are nine or fewer candidates, there are in all squares opposite the names of candidates on the ballot paper, or in all but one of those squares (which is left blank), numbers which form a sequence of consecutive numbers beginning with the number 1 without repetitions, or numbers which would be such a sequence with changes to not more than two of them.

A third case arises where the voter has tried to record both a ticket vote and a preferential vote. This case can be broken down into three distinct situations:

- where the ticket vote and the preferential vote would each have been informal if recorded on its own, the ballot paper is informal;

- where the ticket vote would have been formal if recorded on its own but the preferential vote would have been informal if recorded on its own, the ballot paper is formal and is treated as if the preferential vote had not been attempted; conversely, where the preferential vote would have been formal if recorded on its own, but the ticket vote would have been informal if recorded on its own, the ballot paper is formal and is treated as if the ticket vote had not been attempted;

- finally, where the elector records a ticket vote and a preferential vote, each of which would have been formal if recorded on its own, the ballot paper is formal and is treated as if the ticket vote had not been attempted, that is, correct preferential numbering prevails over a correct ticket vote.

As noted in Chapter 6, upon the finding that Senator Wood had not been eligible to contest an election for the Senate in July 1987, it was determined that the place should be filled by counting or recounting of ballot papers cast for candidates for election for the Senate at the election. It was held "that the ballot papers for an election to the Senate, conducted under the system of proportional preferential voting prescribed by Part XVIII of the Commonwealth Electoral Act, for which an unqualified person was a candidate, were not invalid but indications of voters' preference for the candidate were ineffective" (*In Re Wood* 1988 167 CLR 145).

Determining the successful candidates

The essential features of the Senate system of election are as follows:

- Step 1. To secure election, candidates must secure a quota of votes. The quota is determined by dividing the total number of formal first preference votes in the count by one more than the number of senators to be elected for the state or territory and increasing the result by one.

- Step 2. Should a candidate gain an exact quota, the candidate is declared elected and those ballot papers are set aside as finally dealt with, as there are no surplus votes.

- Step 3. For each candidate elected with a surplus, commencing with the candidate elected first, a transfer value is calculated for all the candidate's ballot papers. All those ballot papers are then re-examined and the number showing a next available preference for each of the continuing candidates is determined. Each of these numbers, ignoring any fractional remainders, is added to the continuing candidates' respective progressive totals of votes. Surplus votes are transferred at less than their full value. The transfer value is calculated by dividing the successful candidate's total surplus by the total number of the candidate's ballot papers.

- Step 4. Under certain circumstances the transfer of a surplus may be deferred until after an exclusion or bulk exclusion (see Step 6).

- Step 5. Where a transfer of ballot papers raises the numbers of votes obtained by a candidate up to a quota, the candidate is declared elected. No more ballot papers are transferred to that elected candidate at any succeeding count.

- Step 6. When all surpluses have been distributed and vacancies remain to be filled, and the number of continuing candidates exceeds the number of unfilled vacancies, exclusion of candidates with the lowest numbers of votes commences. Bulk exclusions are proceeded with if possible; otherwise exclusions of single candidates take place. Excluded candidates' votes are transferred at full value in accordance with their next preferences to the remaining candidates.

- Step 7. Step 6 is continued, as necessary, until either all vacancies are filled or the number of candidates in the count is equal to the number of vacancies remaining to be filled. In the latter case, the remaining candidates are declared elected.

In counting votes in a Senate election, if only two candidates remain for the last vacancy to be filled and they have an equal number of votes, the Australian Electoral Officer for the state or territory has a casting vote, but does not otherwise vote in the election.

Recounts

Recounts normally occur only when the result of an election is very close. At any time before the declaration of the result of an election, the officer conducting the election may, at the written request of a candidate or on the officer's own decision, recount some or all of the ballot papers. The Electoral Commissioner or an Australian Electoral Officer may direct a recount.

Disputed returns and qualifications

Under the Commonwealth Electoral Act the validity of any election or return may be disputed only by petition addressed to the Court of Disputed Returns. The High Court of Australia is the Court of Disputed Returns and it has jurisdiction either to try the petition or to refer it for trial to the Federal Court.

A petition must:

- set out the facts relied on to invalidate the election;
- sufficiently identify the specific matters on which the petition relies;
- detail the relief to which the petitioner claims to be entitled;
- be signed;
- be attested by two witnesses whose occupations and addresses are stated;
- be filed in the Registry of the High Court within 40 days after the return of the writ or the notification of the appointment of a person to fill a vacancy;
- be accompanied by the sum of $500 as security for costs.

The Court has wide powers which include power to declare that any person who was returned was not duly elected; to declare any candidate duly elected who was not returned as elected; and to declare any election absolutely void. The requirement for a petition to be lodged within the 40 day limit cannot be set aside: *Rudolphy v Lightfoot* 1999 167 ALR 105. The Court cannot void a whole general election: *Abbotto v Commonwealth Electoral Commission* 1997 144 ALR 352.

The Court must sit as an open Court and be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not (Commonwealth Electoral Act, s. 364). Questions of fact may be remitted to the Federal Court. All decisions of the Court are final and conclusive and without appeal and cannot be questioned in any way.

If the Court of Disputed Returns finds that a candidate has committed or has attempted to commit bribery or undue influence, and that candidate has been elected, then the election will be declared void (Commonwealth Electoral Act, s. 362).

Any question arising in the Senate respecting the qualification of a senator or respecting a vacancy may be referred by resolution to the Court of Disputed Returns (Commonwealth Electoral Act, s. 376). For cases on the qualifications of senators, see Chapter 6, Senators, under that heading.

Return of the writ

Writs must be returned within 100 days of issue.

Following the declaration of the result in a Senate election, the Australian Electoral Officer for a state or territory certifies the names of the candidates elected for the state or territory, and returns the writ and the certificate to the Governor of the state or, in the case of the ACT and the Northern Territory, to the Governor-General.

Meeting of new parliament

Under the Constitution, section 5, after any general election (for the House of Representatives and usually a periodical election for the Senate) the Parliament shall be summoned to meet not later than 30 days after the day appointed for the return of the writs.

Division of the Senate

After a general election for the Senate, following simultaneous dissolutions of both Houses, it is necessary for the Senate to divide senators into two classes for the purpose of restoring the rotation of members (Constitution, s. 13).

On the seven occasions that it has been necessary to divide the Senate for the purposes of rotation, the practice has been to allocate senators according to the order of their election. An example of the effective part of the resolution passed is that used following simultaneous dissolutions in 1974: "the name of the Senator first elected shall be placed first on the Senators' Roll for each State and the name of the Senator next elected shall be placed next, and so on in rotation".

In its report of September 1983 the Joint Select Committee on Electoral Reform proposed that "following a double dissolution election, the Australian Electoral Commission conduct a second count of Senate votes, using the half Senate quota, in order to establish the order of election to the Senate, and therefore the terms of election" (PP 227/1983, para 3.39). The committee also recommended that there should be a constitutional referendum on "the practice of ranking senators in accordance with their relative success at the election" so that "the issue is placed beyond doubt and removed from the political arena" (*ibid*.). The Commonwealth Electoral Act was subsequently amended to authorise a recount of the Senate vote in each state after a dissolution of the Senate to determine who would have been elected in the event of a periodical election for half the Senate (s. 282).

Following the 1987 dissolution of the Senate, the then Leader of the Government in the Senate, Senator John Button, successfully proposed that the method used following previous elections for the full Senate should again be used in determining senators in the first and second classes respectively (SD, 14/9/1987, p. 17).

The Opposition on that occasion unsuccessfully moved an amendment to utilise section 282 of the Commonwealth Electoral Act for the purpose of determining the two classes of senators, in accordance with the September 1983 recommendation of the Joint Select Committee on Electoral Reform. According to the leading Opposition speaker, Senator Short, the effect of using the historical rather than the proposed new method was that two National Party senators would be senators in the first (three-year) class rather than the second (six-year) class, whilst two Australian Democrat senators would be senators in the second rather than the first class (SD, 15/9/1987, p. 97).

On 29 June 1998 the Senate agreed to a motion, moved by the Leader of the Opposition in the Senate, Senator Faulkner, indicating support for the use of section 282 of the Commonwealth Electoral Act in a future division of the Senate (29/6/1998, J.4095). The stated reason for the motion was that the new method should not be adopted without the Senate indicating its intention in advance of a simultaneous dissolution, but it was pointed out that the motion could not bind the Senate for the future (SD, 13/5/1998, pp 2649-51, 29/6/1998, pp 4326-7).

Casual vacancies

Casual vacancies in the Senate are created by death, resignation or absence without permission.

In the case of resignation, a senator writes to the President, or the Governor-General if there is no President or the President is absent from the Commonwealth (Constitution, s. 19). A resignation may take the following form —

(Date)

Dear Mr/Madam President

I resign my place as a senator for the State of , pursuant to section 19 of the Constitution of the Commonwealth of Australia.

Signature

Where the letter of resignation is sent to the Governor-General, the form may be as follows:

(Date)

Dear Governor-General,

Section 19 of the Constitution provides —

> "A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant."

As the President of the Senate is absent from the Commonwealth, I address my resignation to you.

> I resign my place as a senator for the State of ....., pursuant to section 19 of the Constitution of the Commonwealth of Australia.
>
> Signature

The following principles have been observed in relation to the manner in which a senator may resign the senator's place:

(a) a resignation by telegram or other form of unsigned message is not effective;

(b) a resignation must be in writing signed by the senator who wishes to resign and must be received by the President; whether the writing is sent by post or other means is immaterial;

(c) it is only upon the receipt of the resignation by the President that the senator's place becomes vacant under section 19 of the Constitution;

(d) a resignation cannot take effect before its receipt by the President;

(e) a resignation may not take effect at a future time;

(f) the safest procedure is for the resignation, in writing, to be delivered to the President in person in order that the President can be satisfied that the writing is what it purports to be, namely, the resignation of the senator in question; resignations transmitted by facsimile and confirmed by telephone are accepted.

On 5 July 1993 Senator Tate, having just commenced a new term as a senator for Tasmania, resigned before taking his seat in the Senate. The resignation of Senator Tate before his swearing in did not affect the procedure for his replacement. Had he resigned before the commencement of his new term, however, this would have given rise to interesting questions. Presumably he would have had to lodge a sort of "double resignation", making it clear that he was resigning his place in respect of his term ending on 30 June and also in respect of his new term commencing on 1 July.

If the President resigns as a senator, the resignation is addressed to the Governor-General (Constitution, s. 17).

The death of a senator-elect has been regarded as creating a casual vacancy to be filled in accordance with section 15 of the Constitution (case of Senator Barnes, 1/7/1938, J.78). Presumably a senator-elect could resign or become disqualified and similarly create a casual vacancy. The disqualification of a senator at the time of election, however, does not create a vacancy but a failure of election which is remedied by a recount of ballot papers (see Chapter 6, Senators, under Qualifications of Senators).

The Constitution, section 20, states that the "place of a senator becomes vacant if for two consecutive months of any session of the Parliament" a senator fails to attend the Senate without

its permission. In 1903 the seat of Senator John Ferguson was declared vacant owing to absence without leave for two months.

Filling casual vacancies

Casual vacancies are filled in accordance with section 15 of the Constitution.

The purpose of the current section 15, inserted by an amendment of the Constitution in 1977, is to preserve as much as possible the proportional representation determined by the electors in elections for the Senate.

The main features of the section are as follows:

- When a casual vacancy arises, the Houses of the Parliament, or the House where there is only one House, of the state represented by the vacating senator chooses a person to hold the place until the expiration of the term.

- If the Parliament is not in session, the Governor of the state, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of 14 days from the beginning of the next session of the parliament of the state or the expiration of the term, whichever first happens.

- A person chosen is to be, where relevant and possible, a member of the party to which the senator whose death or resignation gave rise to the vacancy. The pertinent paragraph of section 15 states:

> Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognised by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

- Section 15 also provides:

> Where —
>
> (a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and
>
> (b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist),
>
> he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution.

Casual vacancies arising in the Senate representation of the Australian Capital Territory or the Northern Territory are filled by the respective territory legislative assemblies. If the legislature is out of session, a temporary appointment can be made in the case of the Australian Capital Territory by the Chief Minister, and in the case of the Northern Territory by the Administrator. Provisions relating to political parties, similar to those of section 15 of the Constitution, also apply. (Commonwealth Electoral Act, s. 44).

When a senator is appointed to a vacant place by the governor of a state and the appointment is "confirmed" by the state parliament within the 14 days allowed by section 15, the senator is not regarded as commencing a new term on the appointment by the parliament and is not sworn again (ruling of President Baker, upheld by Senate, 3/9/1903, J.157; 4/9/1903, J.162). The 14 day period is regarded as commencing on the day after the first day of the session, in accordance with the normal rule of statutory interpretation. If there is a "gap" between the expiration of the 14 day period and the appointment of the senator by the parliament, the senator is sworn again (case of Senator Vardon, 5/8/1921, J.330; 9/8/1921, J.332).

The 1977 alteration of the Constitution has not entirely solved all problems in the filling of casual vacancies. There is nothing to compel a state parliament to fill a vacancy. This was illustrated in 1987 following the resignation of Tasmanian Senator Grimes, who had been elected to the Senate as an endorsed candidate of the Australian Labor Party. In accordance with the Constitution, section 15, the Parliament of Tasmania met in joint sitting on 8 May 1987. The Leader of the Australian Labor Party in the House of Assembly and Leader of the Opposition, Mr Batt, nominated John Robert Devereux to fill the vacancy. In the ensuing debate it became apparent that government members as well as a number of independent members of the Legislative Council intended to vote against the nomination. The basis for doing so, in terms of the Constitution, was expressed as follows by Mr Groom, Minister for Forests:

> It has been suggested by some people that there is a convention which requires us to accept Mr Devereux's nomination without question, but section 15 of the Constitution clearly states that it is for the Parliament to choose the person to fill the vacancy and not the party. We can choose only a person who is a member of the same party as the retired senator — that is well recognised — but we are not bound to accept the nomination of the party concerned. (Tasmanian Hansard, Joint Sitting, 8 May 1987, p. 1208)

The matter shortly came to a vote. Votes were tied at 26 each. The question was thus resolved in the negative in accordance with the rules adopted for the joint sitting.

Subsequently a member of the Legislative Council who had voted "No" in the division nominated William G McKinnon, a financial member of the Australian Labor Party and former member of the Tasmanian Parliament, to fill the vacancy and produced a letter from the nominee agreeing to the nomination. After a brief suspension the chairman of the Joint Sitting declared that the "letter is not in order". He continued:

> It does not comply with rule 16(6) in that the letter does not declare that the person is eligible to be chosen for the Senate and that the nomination is in accordance with section 15 of the Constitution of the Commonwealth of Australia. Therefore I am in the position of being unable to accept the nomination. (Tasmanian Hansard, Joint Sitting, 8 May 1987, p. 1226)

The joint sitting adjourned soon afterwards without any further voting.

The filling of the casual vacancy was, in the event, overtaken by simultaneous dissolutions of the Senate and the House. In the subsequent election John Devereux was among the endorsed ALP candidates in Tasmania who were elected.

In the Senate itself, the Opposition granted a pair to the government following Senator Grimes' resignation so that in party terms relative strengths were maintained. The Opposition's position on the matter was stated in the following terms: "the person appointed to fill casual vacancies of this kind ought to be the person nominated by the retiring senator's political party" (Senator Durack, SD, 12/5/1987, p. 2703).

There was no certainty as to the outcome of the dispute. According to Senator Gareth Evans, representing the Attorney-General in the Senate, "we have all the makings, however, of a deadlock, and that is what will prevail in the absence of legal challenge and in the absence of a change of heart in Tasmania at the moment" (SD, 11/5/1987, p. 2550).

Failure to fill a casual vacancy promptly means that a state's representation in the Senate is deficient and the principle of equality of representation infringed. The Senate itself takes a keen interest in prompt filling of casual vacancies and has on several occasions expressed by resolution concern about delay. On 19 March 1987, in the case of the Tasmanian vacancy, the Senate expressed the view that the nominee of the relevant party should be appointed (J.1698). Because of the delay in filling a casual vacancy created by the resignation of Senator Vallentine on 31 January 1992, the Senate passed a resolution on 5 March 1992 expressing its disapproval "of the action of the Western Australian Government for failing to appoint Christabel Chamarette [the candidate endorsed by the relevant political group] as a Senator for Western Australia, condemns the Western Australian Government for denying electors of that state their rightful representation in the Senate, and condemns the Western Australian Government for the disrespect it has shown to the Senate" (J.2085; SD, 5/3/1992, pp 857-72).

On 3 June 1992 the Senate passed the following resolution:

> That the Senate —
>
> (a) believes that casual vacancies in the Senate should be filled as expeditiously as possible, so that no State is without its full representation in the Senate for any time longer than is necessary;
>
> (b) recognises that under section 15 of the Constitution an appointment to a vacancy in the Senate may be delayed because the Houses of the Parliament of the relevant State are adjourned but have not been prorogued, which, on a strict construction of the section, prevents the Governor of the State making the appointment; and
>
> (c) recommends that all State Parliaments adopt procedures whereby their Houses, if they are adjourned when a casual vacancy in the Senate is notified, are recalled to fill the vacancy, and whereby the vacancy is filled:
>
> (i) within 14 days after the notification of the vacancy, or
>
> (ii) where under section 15 of the Constitution the vacancy must be filled by a member of a political party, within 14 days after the nomination by that party is received,
>
> whichever is the later. (J.2401)

This resolution was passed because the government of Western Australia had adopted the "strict construction" referred to in the resolution, that the state governor could not fill the vacancy because the state Parliament was not prorogued but the Houses had adjourned. Other states from time to time have adopted the view that their governors fill vacancies when their Houses are adjourned. This resolution was reaffirmed in 1997: 7/5/1997, J.1864.

The Senate passed a resolution on 4 March 1997 (J.1538) calling on two states to fill casual vacancies expeditiously. The resolution was prompted largely by statements by the Premier of Queensland that a casual vacancy in that state caused by a mooted resignation of a senator might not be filled in accordance with section 15 of the Constitution. A resolution of 15 May 1997 (J.1940-1) referred to the tardiness of the Victorian government in filling vacancies.

The obligation on states to fill casual vacancies as expeditiously as possible is matched by an obligation on the Senate to swear in and seat the appointees at the earliest possible time. The Senate has always adhered to this principle.

A list of casual vacancies filled under section 15 of the Constitution is contained in appendix 7. Information on filling casual vacancies before 1977 may be found in *ASP*, 6th ed., pp 147-59.

Territory senators

Until 1975 all members of the Senate were elected to represent the people of the states. In the elections in December 1975 following simultaneous dissolution of the two Houses on 11 November 1975 the Australian Capital Territory and the Northern Territory each elected two senators for the first time.

Legislation for election of territory senators was enacted in the *Senate (Representation of Territories) Act 1973*. This legislation was based on the Constitution, section 122, which provides that, in relation to territories, the Parliament "may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit". The provisions for the representation of the territories in the Senate are now contained in the Commonwealth Electoral Act, ss 40-44.

The legislation was not enacted without controversy. Indeed, it was one of the bills cited as a ground for the simultaneous dissolutions of 1974 and was eventually passed into law at the joint sitting of that year. It was subsequently twice challenged in the High Court, surviving the first challenge by one vote, the second by three. (*Western Australia v Commonwealth* 1975 134 CLR 201; *Queensland v Commonwealth* 1977 139 CLR 585.)

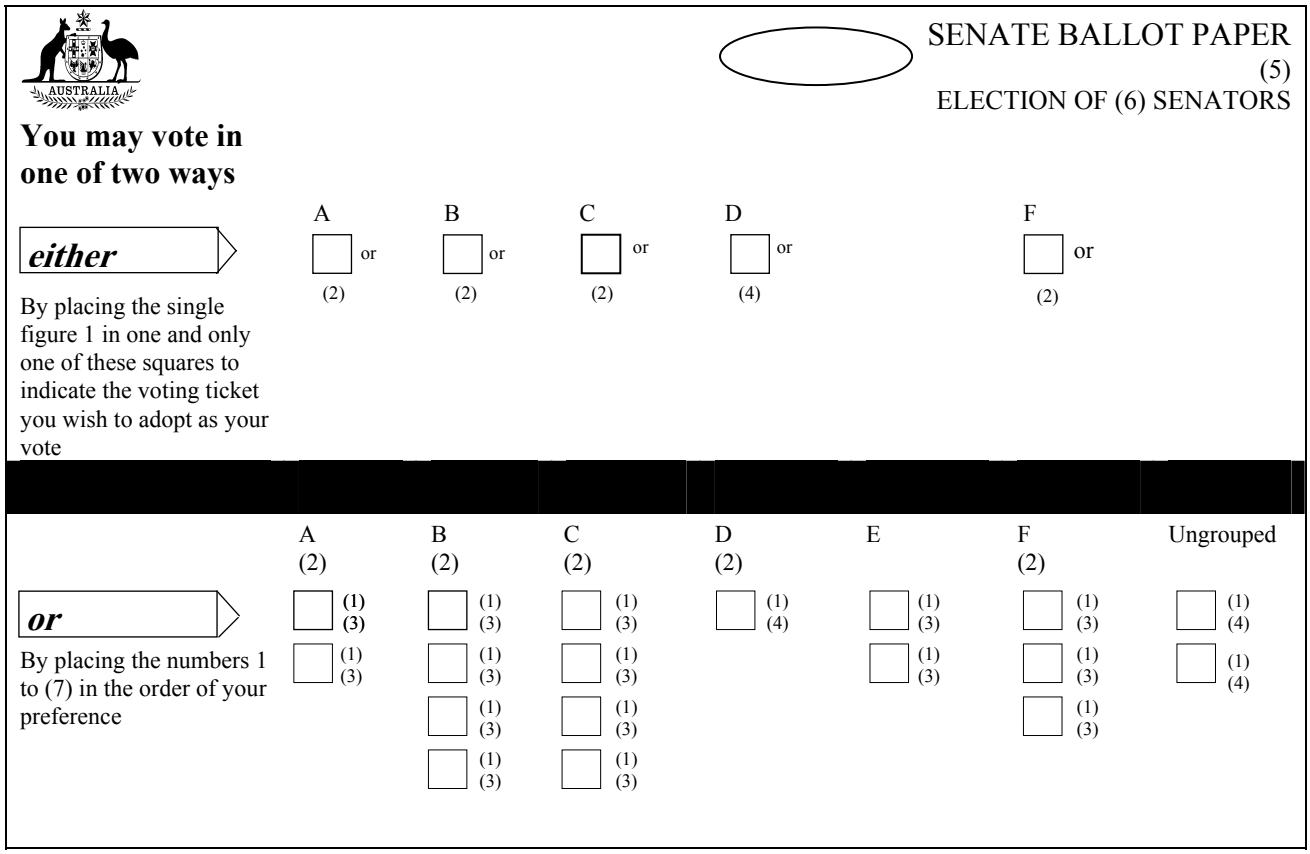
The principal issue in dispute was the contention that territory senators would undermine the constitutional basis of the Senate as a house representing the people by states and that territory representation would disrupt the numerical balance between large and small states. Other questions related to the voting rights of territory senators; the effect of territory senators on the nexus between the sizes of the two Houses and on quorums in the Senate; and applicable criteria in determining whether a territory should be represented in the Senate. A full account of the matter is contained in *ASP*, 6th ed., pp 120-3. That edition concluded that "the broadest possible

representation of all the people of Australia best serves that [the Senate's] checks and balances role" (p. 123).

Territory senators' terms commence on the date of their election and end on the day of the next election. They therefore do not have the fixed six year terms commencing on 1 July of the senators elected to represent the states. Their terms are, however, unbroken, which is important in ensuring that the Senate has a full complement of members during an election period. Their elections coincide with general elections for the House of Representatives.

Given that each territory's representation is currently limited to two senators, the practice of electing both at the one election by proportional representation preserves the Senate's role as a House which enhances the representative capacity of the Parliament and provides a remedy for the defects in the electoral method used for the House of Representatives. As indicated in Chapter 1, since the 1980 general election all members of the House of Representatives for ACT electorates have usually been members of the Australian Labor Party. Throughout this period, one senator has been a member of the ALP, the other senator from the Liberal Party. One-party representation in the House has also been usual for the Northern Territory, so that its two senators are also essential to providing that territory with balanced representation.

The writ for election of senators for a territory is issued by the Governor-General and is addressed to the Australian Electoral Officer for that Territory; following declaration of the result of a Senate election in a territory, the writ is returned to the Governor-General.



(1) Here insert name of a candidate.
(2) Here insert name of a registered political party or composite name of registered political parties if to be printed.
(3) Here insert the name of a registered political party if to be printed.
(4) Here insert name of a registered political party or word 'Independent' if to be printed.
(5) Here insert name of State or Territory and year of election.
(6) Here insert number of vacancies.
(7) Here insert number of candidates.

Chapter 5

OFFICERS OF THE SENATE: PARLIAMENTARY ADMINISTRATION

BEFORE PROCEEDING to any other business, the Senate chooses a senator to be the President of the Senate (Constitution, s. 17). The President and other officers of the Senate perform functions to enable the orderly and regular conduct of its proceedings.

The President of the Senate

The President is the presiding officer of the Senate, responsible for the proper conduct of proceedings of the Senate and the interpretation and application of the rules of the Senate.

In relation to proceedings in the Senate, the President calls senators to speak in debate, gives rulings on any questions of order which may be raised and maintains order. The authority of the President to maintain order in the Senate chamber is in force at all times, and not only when the Senate is sitting (ruling of President Kingsmill, SD, 5/12/1930, p. 1027).

The President is the spokesperson and representative of the Senate in dealings with the Governor-General, the executive government, the House of Representatives and persons outside the Parliament.

Although the President, once elected, may continue to be an active member of a party, the duties of the office, both inside and outside the chamber, must be carried out in an impartial manner. Thus, to some extent, the President is distanced from day-to-day party political activity.

The President has the right of any senator to participate in debate, and did so regularly in the early years of the Senate. Presidents now rarely participate in debate unless on a matter concerning the Senate or the Parliament. One such instance occurred in 1986, when President McClelland took the unprecedented step of introducing a bill, the Parliamentary Privileges Bill 1986. In tabling a draft of the bill for senators to examine before formally introducing the bill, the President said he was taking this step because of the fundamental importance to both Houses of the matters dealt with by the bill, which included maintaining the absolute right of freedom of speech in Parliament (SD, 4/6/1986, p. 3308; see Chapter 2, Parliamentary Privilege). The President also participates in committee hearings on the bi-annual Appropriation (Parliamentary Departments) Bills and in committee of the whole proceedings on those bills (see Chapter 13, Financial Legislation).

The President also has the right to exercise a deliberative vote on all matters in the Senate or in committee of the whole, but when in the chair of the Senate is not compelled to do so

(Constitution, s. 23; SO 99). When the votes in the Senate are equally divided the question passes in the negative (Constitution, s. 23). This provision of a presiding officer having a deliberative and not a casting or deciding vote was enshrined in the Constitution to ensure that the states should have equal voting strength. (See also Voting by President and Deputy President, below.)

The ceremonial duties of the President include participation in the opening of Parliament and visits by foreign Heads of State. The President also represents the Senate at international conferences, leads some parliamentary delegations to other nations and receives parliamentary delegations visiting Australia.

The President is the parliamentary head of the Department of the Senate, and is responsible to the Senate for its operations. The President's role is similar to that of a minister of an executive department. In addition to ministerial-type functions, the President's duties include chairing the Standing Committee on Appropriations and Staffing, which determines the budget and oversees the organisational structure of the department. The President is also concerned with the seating arrangements in the chamber, senators' room allocations and entitlements of senators.

The President has joint administrative responsibility with the Speaker of the House of Representatives for the joint department supplying services to senators and members of the House of Representatives, and also has joint control of the parliamentary precincts (*Parliamentary Precincts Act 1988*). The President and the Speaker are also jointly responsible for security, parliamentary education and relations with other parliaments.

Election and vacation of office of President

Section 17 of the Constitution provides that the office of President must be filled whenever it becomes vacant; the Senate cannot function without a President.

The office of President becomes vacant if the President dies, ceases to be a senator, resigns from office, or is removed by a vote of the Senate. The office also becomes vacant on the day before a sitting of the Senate after 30 June following a periodical Senate election (that is, following a turnover of the state senators), and on a proclamation of dissolution of the Senate and House of Representatives under section 57 of the Constitution. If a territory senator is the President and is re-elected at a general election, the office of President does not become vacant because there is no break in such a senator's term of office as a senator; he or she remains in the Chair as President but takes the oath or affirmation as a senator at a subsequent sitting of the Senate. (Constitution, s. 17; SO 5(1); *Parliamentary Presiding Officers Act 1965*; Procedure Committee, Third Report of 1992, PP 510/1992, pp 7-11; case of President Reid, 10/11/1998, J.4-6; 12/2/2002, J.5-6.)

The President may resign as President or as a senator by writing addressed to the Governor-General (Constitution, s. 17).

Before the election of the President, the Clerk of the Senate acts as chair of the Senate, and has the powers of the President under the standing orders while so acting (SO 6(1)).

A senator, addressing the Clerk, proposes to the Senate as President some senator *then present*, and moves that that senator take the chair of the Senate as President. When only one senator is proposed, the senator is called by the Senate to the chair without any question being put, and the senator then expresses a sense of the honour proposed to be conferred, and is conducted to the chair by the senator or senators who proposed the motion (SO 6(3)).

When two or more senators are proposed as President, a motion is made regarding each senator — "That Senator take the chair as President". Each senator so proposed may address the Senate; in practice this is usually no more than a short statement, "I submit myself to the will of the Senate". The senator proposing the motion for the election of a President, and any senator speaking to it, may not speak for longer than 15 minutes (SO 6(2)). This means that debate cannot occur until all nominations have been received, so that any senator speaking is able to refer to all nominations. The candidates address the Senate before other senators speak (SD, 14/8/2007, p. 1). There is no provision in the standing orders for a reply by the movers of motions proposing senators as President.

When there are two or more candidates for President, an election is conducted by secret ballot. This practice was established at the first meeting of the Senate in 1901, senators regarding it as the best way of ascertaining the choice of the majority. Each senator is provided by the Clerks with a ballot paper upon which to write the name of the candidate for whom the senator votes.

In the case of two candidates the votes are collected and counted by the Clerks, under the supervision of senators, usually whips from the party or parties sponsoring the candidates, and the candidate who has the greater number of votes is declared by the Clerk to be elected President. The successful candidate is then conducted to the chair (SO 7(1)).

When there are more than two candidates, the votes are taken in the same way, and the senator who has the greatest number of votes is declared the President, provided that there is also a majority of the votes of the senators present (SO 7(2)). If no candidate has such a majority the name of the candidate having the smallest number of votes is withdrawn, and a fresh ballot is taken. This is done as often as necessary, until one candidate is declared elected as President by majority, and that senator is conducted to the chair (SO 7(3)). There have been more than two candidates twice. On 9 May 1901, three candidates contested the first election for President, which was won by an absolute majority on the first ballot by Senator Richard Baker (J.3-4). On 17 February 1987, three candidates stood for election, and on this occasion two ballots were required to elect Senator Kerry Sibraa as President (J.1591-2).

If the votes are equally divided, the Clerk declares accordingly, and the votes are again taken. If again the votes are equally divided, the Clerk determines, by lot, which candidate should be withdrawn (SO 7(4)). This has happened only once in the history of the Senate, on 1 July 1941 (J.83). The constitutionality of standing order 7(4) providing for the drawing of lots was raised in the Senate on 25 November 1908 (SD, p. 2158), in connection with the election of a Chair of Committees. Senator Neild pointed out that section 23 of the Constitution provided that where the votes of the Senate are equally divided the question shall pass in the negative, and contended that the standing order providing for the drawing of lots was in derogation of the Constitution. President Gould held that section 23 of the Constitution related to ordinary questions submitted to the Senate, and stated that he was obliged to follow the standing order.

No subsequent examination of any ballot papers of a secret ballot of the Senate is permitted (ruling of President O'Byrne, SD, 11/7/1974, pp 81-3, 101). This ruling was given in response to a suggestion by a senator that ballot papers be examined to refute a press claim about his vote. It would not prevent a formal inquiry by the Senate into an election if such proved necessary.

Having been conducted to the chair, the senator elected acknowledges to the Senate the honour conferred and assumes the chair. The President then receives the congratulations of the Senate, and a minister informs the Senate of the time for presentation of the President to the Governor-General. Before the Senate proceeds to any business, the President, accompanied by senators, is presented to the Governor-General (SO 8; for a suspension of this SO, see 1/2/1994, J.1143). This presentation is a custom of courtesy only and does not affect the President's tenure of office or powers.

Title and precedence of President

While in office the President is entitled to the title "Honourable". When the President leaves office, the practice is that the title may be retained only if authorised by the monarch.

Since 1975, the Presiding Officers of the two Houses have ranked in precedence after the Prime Minister, and the relative precedence of the President and the Speaker is determined by date of appointment. If the President and Speaker are appointed on the same day, the President takes precedence. The history of the question of precedence is in *ASP*, 6th ed., at pp 187-9.

Deputy President and Chair of Committees

The Deputy President and Chair of Committees is the President's deputy and may take the chair in the Senate when requested by the President to do so, and is also the presiding officer in committee of the whole, presiding over committee proceedings in the chamber whenever a committee of the whole Senate is constituted (SO 11). Such a committee is formed for several purposes, but particularly for the detailed examination of legislation (SO 115(1)). When the committee is formed, the President leaves the President's chair, and the Chair of Committees takes the chair at the table below, between the Clerk and the Deputy Clerk. The composition of the committee is the same as that of the Senate.

The Deputy President is also deemed to be the President for the purpose of the statutory functions of the President in the event of the President's death, absence or incapacity (*Parliamentary Presiding Officers Act 1965*, ss 5-7).

The Deputy President and Chair of Committees exercises the same authority when presiding in the Senate or in committee as the President, but any disorder in committee may be dealt with only by the Senate, on receiving a report from the Chair (SO 144(7)).

The Deputy President takes the chair of the Senate whenever requested to do so by the President during a sitting of the Senate, without any formal communication to the Senate (SO 15(1)). The Deputy President must not remain in the chair of the Senate after the President enters the chamber (ruling of President Givens, SD, 24/6/1915, p. 4312). When the President is in the

chamber the President must be in the chair, and cannot, in order to take part in debate in the Senate, put the Deputy President in the chair (ruling of President Givens, SD, 18/4/1918, p. 4021). Similarly, the Deputy President and Chair of Committees must be in the chair when in the chamber in committee of the whole.

The term of service and method of appointment of the Deputy President and Chair of Committees are the same as for the President (SOs 9 and 10).

Since 1981 there has been a practice, usually followed, whereby, if the President is a senator from the party supporting the government (which has invariably been the case since 1974), the Deputy President is chosen from the largest party not supporting the government.

The standing orders make no provision for the resignation of the Deputy President and Chair of Committees. Resignations in writing have been directed to the President (16/3/1965, J.222; 19/2/1980, J.1129; 9/5/1995, J.3235; 6/5/1997, J.1829). There is no reason for a resignation not being made orally in the Senate, but in some past cases the senators concerned have been appointed as ministers and it is obviously undesirable that a Deputy President should also hold ministerial office for a period until the Senate next meets.

Temporary Chairs

At the commencement of every Parliament the President nominates a panel of not less than two senators who may act as Temporary Chairs of Committees when requested so to do by the Chair of Committees, or when the Chair of Committees is absent (SO 12).

The warrant nominating the panel of Temporary Chairs is read to the Senate by the President and laid upon the Table. It is usual for the President to nominate about 12 senators as Temporary Chairs. Separate appointments of additional Temporary Chairs may be made.

The nomination of Temporary Chairs is the President's prerogative, but in practice the parties indicate their nominees for appointment.

During the absence of the Deputy President, the President may call on any one of the Temporary Chairs of Committees to relieve temporarily in the chair, without any formal communication to the Senate (SO 15(2)). The Temporary Chairs are placed on a roster organised by the Deputy President, and all Temporary Chairs on the panel may expect to serve regularly in the President's chair or in the chair of committee of the whole. The Temporary Chairs exercise the full authority of the President or Chair of Committees when presiding in the Senate or committee of the whole.

Rulings of the Chair

The President, Deputy President or senator in the chair may give a ruling on any question of order, whether or not a point of order is raised by a senator. A ruling may be an interpretation or application of a standing order or may be made in the absence of provision in the standing orders. The early decision of the Senate not to adopt a standing order providing for the usages of the House of Commons to be observed in the absence of other provision, but rather to build up its own rules, forms, and practices, has necessarily resulted in many President's rulings (see Chapter

1 under Rules and Orders). It is established Senate practice that, where there may be doubt with respect to the interpretation of a rule or order, the chair leans towards a ruling which preserves or strengthens the powers of the Senate and the rights of senators rather than one which may weaken or lessen those powers and rights.

A President's ruling which has not been dissented from is equivalent to a resolution of the Senate and must be complied with (ruling of President Baker, SD, 4/10/1906, pp 6089-90; rulings of President Gould, SD, 9/8/1907, pp 1690-1; 18/10/1907, p. 4909).

It is the chair's duty to see that the powers and immunities of the Senate, as provided by the Constitution, are observed, but unless the conduct of the business of the Senate is at issue the chair ought not to be called upon to decide a question involving the interpretation of the Constitution (rulings of President Baker, SD, 1/8/1901, p. 3375; 1/7/1903, p. 1595; 11/8/1904, p. 4127; 15/12/1904, p. 8571; ruling of President Mattner, SD, 11/9/1952, p. 1265).

It is not the duty of the chair to determine the constitutionality of a standing order, but to carry it out (ruling of President Gould, SD, 25/11/1908, p. 2158). Nor is it the chair's duty to adjudicate upon points of law (rulings of President Kingsmill, SD, 26/3/1931, p. 630; 28/10/1931, p. 1258, 1273); to decide technical legalities of interpretation in any bill; to compel the government to table regulations; or to decide whether a regulation is null and void; to judge the correctness or otherwise of statements made by senators (rulings of President Givens, SD, 22/7/1915, p. 5230; 6/12/1916, p. 9390; 25/7/1917, p. 415); or to interpret the standing orders of, or the procedure on a bill in, the House of Representatives (ruling of President Baker, SD, 8/12/1905, pp 6538-42).

See also Chapter 10, Debate, under Questions of order. For objection to a ruling of the President, see Chapter 10, Debate, under that heading.

Questions to the President

The standing orders do not provide for the President to be asked questions, either without or on notice. Nonetheless, it is now common practice for questions to be asked of the President, on the ground that certain matters, particularly dealing with parliamentary administration, can be answered satisfactorily only by the President, rather than by a Minister to whom otherwise the question would have to be addressed. Questions to the President are usually without notice, but are occasionally placed on the Notice Paper. Answers are given either immediately or when the information becomes available.

The President also appears before the relevant committee, accompanied by parliamentary officers, to answer questions on the estimates for the Senate Department and the joint parliamentary department, and may be required to answer further questions in committee of the whole on those estimates. **(See Supplement)**

Absence of President and Deputy President

If the President is absent at the commencement of a sitting of the Senate, the Clerk informs the Senate, and the Deputy President takes the chair. The Deputy President then performs the duties and exercises the authority of President in relation to all proceedings of the Senate until the next

meeting of the Senate, provided that, if the Senate adjourns for more than 24 hours, the Deputy President acts for the President for 24 hours only after the adjournment, unless the Senate otherwise provides (SO 13).

When it is known that the President will be absent from the sittings of the Senate for longer than one sitting, it is the practice to empower the Deputy President by motion to perform the duties and exercise the authority of President during such an absence. Where appropriate the President announces a forthcoming absence in advance and a motion is then moved to empower the Deputy President to act. This procedure obviates the necessity for the daily announcement by the Clerk of the President's absence.

If both the President and the Deputy President are absent, the senators present, if a quorum, must elect a senator present to act as President for that day only, the question being put to the Senate by the Clerk (SO 14; 6-8/11/1962, J.165, 167, 169). The Senate may also appoint a senator to act as President by a special order in circumstances not covered by the standing order (5/10/1993, J.562-3).

On 21 December 1990, as a courtesy to a long-serving senator who was retiring on that day, the senator took the chair by leave of the Senate granted on 20 December (20-1/12/1990, J.663, 675).

In 1965 the Parliamentary Presiding Officers Act was passed to provide a legal basis for the performance of certain statutory powers of the President of the Senate and the Speaker of the House of Representatives when their offices are vacant. Provision was also made in the Act for the presiding officers' statutory functions to be performed by the deputy presiding officers when required.

Voting by President and Deputy President

The President and Deputy President are in all cases entitled to a vote. When in the chair they may vote by stating to the tellers whether they vote with the "Ayes" or with the "Noes" (Constitution, s. 23; SO 99).

Voting by the President, or the Deputy President as Chair of Committees, when in the chair, is optional (SO 101(5)). In practice this rule is extended to any senator occupying the chair. The reason for the rule is that a senator in the chair cannot avoid voting by leaving the chamber when a division is called for, as can other senators. In practice, however, the senator in the chair normally votes in a division.

When the President is present in committee of the whole during a division the President must vote. Similarly, if the Deputy President is present in the Senate when a division is presided over by the President, the Deputy President must vote.

As with the President, a senator in the chair has a deliberative vote and not a casting or deciding vote.

The Clerk of the Senate

The Clerk of the Senate is the principal adviser in relation to proceedings of the Senate to the President, the Deputy President and Chair of Committees, and senators generally. The Clerk's advice is given both in the Senate chamber when the Senate is sitting and at other times, and may be in oral or written form. Each senator has access to the advice on the basis of equality and confidentiality. Frequently, however, written advice is made public by the senator who sought it.

In addition, the Clerk is the departmental head of the Department of the Senate, exercising in accordance with the *Parliamentary Service Act 1999* the powers of a secretary of a department, and is responsible to the President and to the Senate for the budget, staffing and operations of the department.

The Clerk is appointed by the President of the Senate after consultation with senators for a non-renewable term of 10 years.

In the chamber, the Clerk sits at the table on the floor of the Senate, on the President's right. All proceedings are noted by the Clerk, who is responsible for the preparation and publication of the Journals of the Senate (SO 43). The Clerk has the custody of the Journals, records and all documents laid before the Senate, and they must not be taken from the chamber or Senate offices without the permission of the Senate (SO 44). (A resolution of 6 October 2005, on the recommendation of the Procedure Committee, authorises the storage of original tabled documents outside Parliament House: 6/10/2005, J.1200).

Whenever the office of President becomes vacant, the Clerk acts as chair of the Senate prior to the election of the President, and has the powers of the President under the standing orders while so acting (SO 6(1)).

Before a bill is sent or returned to the House of Representatives, the Clerk certifies at the top of the first page the manner in which the Senate has dealt with the Bill (SO 125). When a bill which originated in the Senate has finally passed both Houses, the Clerk must, before the bill is presented to the Governor-General for assent, certify on the last page of the bill that it originated in the Senate and has finally passed both Houses (SO 137).

The Clerk also acts as secretary and adviser to the Procedure Committee, which is appointed at the commencement of each Parliament. The committee, which was called the Standing Orders Committee before 1987, consists of the President, the Deputy President as chair and leaders and senior members of all parties represented in the Senate. It examines procedural matters referred to it by the Senate or the President, and evaluates, and recommends changes to, the rules of the Senate to facilitate full and fair debate and the proper conduct of the business of the Senate and its committees.

The Department of the Senate

The Department of the Senate has existed since 1901 but is now established under the *Parliamentary Service Act 1999*, and provides the Senate, its committees, the President of the

Senate and senators with a broad range of advisory and support services, to enable the performance of the constitutional role of the Senate. These services include procedural advice, legislative drafting, secretariats for committees, programming and documentation support for the chamber, the processing of legislation and other documents, research and education, and administrative support.

Staff of the department are employed under the Parliamentary Service Act. The department and its officers serve equally senators from all political parties and independent senators. Many staff have a high level of individual and direct responsibility to senators.

The Department is administered by a senior executive consisting of the Deputy Clerk, three Clerks Assistant and the Usher of the Black Rod. The Deputy Clerk has no line management responsibilities, and supports and deputises for the Clerk. Each Clerk Assistant and the Usher of the Black Rod is responsible for the efficient management of an office of the department.

The Senate Department receives its funding through the Appropriation (Parliamentary Departments) Acts, is accountable to the Senate through the President of the Senate, and is subject to scrutiny by the Senate Standing Committee on Appropriations and Staffing (see below), the Senate committee which considers its estimates and the Finance and Public Administration Committee. It is also subject to examination annually by the Auditor-General, and continuously throughout the year by a contract internal auditor. Apart from legislation which establishes the special nature of the parliamentary service, such as the Parliamentary Service Act and the Appropriation (Parliamentary Departments) Act, the department operates within the same legislative framework as executive departments.

Senate's appropriations and staffing

Appropriations for the Department of the Senate are determined in the first instance by the Standing Committee on Appropriations and Staffing, which also advises the President on staffing matters.

The committee was established following the adoption of recommendations in the report of the Select Committee on Parliament's Appropriations and Staffing tabled in the Senate on 18 August 1981. The select committee referred to the unsatisfactory situation then prevailing whereby the appropriations for the parliamentary departments were included in the appropriation bills for the ordinary annual services of government, thus making Parliament dependent on the executive for funds and contradicting the principles of separation of powers and parliamentary independence. The history of the issue is covered in Chapter 2 of the select committee's report (PP 151/1981). The select committee recommended a separate appropriation bill for the Parliament, the creation of a mechanism for considering staffing proposals and determining the appropriations for the Department of the Senate, independently of, but in consultation with, the government, and amendment of the then relevant legislation to give the Presiding Officers greater autonomy over staffing matters. The recommendations were supported by all parties in the Senate and were accepted by the government, subject to the proviso that the government insisted on maintaining ultimate control over the total amount of funds available to the Parliament because of its responsibility in relation to public expenditure. A separate appropriation bill for the Parliament was introduced for 1982-83 and thereafter. The Appropriations and Staffing Committee was first

appointed in 1982 (25/3/1982, J.834). The select committee recommended the establishment of a similar standing committee in the House of Representatives to consider staffing and appropriations matters relating to that House, and to meet with the Senate committee in relation to joint services. The government, however, has not permitted the establishment of such a committee in the House.

The standing committee is established by standing order 19, which provides:

> The Committee shall inquire into:
>
> (a) proposals for the annual estimates and the additional estimates for the Senate;
> (b) proposals to vary the staff structure of the Senate, and staffing and recruitment policies; and
> (c) such other matters as are referred to it by the Senate.
>
> The Committee shall:
>
> (a) in relation to the estimates —
> (i) determine the amounts for inclusion in the parliamentary appropriation bills for the annual and the additional appropriations, and
> (ii) report to the Senate upon its determinations prior to the consideration by the Senate of the relevant parliamentary appropriation bill;
> (b) in relation to staffing —
> (i) make recommendations to the President, and
> (ii) report to the Senate on any matter;
> (c) make an annual report to the Senate on the operations of the Senate's appropriations and staffing, and related matters; and
> (d) consider the administration and funding of security measures affecting the Senate and advise the President and the Senate as appropriate.

The standing committee's method of operation is largely as envisaged by the select committee chair, Senator Jessop, who, in responding to queries from Senator Peter Rae, gave the following description of its intended procedures:

> In relation to the estimates, both Budget and Additional, the proposals of the Clerk of the Senate for the Senate and its Committees would be submitted to the proposed Committee through the President as Chairman.
>
> A programme of deliberative meetings of the Committee would then follow, open to all interested Senators, during which the Clerk's estimates would be examined, added to, deleted or reduced, as thought necessary. In addition, other proposals from Senators or groups of Senators could be considered for inclusion in the Estimates of the Senate.
>
> The Estimates, as finally agreed upon by the Committee would then be submitted by the President to the Minister or Finance for inclusion, without modification, in a separate Parliamentary Appropriation Bill.
>
> The Committee would then prepare a report covering its deliberations concerning the Estimates for use by the Senate when considering the Parliamentary Appropriation Bill, after its receipt from the House of Representatives. (SD, 19/11/1981, p. 2411)

In the period from 1985 to 1995, the then Minister for Finance occasionally unilaterally modified the amounts determined by the committee for inclusion in the Appropriation (Parliamentary Departments) Bill and this was a source of dispute between the committee and the government. The matter was extensively discussed before Estimates Committee A during the 1985 Budget sittings, followed by a lengthy debate on the Appropriation (Parliamentary Departments) Bill 1985-86, during which the Chair of Estimates Committee A, Senator Richardson, moved the following motion in committee of the whole:

> That the committee, having considered the report of Estimates Committee A, recommends:
> That —
>
> (a) the provisions of the Resolution of the Senate dated 25 March 1982, relating to the responsibilities of the Standing Committee on Appropriations and Staffing with respect to the Estimates for the Senate, are reaffirmed;
>
> (b) the estimates of expenditure for the Senate to be included in the Appropriation (Parliamentary Departments) Bill shall continue to be those determined by the Standing Committee on Appropriations and Staffing;
>
> (c) if before the introduction of the Bill the Minister for Finance should, for any reason, wish to vary the details of the estimates determined by the Committee he should consult with the President of the Senate with a view to obtaining the agreement of the Committee to any variation;
>
> (d) in the event of agreement not being reached between the President and the Minister, then the Leader of the Government in the Senate, as a member of the Appropriations and Staffing Committee, be consulted;
>
> (e) the Senate acknowledges that in considering any request from the Minister for Finance the Committee and the Senate would take into consideration the relevant expenditure and staffing policies of the Government of the day; and
>
> (f) in turn the Senate expects the Government of the day to take into consideration the role and responsibilities of the Senate which are not of the Executive Government and which may at times involve conflict with the Executive Government. (2/12/1985, J.676)

The resolution was agreed to and provided some basis for resolving disputes between the committee and the Minister for Finance. It soon became apparent, however, that the intent of the resolution could be circumvented by delay on the part of the Minister for Finance, leaving insufficient time for consultation with the President and the committee on any modified figure to be included in the bill. This matter was canvassed in the Eleventh Report of the committee presented on 1 September 1988 (PP 383/1988). During debate in committee of the whole on the Appropriation (Parliamentary Departments) Bill 1988-89 in November 1988, the following resolution, recommended by the committee and moved by Senator Michael Baume, was agreed to:

> That the committee, having considered the Eleventh Report of the Standing Committee on Appropriations and Staffing —
>
> (a) reaffirms the Resolution of 2 December 1985 concerning the determination of the estimates of expenditure for the Senate to be included in the Appropriation (Parliamentary Departments) Bill;

> (b) requires the Minister for Finance to process the Senate Department's estimates as early as practicable to enable any differences between the Minister and the Committee to be resolved in accordance with the Resolution; and
>
> (c) expects that the Resolution will be adhered to in determining those estimates in the future. (30/11/1988, J.1214)

The same resolution had also been agreed to on 28 September 1988 by the adoption of the committee's Eleventh Report (J.954).

The committee's Twelfth Report, presented on 24 October 1989 (PP 460/1989), quoted from the opening statement made by the President to Estimates Committee A on 26 September 1989 in which he noted correspondence with the Leader of the Government in the Senate pointing out the desirability of having a well-briefed minister at committee meetings to represent the government's view and to participate in the process of determining the appropriations (report, p. 2). The Twelfth Report also noted the introduction of the running costs system under which continuing levels of expenditure for normal operations would proceed on an agreed basis, with funding for new policy or unforeseen matters to be determined in the usual way. Following the establishment of a base level of funding, the Senate Department would be responsible for management of its own resources and determination of priorities within the net funding level provided. The committee agreed that this system should be tried but did not accept that the 1989-90 appropriations represented an adequate base. It was apparent that satisfactory negotiations on the amounts for new policy would depend on the Minister for Finance's compliance with the relevant resolutions.

In May 1994, after the committee had formally agreed to the adoption of the running costs system for the Department of the Senate in March 1992, the shortcomings of the procedure remained apparent when the Minister for Finance declined to vary his modification of the Committee's determination. Discussions in Estimates Committee F reiterated as a possible solution the earlier involvement of the government in the process of determining the Department's estimates:

> ... the way to make it work as it was intended to work is for the minister representing the Leader of the Government on the appropriations and staffing committee to be briefed and prepared at the stage of the committee's determination to put the government's view and to influence the committee's determination at that stage.
>
> Now as the Senate resolution recognises, there may still be difficulties after that if the government still has a particular difficulty with the determination of the committee. That is when that set of negotiations can come into play in accordance with the resolution. But with that situation the negotiations should be able to proceed immediately. There should be no long delay between the determination of the committee and the response of the Minister for Finance. (Clerk of the Senate, Evidence, Estimates Committee F, 27/5/1994, p. F99)

In its 22nd report, on the appropriations for the Senate for 1995-96 in May 1995 (PP 490/1995), the committee revealed that the appropriations for the Department of the Senate determined by the committee had again been reduced by the Minister for Finance before inclusion in the appropriation bill as introduced into the House of Representatives, without the consultation required by successive resolutions of the Senate. On this occasion, however, the reductions in the amounts were not minor as in the past but significant, as part of the government's efforts to

reduce public expenditure. The committee reported that it would be pursuing the matter of appropriate funding for Senate committees, which were to receive most of the funds left out of the bill by the minister.

In 1996 the Appropriations and Staffing Committee reported that, in determining the Senate's appropriations for 1996-97, it had accepted requests by the government to make general reductions in expenditure, but had not accepted a repudiation by the Department of Finance of an agreement which had been arrived at in the previous year concerning committee funding. The committee reported that, after further negotiations between the committee and the Minister for Finance, an agreement had been reached whereby further funds were provided for the purposes of Senate committees. (Annual Report of the committee, 1995-96, PP 427/1996)

Agreement between the committee and the Minister for Finance on a method for calculating funding for select committees, and changes in government budgeting methods generally, have usually avoided disagreements in recent years.

In its 40th report in May 2004 (PP 125/2004) the committee reported that the government had attempted to cut the funding of the Senate Department to pay for increased security expenditure, although it had previously claimed that that expenditure would be covered by savings from amalgamation of other departments. The committee recommended a rearrangement of funding, subsequently adopted by the Senate, so that the cuts would fall on the other departments. This also had the effect of saving the House of Representatives Department from the cuts. The committee also recommended measures to ensure oversight by the Senate of the security system. The Senate adopted these proposals (16/6/2004, J.3480). See also the 41st report of the committee (PP 360/2004), adopted by the Senate (8/12/2004, J.273).

The committee has a mandate to inquire into proposals to vary the staffing structure of the Senate as well as "such other matters as are referred to it by the Senate". In 1987, a review of the administration of Parliament was undertaken in preparation for the move to the new and permanent Parliament House in 1988. In this context, Senator Georges moved the following motion, agreed to by the Senate on 3 June 1987:

> That the Senate declares that no changes in the structure or responsibilities of the Parliamentary Departments should be made until —
>
> (a) particulars of proposed changes have been provided to all Senators;
>
> (b) the Standing Committee on Appropriations and Staffing has examined the proposed changes and reported to the Senate; and
>
> (c) the Senate has approved of the changes. (J.1951)

Upon his re-election to the Presidency on 14 September 1987, Senator Sibraa affirmed his commitment to this course of action (SD, 14/9/1987, p. 5). For resolutions of the Senate approving changes under this procedure, see 4/9/1997, J.2429; 25/9/1997, J.2517; 18/11/2002, J.1120.

The committee also oversees the funding and administration of security arrangements affecting the Senate, under an amendment of the standing order in 2004.

For further information on parliamentary appropriations, see Chapter 13, Financial Legislation, under that heading. See also Chapter 16, Committees, under Appropriations and Staffing Committee.

Other Departments

There are two other parliamentary departments:

- **Department of the House of Representatives**, which provides procedural, information and advisory services for members of the House of Representatives

- **Department of Parliamentary Services**, a joint department which provides services used in common by members of both Houses:

    - library, reference and research services to senators and members

    - transcripts of proceedings of both Houses and their committees, information systems support to senators, members and the parliamentary departments, and audio and video monitoring of the proceedings of both Houses and their committees

    - building management, maintenance and catering functions associated with Parliament House.

An independent position of Parliamentary Librarian is established within the Department of Parliamentary Services.

The Department of the House of Representatives is administered by the Speaker of that House. The joint department is administered by the President and the Speaker jointly.

For the amalgamation of three joint departments into one in 2003, see the 39th and 40th reports of the Appropriations and Staffing Committee, PP 125/2003, 125/2004, and SD, 23/6/2003, pp 12164-8; 18/8/2003, pp 13780-802; Finance and Public Administration Legislation Committee estimates hearing transcript, 24/5/2004, pp 2-6, 20-1.

For control of Parliament House and the parliamentary precincts, see Chapter 2, Parliamentary Privilege, under Parliamentary precincts.

Chapter 6

SENATORS

THE CONSTITUTIONAL choices made by the framers of the Australian Constitution delineated the political character of members of the Senate. The provision for direct election of senators made them the representatives of the people rather than the appointees of any other body. The provisions for a six-year fixed term for senators and for elections by rotation provided the opportunity for senators to have a greater degree of independence from the executive government. The provisions for each state to elect senators by voting as one electorate and for the equal representation of the states gave senators a wider representative capacity than members for local constituencies. Developments since 1901 have also significantly affected the character of senators as representatives. The introduction of proportional representation for Senate elections in 1949 made senators as a group more representative of the range of opinions in the community. The establishment in 1970 of a comprehensive committee system in the Senate provided senators with greater opportunity for productive interaction with the people through committee inquiries and hearings.

Qualifications of senators

The Constitution, sections 16 and 34, prescribe certain qualifications for election to, and membership of, the Senate, but allow the Parliament to alter those qualifications by statute. The current statutory prescription of the qualifications of a senator are contained in the *Commonwealth Electoral Act 1918*, section 163. To be elected as a member of either House of the Parliament a person must:

- have reached the age of 18 years
- be an Australian citizen
- be either an elector entitled to vote at a House of Representatives election or be a person qualified to become such an elector.

The Constitution, section 44, prescribes certain disqualifications which render a person incapable of being chosen or of sitting as a member of either House. The section is as follows:

> Any person who —
>
> (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
>
> (ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

> (iii) Is an undischarged bankrupt or insolvent: or
>
> (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
>
> (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
>
> But sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

The rationale of these disqualifications provisions is that they prevent senators being subject to undue external influence which could prejudice their performance of their duties. A person having an allegiance to a foreign power could be unduly influenced by that power. A person under sentence for an offence is subject to the control of the executive government. An undischarged bankrupt or insolvent is subject to the control of creditors or the courts. A person holding an executive government position could be subject to undue influence by the executive government. The granting of a pension at the discretion of the executive government could obviously be used to buy allegiance of senators. A person having an interest in an agreement with the Commonwealth could similarly be subject to such undue influence, and could also be influenced by personal interest in performing the legislative duties of a senator.

Undoubtedly the most significant of these qualifications is that relating to an office of profit under the Crown. It is designed to ensure that the executive government of the Commonwealth or a state cannot purchase the allegiance of a senator by awarding the senator a government job. This purpose is important, because without the provision a government could award jobs to senators other than ministers and thereby place them in a similar position to ministers as regards supporting the decisions and proposals of the government. The provision is a vital safeguard against bribery of senators. The manner in which the disqualification is expressed, however, gives rise to some questions of interpretation.

Employing its power under sections 16 and 34 of the Constitution, the Parliament has in the Commonwealth Electoral Act prescribed further disqualifications for election to either House. A person may not be elected if the person:

- is a member of a parliament of a state or of the legislature of a territory (s. 164)
- has been convicted within two years of the election of certain offences relating to bribery and undue influence (s. 386).

The prohibition in s. 164 of the Commonwealth Electoral Act on members of state and territory legislatures was, by its legislative history and relevant parliamentary statements, clearly intended to be a prohibition on their election, but is stated to be a bar to their nomination only. Theoretically a person could be elected to the Senate if they were elected to a state or territory legislature after the lodging of their Senate nomination, leaving aside state or territory prohibitions on membership of two legislatures. This situation could have arisen in the context of the Senate and Australian Capital Territory elections of 2001.

There is also nothing in Commonwealth law to prevent the appointment to a casual vacancy in the Senate of a person who is a member of a state or territory legislature.

The disqualification provisions of section 44 of the Constitution have been construed by the High Court, sitting as the Court of Disputed Returns (see below), in a number of judgments.

In relation to the qualification of citizenship, the Court has held that the election of a person who was not an Australian citizen at any material time during the election is void (disqualification of Senator Wood, *In Re Wood* 1988 167 CLR 145).

Paragraph (i.) of section 44, relating to adherence to a foreign power, has been construed by the Court as relating only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not revoked that acknowledgment. In relation to persons who have dual nationality, the question is to be determined by whether the person has taken reasonable steps to renounce a foreign nationality, and what amounts to the taking of reasonable steps depends on the circumstances of a particular case (*Nile v Wood* 1988 167 CLR 133; *Sykes v Cleary* 1992 109 ALR 577). British nationality is foreign nationality for this purpose (disqualification of Senator-elect Hill, *Sue v Hill* 1999 163 ALR 648).

Paragraph (ii.) of section 44, relating to conviction for offences, operates only while a person is under sentence or subject to be sentenced for an offence described by the section, that is an offence punishable (not necessarily actually punished) by imprisonment for one year or longer. (*Nile v Wood* 1988 167 CLR 133). A person is under sentence while a sentence which has been imposed has not been completed, and is subject to be sentenced while there is a continuing possibility of a sentence being imposed, for example, where a sentence is suspended as part of a conditional release with a bond. Presumably if a conviction is quashed on appeal the vacancy which was taken to have occurred upon conviction and sentence is then taken not to have occurred. If such a presumed vacancy has been filled the filling of the vacancy would then also be void (for a contrary interpretation in the UK, see *Attorney-General v Jones* 1999 3 All ER 436). Therefore, if a member of either House is convicted and sentenced such as to involve the disqualification, the member should not attend the House and the member's place should not be filled until any appeal against the conviction is determined.

In paragraph (iii.) of section 44, relating to bankruptcy, the word "undischarged" qualifies both of the words "bankrupt" and "insolvent", and the paragraph applies only to a person who has been formally declared bankrupt or insolvent and who has not been discharged from that condition (*Nile v Wood* 1988 167 CLR 133; *Sykes v Australian Electoral Commission* 1993 115 ALR 645 at 650).

In relation to paragraph (iv.) of section 44, relating to office of profit under the Crown or pension payable by the Crown, in order to fall within the paragraph an office must be remunerated and must be under the Crown, that is, an office to which appointment is made by the executive government. The paragraph therefore covers persons permanently employed by the executive government. The taking of leave without pay by a person who holds such an office does not alter the character of the office (*Sykes v Cleary* 1992 109 ALR 577). The exemption of ministers from the prohibition in the paragraph does not cover parliamentary secretaries, who were accordingly not paid any remuneration until an amendment of the Ministers of State Act in 2000 provided for them to be sworn in as ministers, but without that title (see Chapter 19, Relations with the Executive Government, under Parliamentary secretaries). Receipt of a pension does not disqualify a person unless the pension is payable during the pleasure of the Crown; a pension payable under the provisions of a statute would not activate the disqualification.

After the general election of 1996, the question was raised whether Senator-elect Jeannie Ferris of South Australia was disqualified from election and as a senator because she had accepted a position on the staff of a parliamentary secretary. It appeared likely that she would be disqualified if the question were determined, because the position in question was clearly an executive government position, a parliamentary secretary being an office-holder of the executive government. In debate in the Senate on the matter, the government argued that the appointment to the position was not validly made, but as she had actually taken up the position and was paid for it for a period, the likelihood was that this would not avoid the disqualification. The argument was also advanced that the disqualification provisions do not apply to a senator-elect, but only to a candidate and to a senator who has commenced a term. It would seem to be a strange result, however, if the safeguard intended to be provided by the disqualification could be defeated by conferring an executive government position on a senator-elect, which could influence the conduct of the senator during an election and after the beginning of the senator's term. In any case, the writ for the election had not been returned at the time when Senator Ferris took up the position, so that the election was technically still in progress and she was still in the process of being chosen.

The Senate agreed to a motion to refer the matter to the Court of Disputed Returns, but the motion was amended to provide that it would not take effect until after the commencement of Senator Ferris' term if she were a member of the Senate at that time (29/5/1996, J.251-3). The intention of this amendment appeared to be to allow an opportunity for Senator Ferris to resign and to have her place filled as a casual vacancy. (It is not entirely clear whether senators-elect can resign, but the death of a senator-elect is treated as giving rise to a casual vacancy: case of Senator Barnes: 1/7/1938, J.78.) The Senate's resolution did not take effect, because Senator Ferris resigned after the commencement of her term and was not a member of the Senate on the date specified in the resolution. She was then, however, appointed by the South Australian Parliament to the place rendered vacant by her resignation, and she appeared with the other senators returned at the general election to be sworn in when the Senate next met (20/8/1996, J.452-3). If she had been disqualified at the time of her election, her resignation and appointment to the consequent vacancy would not seem to cure the defect, because if she were not validly elected there could be no valid resignation and consequent vacancy. This was made clear by the Court of Disputed Returns in *Vardon v O'Loghlin* 1907 5 CLR 201 at 208-9. As the Court found *In Re Wood* and *Sue v Hill* (see

above), if a candidate has not been validly elected the cure is a recount of the ballot papers to determine the candidate who was validly elected to the place in question.

Notice of a motion was given to refer the matter to the Court of Disputed Returns, but the notice was withdrawn, apparently for lack of support (12/9/1996, J.592-3). It was then pointed out that an action to test the matter could be brought under section 46 of the Constitution. No further action was taken.

In 1996 the Court of Disputed Returns ordered a new election in a House of Representatives electorate when it came to light that the member elected in the 1996 general election was a member of the Air Force at the time of her election. It is unclear whether she was disqualified on a proper interpretation of the part of the proviso in section 44 relating to forces of the Commonwealth. The question was not argued before the Court, but was conceded by her counsel. It was stated in submissions that members of the forces who had sought election to either House in the past had been transferred to the reserve before nominating, but it is not clear that even this precaution is necessary, and it is unfortunate that the Court did not determine the issue on a full consideration. (*Free v Kelly* 1996 185 CLR 296)

In 1974 a senator accepted a position as an ambassador without resigning from the Senate, and there was a dispute about the effect of this on the senator's place in the Senate. This dispute was unresolved at the time of the simultaneous dissolutions of the two Houses in 1974. (For an account of this case, see *ASP*, 6th ed., pp 55-8.)

Paragraph (v.) of section 44, relating to pecuniary interest in an agreement with the public service of the Commonwealth, was construed very narrowly by the Court of Disputed Returns in a particular case in 1975. It was held that, in order to fall within the paragraph, an agreement must have currency for a substantial period of time and must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs (*Re Webster* 1975 132 CLR 270; for a critique of this judgment, see the report of the Senate Standing Committee on Constitutional and Legal Affairs on the *Constitutional Qualifications of Members of Parliament*, PP 131/1981, pp 76-80). In 2002 the Senate took under consideration the question of whether Senator Scullion was disqualified because of contracts with government departments and agencies (14/5/2002, J.323). Independent advice was sought on the matter (18/9/2003, J.2436-7). The advice indicated that he was not disqualified (10/2/2004, J.2963).

The disqualifications in section 44 render a person incapable of being chosen or of sitting as a member of either House. The disqualifications therefore operate from the time the process of election starts, that process including nomination of candidates (*Vardon v O'Loghlin* 1907 5 CLR 201 at 210; *Sykes v Cleary* 1992 109 ALR 577).

It has not been explicitly determined whether the disqualifications apply to a senator-elect, but it would be anomalous if they did not, having regard to the purposes of the disqualifications (see above for the case of Senator Ferris, 1996).

If a senator is found to have been disqualified at the time of election, the election of that senator is void. The resulting failure validly to fill a place in the Senate is remedied by a recount of ballots cast in the election to determine the person validly elected. If a senator becomes

disqualified after completion of the election process, this creates a casual vacancy which may be filled under section 15 of the Constitution. (See *Vardon v O'Loghlin*, *In Re Wood* and *Sue v Hill*, cited above.)

There is no obligation on the Australian Electoral Commission to determine whether a person is disqualified at the time of the person's nomination (*Sykes v Australian Electoral Commission* 1993 115 ALR 645).

The Constitution provides in section 45 that the place of a member of either House becomes vacant when the member becomes subject to the disqualifications mentioned in section 44. This automatic vacating of a member's place also operates if the member:

> (ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or
>
> (iii.) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State.

The Constitution, section 43, provides that a person may not be elected to, or be a member of, both Houses of the Parliament simultaneously. Because the disqualification prevents a person being chosen as well as being a member of both Houses, this prevents a person nominating for election to both Houses in an election. Multiple nominations are also prohibited by section 165 of the Commonwealth Electoral Act.

The disqualifications contained in section 44 were examined in some detail by the Senate Standing Committee on Constitutional and Legal Affairs in 1981 (report on the *Constitutional Qualifications of Members of Parliament*, PP 131/1981). The Committee found the relevant provisions to be anomalous and out of date and recommended that they be comprehensively changed. This report, however, was written before most of the judgments of the Court of Disputed Returns to which reference has been made, and those judgments have considerably clarified the meaning and application of those provisions.

Determination of disqualifications

The Constitution, section 47, provides that, until the Parliament otherwise provides, any question respecting the qualifications of a member of either House and any question of a disputed election to either House shall be determined by the relevant House. This provision reflects the traditional power of a House to determine its own composition (see Chapter 2, Parliamentary Privilege, under Power of the Houses to determine their own constitution).

The Parliament has otherwise provided in the Commonwealth Electoral Act. Under sections 376 to 381 of that Act either House may refer any question concerning the qualifications of its members to the High Court, which is constituted as the Court of Disputed Returns, to hear and determine the question. The Court is required to hear the question in public, and has the power to:

(a) declare that a person was not qualified to be a member of either House

(b) declare that a person was not capable of being chosen or of sitting as a member of either House

(c) declare that there is a vacancy in either House.

The Court may remit questions of fact to a lower court for determination.

Questions relating to the qualifications of Senator Webster in 1975 and Senator Wood in 1988 were referred by the Senate to the Court under these provisions (see the judgments relating to those senators, cited above; for earlier cases see *ASP*, 6th ed., pp 172-4).

A motion concerning the qualification of a senator takes precedence as Business of the Senate over other business (SO 58).

The Commonwealth Electoral Act, sections 352 to 374, provides that the validity of any election to the Senate may be disputed by a petition addressed to the Court of Disputed Returns within 40 days after the return of the writ. Election is defined to include the appointment of a person to a casual vacancy. The Court must examine the petition in public and has the power to:

- declare that any person who was returned as elected was not duly elected
- declare any candidate duly elected who was not returned as elected
- declare any election absolutely void.

The Court may determine questions involving constitutional qualifications under these provisions (*Sue v Hill* 1999 163 ALR 648).

The Constitution in section 46 provides a procedure whereby any person can seek a remedy for a member of either House continuing as a member while disqualified. The section provides:

> Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

The Parliament has exercised its legislative power under this section only to the extent of limiting the sums which may be claimed from a disqualified member to $200 for having continued as a member before the day on which the suit was originated and $200 for each day after that day (*Common Informers (Parliamentary Disqualifications) Act 1975*).

There is nothing to require a senator to be absent from the Senate when the senator's qualification is under consideration by the Court of Disputed Returns, although a senator who continues to attend in the Senate in such a period may run a risk of a successful suit under section 46 of the Constitution. Senator Webster in 1975 absented himself while the Court considered his case, but Senator Wood in 1988 attended in the Senate and participated in proceedings while his case was before the Court.

The Constitution, section 20, provides for the place of a senator to become vacant automatically if the senator is absent from the Senate without the Senate's permission for two consecutive months during any session. In the history of the Senate there has been only one occasion on which a senator has lost his seat because of non-attendance. Senator J. Ferguson, of Queensland, was elected to serve in the Senate from 1 January 1901, and his term of service was for three years. Because of non-attendance for two consecutive months, his seat became vacant, under section 20, on 6 October 1903.

The presence in the Senate of a senator found not to have been validly elected or to be disqualified does not invalidate the proceedings of the Senate in which the senator participated: *Vardon v O'Loghlin* 1907 5 CLR 201 at 208, *In Re Wood* 1988 167 CLR 145 at 162-3.

Designation of senators

The choice by the framers of the name of the upper house in the Commonwealth Parliament had the effect of conferring on its members the title of senator, a title used in the Constitution, and a title of their counterparts in the United States and some other countries.

The title "honourable" is granted to the following senators:

- the President of the Senate
- members of the Executive Council (current and former federal ministers and parliamentary secretaries)
- former members of state ministries, former Presidents of State Legislative Councils and former Speakers of State lower houses.

Senators-elect

Senators who have been elected to places in the Senate at periodical Senate elections but whose terms as senators have not begun are referred to as senators-elect.

The principal disqualifications for senators probably apply equally to senators-elect, in so far as they render a person incapable of election to the Senate as well as membership of the Senate. Thus senators-elect probably cannot accept positions in the public service of the Commonwealth, a state or territory, because this would disqualify them under the provision relating to an office of profit under the Crown. (For a consideration of this question, see the case of Senator-elect Ferris, under Qualifications of senators, above.)

For the death or resignation of a senator-elect, see Chapter 4, Elections for the Senate, under Casual vacancies.

Oath or affirmation of office

The Constitution, section 42, requires senators to make and subscribe (sign) before the Governor-General, or some person authorised by the Governor-General, an oath or affirmation of allegiance in the form set out in the Constitution.

Senators make and sign the oath or affirmation at the first sitting of the Senate which they attend after the commencement of their terms as senators. Senators taking their places after a periodical or general election are sworn in by the Governor-General. Senators taking their places at other times are usually sworn in by the President, who is authorised by the Governor-General, in accordance with section 42, to administer the oath or affirmation (see Chapter 7, Meetings of the Senate).

Section 42 requires that a senator make and subscribe the oath or affirmation before taking the senator's seat in the Senate. A senator must therefore be sworn in before sitting in the Senate or participating in its proceedings, but there is nothing to prevent a senator performing other official functions before taking the oath or affirmation. Thus the Senate appoints senators to committees, and senators may participate in the proceedings of those committees, before they have been sworn in. For this purpose, membership of committees is often changed with effect from the date of commencement of the terms of new senators who are appointed to committees.

Immunities of senators

Senators have certain immunities under the law, as part of the law of parliamentary privilege. These immunities are set out in Chapter 2, Parliamentary Privilege.

Leave of absence

Because of the provisions of section 20 of the Constitution, under which the place of a senator becomes vacant if the senator, without the permission of the Senate, fails to attend the Senate for two consecutive months of any session (see above, under Determination of disqualifications), the Senate grants leave of absence to senators.

Leave of absence may be granted to a senator by motion on notice, the motion stating the cause and period of absence. A notice of motion to grant leave of absence takes precedence as Business of the Senate (SO 47(1)). A senator granted leave of absence is excused from service in the Senate or on a committee (SO 47(2)). A senator forfeits leave of absence by attending the Senate before the leave expires (SO 47(3)).

It is now the practice to grant leave of absence even for short periods when there is no danger of section 20 applying. One reason for this is that the Journals of the Senate record attendance of senators and whether leave of absence has been granted.

Section 20 applies only to absence during a session, so the absence of a senator during a period when the Parliament is prorogued does not activate the section (for an explanation of sessions and prorogation, see Chapter 7, Meetings of the Senate).

It is not clear whether senators should be granted leave of absence during a long adjournment of the Senate to avoid disqualification under section 20. It can be argued that, when the Senate is adjourned, it is not possible for a senator to attend in the Senate, and all senators have implied permission to be absent during the adjournment. Erring on the side of caution, however, the Senate always grants leave of absence to all senators before a long adjournment. This grant of leave of absence covers new senators whose terms of office begin during a long adjournment. (Debates on the interpretation of section 20 and the necessity for this precaution occurred in 1907 and 1914: SD, 21/11/1907, pp 6297-9; 11/12/1914, pp 1566-9; for an analysis of the question of the competence of the Senate to grant leave of absence to senators who have not taken the oath or affirmation, see *ASP*, 6th ed., pp 956-7.)

Parties and party leaders

The standing orders and procedures of the Senate recognise the membership of senators of political parties and their holding office as leaders of political parties.

A senator's statement in the Senate that the senator is a member, a leader or office-holder of a political party is accepted for the purposes of recognition under the procedures. A senator who changes party membership or who becomes a leader of a party usually makes a statement to that effect to the Senate at the earliest opportunity. Statements concerning office-holders of parties are usually made by party leaders.

The leader in the Senate of the party or coalition of parties which has formed the ministry is recognised as Leader of the Government in the Senate, and the leader of the largest party not participating in the formation of the ministry is recognised as Leader of the Opposition in the Senate. These leaders are given a number of powers, such as the power to make nominations to committees, and certain precedence in receiving the call from the chair (see Chapter 10, Debate, and Chapter 16, Committees).

Other office-holders

The standing orders and procedures of the Senate also recognise senators who are ministers and parliamentary secretaries. Ministers are given certain powers, such as the power to move for the adjournment of the Senate at any time without notice and to move a motion at any time without notice relating to the conduct of the business of the Senate (SO 53(2), 56; see Chapter 19, Relations with the Executive Government). An order of 6 May 1993, as amended, allows parliamentary secretaries to exercise the powers of ministers except answering questions at question time and appearing for Senate ministers before committees considering estimates in relation to those ministers' responsibilities.

Seniority of senators

For certain purposes, such as the allocation of accommodation in Parliament House, the seniority of senators is significant. A list of a senators' seniority is maintained by the Usher of the Black Rod. Senators' seniority is determined in accordance with their period of continuous service as senators.

The senator with the longest continuous period of service used to be referred to as the "Father of the Senate", but this title is now seldom referred to or used (as no woman senator has ever been in this situation, it is not clear what the title would be in that circumstance).

Conduct of senators

The standing orders of the Senate prescribe rules governing the conduct of senators during their participation in the Senate proceedings. As these rules relate mainly to the conduct of debate, they are set out in Chapter 10, Debate, under Rules of debate and Conduct of senators.

Matters relating to the conduct of senators are also the subject of the Senate's Privilege Resolutions (see Chapter 2, Parliamentary Privilege). Resolution 6(3) prohibits senators asking for or receiving any benefit in return for discharging their duties in any way. Resolution 9 enjoins senators to exercise their freedom of speech in the Senate with regard to the rights of persons outside parliament and not to make statements reflecting adversely on such persons without proper evidence. Resolution 5 provides for the publication by the Senate of responses by persons who have been adversely affected by references about them in the Senate.

Senators are subject to the contempt jurisdiction of the Senate, and may be adjudged guilty of contempt (see Chapter 2, Parliamentary Privilege; for a Privileges Committee inquiry into the conduct of a senator, see 7/5/1997, J.1855-6).

Senators may be censured by the Senate for misconduct (31/5/1989, J.1762-3; 4/10/1989, J.2083-5; 29/3/1995, J.3182-4; 2/10/1997, J.2618; 11/3/1998, J.3359-60; 19/3/2002, J.216-7 (a parliamentary secretary acting in a non-government capacity)). For the censure of ministers and members of other houses, see Chapter 19, Relations with the Executive Government, under Ministerial accountability and censure motions. It has been stated that it is not proper for a House to censure any member other than a minister, but this alleged principle appears to arise from a consideration of the situation in the House of Representatives and other lower houses which are controlled by the government of the day, in that any successful censure motion could only be moved by the government against an Opposition member. If the question is considered apart from that difficulty, however, it may well be concluded that a House properly so called may be justified in censuring its own members, apart from ministers, for unacceptable conduct.

A senator may be prosecuted for an offence which has also been dealt with as a contempt of the Senate (cf *US v Traficant*, US Court of Appeals, 19/5/2004, not reported; Supreme Court declined to hear appeal, 10/1/2005).

In 1992, following dispute over the "Marshall Islands affair", in which a minister was alleged to have sought improperly to influence the president of that country, the Senate passed a resolution relating to the development of a code of conduct for members of the Parliament and ministers (25/6/1992, J.2610-3; 2616-8). No such code of conduct has yet been recommended to, or adopted by, the Senate.

Questions to senators

Questions may be put to senators at question time relating to matters connected with business on the Notice Paper of which they have charge (SO 72(1)). Question time, however, is mainly used to put questions to ministers (see Chapter 19, Relations with the Executive Government), and the procedure of putting questions to other senators is seldom used.

Because a question and answer may not anticipate debate on a matter on the Notice Paper (SO 73(2)), a question to a senator is in effect confined to procedural matters not going to the merits of the relevant item on the Notice Paper. Such a question may, for example, relate to a senator's intention to bring on an item of business, or the effect of certain circumstances on the currency or urgency of the item. (Rulings of Deputy President McClelland, SD, 26/5/1982, p. 2374; President McClelland, 24/10/1984, pp 2323, 2327; President Sibraa, 20/8/1992, p. 346; President Beahan, 6/12/1994, pp 3944-8, 7/12/1994, pp 4098-9; see also SD, 11/9/1969, pp 700-1; 16/4/1970, p. 856; 27/8/1981, p. 379.)

Questions may also be put to chairs of committees, subject to certain restrictions (see Chapter 16, Committees). **(See Supplement)**

Pecuniary interests

Procedures for the registration of senators' pecuniary interests are contained in special orders first adopted in 1994. Such procedures had been under consideration since 1983, but had not been adopted, mainly due to doubts about their effectiveness. They were finally adopted as part of a "package" of "accountability reforms" announced by the government following the resignation of a minister over alleged misallocation of certain cultural and sporting grants (SD, 3/3/1994, pp 1453-4).

A special order of the Senate requires senators to declare specified interests, of themselves, and of their partners of which they are aware, which are then entered in a register, kept by a designated officer of the Senate and open to public inspection (those relating to partners are confidential). The order originally obliged senators to declare relevant interests during proceedings in the Senate. It had been the practice for senators, before the adoption of the order, to declare any interests in matters before the Senate. The requirement was abolished in 2003, but senators may still do so. The system for the registration of interests is supervised by a standing committee, called the Committee of Senators' Interests (SO 22A). The Senate's order declares that failure to comply with the order is a serious contempt of the Senate. Another order, adopted on 26 August 1997, requires senators to register gifts presented to them in their official capacity. (See also Chapter 16, Committees, under Senators' Interests Committee.)

Historically, the formal requirements for registration of interests can be seen as the long term result of two significant inquiries. A Joint Committee of Pecuniary Interests of Members of Parliament was appointed in 1974 and reported in September 1975 (PP 182/1975). The committee considered whether arrangements should be made for the declaration of interests of members of Parliament and, if so, whether a register of interests should be compiled and what it should contain. The committee examined the concept of a code of conduct and the arguments for and against a formal register of interests and concluded that an appropriate balance could be

achieved between the flexible guidance of the former and the rigid requirements of the latter by instituting a system of declaration of interests in which it was compulsory to declare certain interests while declaration of others was discretionary.

The second inquiry was by the non-parliamentary Committee of Inquiry Concerning Public Duty and Private Interest, chaired by the Chief Justice of the Federal Court of Australia, Nigel Bowen, and established in 1978. The committee suggested a set of principles providing for the avoidance or resolution of conflicts of interest and applicable to various categories of persons holding public office or playing a role in public life. The committee's recommendations in relation to ministers were adopted, including confidential disclosure of pecuniary interests.

A motion proposing a system for the registration of senators' interests was referred to the Standing Orders Committee in October 1983 (20/10/1983, J.412-3). After lengthy consideration of and consultation on the issue, the Standing Orders Committee reported in May 1986 that there was a fundamental disagreement amongst its members about the effectiveness of the proposed register and the soundness of the proposals in the resolution relating to registration and declaration of interests (PP 435/1986). The committee considered that the question should be determined by the Senate.

Notice of a motion relating to the registration and declaration of senators' interests and the establishment of a Committee of Senators' Interests was given on 20 November 1986 (J.1429) and debated on 17 March 1987 (J.1680-3) but was unresolved before the 1987 double dissolution. Although it appears that the re-elected government intended to re-introduce the motion, this did not occur until well into the following Parliament (30/4/1992, J.2228). When this motion was debated in May 1992, the same fundamental disagreements about the effectiveness of the register were evident and debate was adjourned (4/5/1992, J.2240). Similar notices were again given shortly after the commencement of the 37th Parliament (18/5/1993, J.159) and again the Opposition claimed that the proposed system would be ineffective (SD, 19/5/1993, pp 800-8; 25/5/1993, p. 1193). Consideration of the matter was postponed until the Budget sittings later that year but, in the meantime, government senators and Senator Chamarette (Greens, WA) tabled declarations of their interests on 25 May 1993 (J.247, 248). Motions were debated on 19 and 30 August 1993 but were not dealt with conclusively until 17 March 1994 when the Committee of Senators' Interests was appointed. The Register of Interests, containing all senators' declarations, together with those of senior departmental officers, was tabled in the Senate on 9 June 1994 in accordance with the terms of the resolution of 17 March requiring this action within 14 sitting days.

Places in chamber

Each senator has a designated seat in the Senate chamber, with a desk.

Standing order 48 prescribes rules relating to senators' seating. The front seats on the right of the President are reserved for ministers, while the front seats on the left of the President are reserved for leaders of parties and senators designated as having responsibility for particular matters. In relation to seats other than front seats, senators are entitled to retain the seats occupied by them at the time of their taking their seats for the first time after their election so long as they continue as

senators without re-election. Subject to any order of the Senate, any question relating to the occupation of seats by senators is determined by the President.

In practice senators sit in party groups, and seating arrangements are made by party whips, subject to the approval of the President. Members of the government party or parties sit to the President's right behind the ministers, and members of the Opposition party or parties sit to the left of the President behind Opposition senators designated as shadow ministers. Members of minority parties and independent senators sit on the cross-benches, that is, on the seats located on the curve of the horseshoe-shaped banks of seats.

A resolution passed in 1986 allows opposition speakers leading for the opposition to speak from the Deputy Leader of the Opposition's place (18/9/1986, J.1214).

Senators may not have on their desks items which are objectionable to other senators (ruling of President Kingsmill, SD, 24/5/1932, pp 1231, 1239).

Dress

There are no rules laid down by the Senate concerning the dress of senators. The matter of dress is left to the judgment of senators, individually and collectively, subject to any ruling by the President (ruling of President McMullin, SD, 27/3/1968, p. 336; see also report of House Committee, PP 235/1971, adopted by the Senate 29/2/1972, J.885). Officers attending on the Senate, such as ministerial advisers, are also expected to maintain appropriate standards of dress (ruling of Chair of Committees, SD, 14/11/1974, pp 2409-10).

Senators' remuneration and entitlements

Section 48 of the Constitution empowers the Parliament to determine the allowances of members of the Houses.

The remuneration, allowances and entitlements of senators are determined by the *Parliamentary Allowances Act 1952*, the *Remuneration and Allowances Act 1990*, and determinations made by the Remuneration Tribunal under the *Remuneration Tribunal Act 1973*. Superannuation entitlements of senators are covered by parliamentary superannuation acts. The provision of personal staff for senators is covered by the *Members of Parliament (Staff) Act 1984*.

The executive government determines and provides certain entitlements to members of the Houses, such as offices in their states and electorates.

In 1990 a decision by the government to provide certain postage entitlements to members of the Houses beyond the entitlements determined by the Remuneration Tribunal was challenged in the courts. The decision was the subject of dispute because it was said to favour government members over non-government members. The High Court held that the executive government has no power to provide benefits to members of the Houses in the nature of remuneration without statutory authorisation. The appropriation of money for such benefits in an appropriation act is not sufficient authority. (*Brown v West* 1990 91 ALR 197.) Following this judgment, the *Parliamentary Entitlements Act 1990* was passed to authorise the provision of benefits to

members by the executive government. The Act sets out in general terms the benefits which the government may provide.

Resignation of senators

Section 19 of the Constitution provides that a senator may resign office by a letter addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth. The place of a resigning senator becomes vacant upon the receipt of the resignation by the President or Governor-General.

For the form of resignation, and principles covering the lodgment of resignation, see Chapter 4, Elections for the Senate, under Casual vacancies.

Distinguished visitors

The President may, by leave of the Senate, admit distinguished visitors to a seat on the floor of the chamber (SO 174).

The practice is for the President to inform the Senate that the distinguished visitor is present and to propose, with the concurrence of senators, to invite the visitor to take a seat on the floor of the chamber. When senators concur, the visitor is admitted and conducted to a chair on the left of the dais near the President's seat.

This honour is normally granted to heads of state and presiding officers of other houses.

It is not in order for senators to approach distinguished visitors in the chamber (rulings of President Calvert, SD, 6/2/2003, p. 8743; 18/6/2003, p. 11855).

On three occasions in the past the Senate agreed to meet with the House of Representatives in the House chamber to hear addresses by presidents of the United States. This procedure was first adopted in 1992 on the occasion of an address by the then US president. It was stated at that time that the procedure was adopted on the basis that a similar honour had been granted to the Australian prime minister in Washington in accordance with the custom of the US Congress, and that granting the equivalent honour to the US president would not set a precedent. The procedure was repeated in 1996; it was felt that the same honour should be extended to the then president. In 2003 it was extended to the then US President and the Chinese President, who happened to be visiting at the same time. The practice had developed into government-controlled occasions, with the prime minister issuing the invitations and the Senate acquiescing. In its third report of 2003 (PP 436/2003) the Procedure Committee recommended that the practice be abandoned after incidents at the last two addresses, when the Speaker of the House of Representatives purported to eject two senators from one meeting and exclude them from the other. The Privileges Committee supported this recommendation (PP 80/2004; 1/4/2004, J.3321). The committees' recommendations that for future addresses the government hold meetings of the House to which senators would be invited were subsequently adopted (2/3/2006, J. 1954).

Chapter 7

MEETINGS OF THE SENATE

THIS CHAPTER describes how meetings of the Senate occur and the rules governing meetings.

Executive government's power to determine sessions

Section 5 of the Constitution provides:

> The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.
>
> After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

Under this section the Governor-General may terminate a session of the Parliament by proroguing it, and may then appoint the time for its next meeting. In practice these powers are exercised on the advice of the government.

When the Governor-General has specified a time for commencing a session of the Parliament, a formal opening of Parliament takes place. The procedures for the opening of Parliament vary according to whether the opening follows a prorogation of a session of Parliament, or a dissolution of the House of Representatives or of the two Houses under section 57 of the Constitution (for dissolutions of both Houses see Chapter 21, under Disagreements between the Houses).

Parliaments and sessions

A new ***Parliament*** begins with the opening by the Governor-General on the first day the two Houses meet after a general election for the House of Representatives or for both Houses. The parliamentary ***term*** continues for three years after the date of the first sitting of the Houses, unless it is ended earlier by the dissolution of the House of Representatives or by the simultaneous dissolution of both Houses.

Within the term of each Parliament, there may be ***sessions***. A new session is also opened by the Governor-General and begins on the first day of sitting following a prorogation of Parliament. To prorogue Parliament means to bring to an end a session of Parliament without dissolving the House of Representatives or both Houses, and, therefore, without a subsequent election. Prorogation has the effect of terminating all business pending before the Houses and Parliament

does not meet again until the date specified in the proroguing proclamation or until the Houses are summoned to meet again by the Governor-General.

Section 6 of the Constitution provides:

> There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

The Parliament complies with the intent of this section in that each year it has two or three sitting periods of several months duration. However, it has not been the practice in recent decades to divide a parliamentary term into annual sessions by the annual use of prorogation, and consequently a session will normally last for the duration of the term of the House of Representatives.

Although Parliament was regularly prorogued in the past, it has been prorogued without an accompanying dissolution on only four occasions since 1961. Two of these, in 1974 and 1977, were for the purpose of allowing openings of Parliament by the monarch during visits to Australia. On another occasion, in February 1968, Parliament was prorogued following the disappearance in the sea of Prime Minister Harold Holt in December 1967. On the fourth occasion, Parliament met for one day in November 1969 following an election for the House of Representatives on 25 October and was prorogued until the following March.

In March 1993 the government restored the practice, not followed since the 1920s, of proroguing the Parliament before dissolving the House of Representatives for the purpose of a general election.

For further details, see below, under Meetings after prorogation or dissolution of House, and Chapter 19, Relations with the Executive Government under Effect of prorogation and of the dissolution of the House of Representatives on the Senate.

Place of meeting

In the proclamation fixing the time for the Parliament to meet at the beginning of a session, traditionally the Governor-General purports to direct the Houses as to the place of their meeting, although this is not authorised by the Constitution. Under its own resolution, the Senate meets in its chamber in Parliament House in Canberra (2/6/1988, J.822). It is arguable that, under section 125 of the Constitution, the Senate may not meet other than in the seat of government established under that section. In 2001, however, the Senate resolved to meet in Melbourne to commemorate the first meetings there in 1901 (9-10/5/2001, J.4219, 4221), but no legislative business was transacted at the commemorative meetings.

Opening of a new Parliament

The following procedures are followed for the opening of the first session of a new Parliament following a dissolution of the House of Representatives or of both Houses and a subsequent election (SO 1(1)).

At the hour (usually 10.30 or 11 am) named in the Governor-General's proclamation, the President (except following a dissolution of the Senate when there is no President: see below) takes the chair and the Clerk of the Senate reads the Proclamation summoning Parliament.

The Governor-General appoints one or more persons, usually justices of the High Court, as deputies in relation to certain aspects of the opening of Parliament (Constitution s. 42 and s. 126). The deputies attend and request the attendance of the Members of the House of Representatives in the Senate chamber. When the members of the House of Representatives have assembled in the Senate chamber, the Clerk of the Senate then reads the commission appointing the deputies.

The senior deputy then announces that after members of the House of Representatives, senators representing the territories and any new senators appointed to fill casual vacancies have been sworn and the House has elected a Speaker, "the causes of His Excellency calling this Parliament will be declared by him in person at this place" later that day. The deputy then retires and subsequently proceeds to the House of Representatives to administer the prescribed oath or affirmation to members of that House.

Should there be no President in office the senior deputy administers the oath or affirmation of allegiance to senators taking their seats for the first time (for an ordinary general election the territory senators and any appointees to casual vacancies).

If there is a President in office, the President ordinarily administers the oath or affirmation to such senators; the commission to administer the oath or affirmation is usually given by the Governor-General to the President following the election of a senator to that office.

The President (or the Clerk if there is no President) tables the certificate of election of territory senators and certificates of the filling of vacancies, if any. Senators taking their seats for the first time then come to the Table to be sworn or make an affirmation and to sign the oath or affirmation form.

Except at openings of Parliament subsequent to a dissolution of both Houses it is normally the case that the only senators taking their seats for the first time and requiring to be sworn at the opening of Parliament are senators representing the territories and senators appointed to fill casual vacancies. Procedures for the swearing of senators newly elected to fill periodical vacancies are described below and in Chapter 6, Senators.

If the office of President is vacant on the opening of Parliament, the Senate then proceeds to elect a President (see Chapter 5, Officers of the Senate: Parliamentary Administration). After the President has been elected, the Leader of the Government in the Senate announces when and where the Governor-General will receive the President.

The sitting of the Senate is then suspended until such time as the Governor-General has appointed to declare in person the reasons for calling the Parliament together (that is, to make the opening speech).

Governor-General's speech

At the designated time (usually 3 pm) the Senate resumes and the Governor-General is announced. The Governor-General then summons the Members of the House of Representatives to the Senate chamber.

When the members of the House of Representatives have assembled in the Senate chamber the Governor-General delivers the opening speech, in which the causes of calling the Parliament together are declared. The speech, which is composed by the ministry, usually reviews recent events and gives a summary of the government's legislative program of the session.

Upon completion of the reading of the speech by the Governor-General, the President and the Speaker each receive a copy of the speech from a member of the Governor-General's staff. The Governor-General then retires.

Opening of a new session of an existing Parliament

The following procedures are followed for the opening of Parliament following a prorogation of the Parliament not accompanied by a dissolution of the House of Representatives or of both Houses (SO 1(2)).

When there is a President in office, on the first day of a new session of an existing Parliament the President takes the chair at the appointed hour and the Clerk reads the proclamation which fixes the date for the assembling of Parliament following its prorogation. The arrival of the Governor-General is then announced. The certificate of election or choice of any senator whose term of office has begun since the last sitting of the Senate is then laid on the Table by the Clerk, and each such senator then makes and subscribes the oath or affirmation of allegiance. The procedure which then follows is the same as at the opening of a new Parliament following the arrival of the Governor-General (see above).

If there is no President in office at the opening of a new session of an existing Parliament the Senate is summoned by proclamation to meet at an earlier hour (usually in the morning) than the time fixed in the proclamation for the meeting of the members of the House of Representatives. At the hour appointed, members of the Senate assemble in the Senate chamber and the Clerk of the Senate reads the proclamation. The arrival of the deputy of the Governor-General is then announced. The deputy produces the commission from the Governor-General, which is then read by the Clerk. The deputy then informs the Senate that the Governor-General will at a future time declare the cause of calling Parliament together.

The certificate of election or choice of any senator whose term of office has begun since the last sitting of the Senate is then laid on the Table by the Clerk, and the deputy administers the oath or affirmation of allegiance to each such senator. The deputy then retires and the Senate proceeds to elect a President.

The proceedings which then follow are the same as at the opening of a new Parliament following the election of the President when that office is vacant.

Opening by the monarch

Standing order 4 provides that when the monarch is present in Australia and intends to indicate in person the cause of the calling together of Parliament references to the Governor-General in those standing orders relating to the opening of Parliament should be read as references to the monarch. The monarch has opened the Parliament of the Commonwealth of Australia and delivered the opening speech on three occasions: 15 February 1954, 28 February 1974 and 8 March 1977.

Address-in-reply

Before the Governor-General's speech is reported to the Senate formal business may be transacted, petitions may be presented and notices given, and documents laid on the table (SO 3(1)). This standing order embodies a traditional assertion of the right of the Senate to transact some business before the opening speech is considered. The President then reports to the Senate the speech of the Governor-General. A motion for an address-in-reply to the speech may then be made, or the consideration of the speech may be made an order of the day for a future time.

While precedence is given to the address-in-reply debate until the adoption of the resolution, the standing orders permit formal business to be transacted (SO 3(4)). Formal business which may be entered upon includes questions (without notice and on notice), the fixing of days and hours of meeting, the appointment of standing committees, motions for the printing of documents and matters which come within the category of Business of the Senate. A matter of privilege may also be raised. The standing order is also usually suspended to allow other business to be transacted before the address-in-reply is passed.

Standing order 194(2) exempts the debate on the address-in-reply from the usual requirements concerning relevance and anticipation and permits debate on any matter.

Amendments may be moved to the motion for the address-in-reply, and on several occasions have been agreed to (3/6/1914, J.59; 30/8/1973, J.330; 12/3/1974, J.45; 18/3/1976, J.82; 8/10/1996, J.652; 16/5/2002, J.366; 10/2/2005, J.372-3).

When the address has been agreed to, a motion is made that it be presented to the Governor-General by the President and any senators who may wish to accompany the President. This motion is usually moved by the Leader of the Government in the Senate. After the motion is carried, the President informs the Senate when the Governor-General is able to receive the address, and invites senators to be present on the occasion.

At Government House, the usual place for presenting the address, the President and accompanying senators and officers are received by the Governor-General. The President reads the address and presents it to the Governor-General who makes a reply. The President then introduces accompanying senators and officers to the Governor-General. At the earliest convenient opportunity the President reports to the Senate the presentation of the address and the reply of the Governor-General.

Swearing of senators elected to periodical vacancies

Periodical elections are almost invariably held together with elections for the House of Representatives and only rarely does their timing permit newly elected senators representing the states to be sworn at the subsequent opening of Parliament. Senators representing the territories, like members of the House of Representatives, are sworn in at the opening of Parliament, which must take place not later than 30 days after the return of the writs. Senators elected to represent the states at a periodical election do not begin their term of office until the first day of July following that election. This means that the date on which they are sworn and first take their seats does not normally coincide with the opening of a session of Parliament. As the Senate very rarely sits in July it is the practice for such newly-elected senators to be sworn on the next sitting day, usually in August.

In this situation there is no President in office because, pursuant to standing order 5, the office of President becomes vacant "on the day next before the first sitting day of the Senate after the 30th day of June following a periodical election" (see Chapter 5, Officers of the Senate: Parliamentary Administration).

The Senate meets at the time appointed. The Governor-General, or the deputy appointed by the Governor-General to administer to newly-elected senators the oath or affirmation of allegiance, is announced. If a deputy is appointed, the commission to administer the oath or affirmation is produced and read by the Clerk.

The certificates of election for the members elected to fill periodical vacancies are laid on the table by the Clerk and each such senator is then sworn. In addition to being sworn or making the affirmation, senators are required to sign the Senators' Roll on the day on which they take the oath or affirmation of allegiance. The Senators' Roll is kept by the Clerk, and shows the names of the senators chosen for each state, the dates of election and of taking the oath, and the date and reason for ceasing to be a senator.

After the swearing of newly-elected senators the Governor-General, or the deputy, as the case may be, retires and the Senate proceeds to the election of a President.

Following the election of the President, and on resumption of the sitting after the President is presented to the Governor-General, the President announces the presentation and reports the Governor-General's reply. Then the business of the Senate may be proceeded with in the ordinary course, including the appointment of the Deputy President and Chair of Committees.

Recent practice has been for the Governor-General personally to administer the oath or affirmation to senators.

Proposals to change the opening of Parliament

The opening ceremony is not constitutionally required, and is otherwise objectionable in principle, for example, by conferring non-judicial functions (as deputies of the Governor-General) on judges and by involving the Governor-General in contentious and partisan

statements composed by the prime minister in the opening speech. It is based on adaptions of British practice, which is itself constitutionally outmoded, without regard to Australia's constitutional arrangements.

Such a consideration leads to the further reflection that the constitutional provisions giving the executive government the power to dispense temporarily with the sittings of the Parliament are outmoded. (See also Chapter 19, Relations with the Executive Government, under Effect of prorogation and of the dissolution of the House of Representatives on the Senate.)

Proposals to change the opening ceremony have been mooted many times.

Prior to the first meeting of the Parliament following the election in March 1993, the Prime Minister announced that the government intended to alter the opening ceremony, so that the two Houses would meet with the Governor-General in the Great Hall to hear the opening speech. Proposals of this kind had been mooted before, but, as with the 1990 election, nothing was done to put them into effect in time for the opening. The change did not occur, notwithstanding that procedures for the modified opening were devised, and the opening was in accordance with the old procedures.

The reason for this was that the opening procedures are contained in the standing orders of each House, and it would have been necessary for each House to suspend its standing orders and agree to the modified procedures after it first met in the morning, and after the members of the House of Representatives and the territory senators and any senators filling casual vacancies had been sworn. This could easily have been brought about in the House of Representatives by the government's control of that House, but the government could not be sure of carrying the necessary motion in the Senate, or of carrying it in time for the meeting with the Governor-General in the afternoon. The proposal was therefore abandoned.

The deliberation and agreement of the two Houses will be required to change the procedure.

Sittings and adjournment of the Senate

When a Parliament or a session of Parliament has been opened as described above, the Senate determines its own sittings.

A sitting of the Senate begins when the Senate first meets after an adjournment, and concludes when the Senate again adjourns, either till a specified time or a time to be fixed by a specified procedure. The bells are rung for five minutes prior to the time appointed for the commencement of a sitting, and the President then takes the chair to begin the sitting (SO 49). Before proceeding to business the President recites the prayer prescribed by standing order 50.

Except where the standing orders provide for the President to adjourn the Senate without putting a question from the chair, the Senate adjourns only by its own resolution (SO 53). Where the Senate is to meet again at a time specified by the standing orders or by any special order, the Senate simply resolves to adjourn. If the time of the next meeting has not been so fixed, a resolution is passed fixing the time before the question for the adjournment is proposed.

Normally the Senate adjourns to a specified time, which has been fixed by an order setting a schedule of sitting days or an order setting the next meeting day at the end of a long adjournment. When adjourning for a period of time longer than normal, for example, at the beginning of the summer and winter long adjournments, the Senate may adjourn to a specified time or such other time as may be fixed by the President.

In exercising the power to fix another time of meeting, the President may exercise an independent discretion to change the time of meeting for any reason related to the orderly conduct of Senate proceedings. The President may set an earlier or a later time of meeting than that specified, and may alter a time of meeting which has been set. In exceptional circumstances the President may postpone a meeting of the Senate. For example, on 22 May 1973 the time appointed was 11 am, but the Canberra airport was closed due to fog and 20 senators were unable to land. With the concurrence of the party leaders, President Cormack ordered that the meeting of the Senate be postponed until 3 pm. There are also precedents for the President delaying the commencement of sittings where official functions have extended beyond the time fixed for the meeting of the Senate. On 17 September 2001 the President altered the time of meeting from 12.30 pm to 2 pm to allow senators to attend a memorial service for victims of terrorist attacks in the United States (17/9/2001, J.4851).

In exercising the power to alter the time of meeting the President also by convention acts upon the advice of the executive government; a statement of this convention was made by President Givens in 1916 (SD, 29/9/1916, p. 9115). The convention operates only for the consideration of government business and not for the political convenience of the government, for example, in deciding upon an early general election. In other words, it is not a substitute for the power of prorogation (see below). In 1972 the President, at the request of the Prime Minister, put senators on provisional notice for a meeting of the Senate on 4 August. The purpose of the proposed sitting was to deal with an emergency arising from a strike in the oil industry. On 3 August the Prime Minister advised the President that, in the light of developments that had taken place, he did not seek a meeting on 4 August and senators were so advised. Subsequently, the Senate met as originally planned, namely, 15 August 1972.

An adjournment resolution which empowers the President to change the time of meeting usually also empowers the Deputy President to act for the President if the President is not available. Where both the President and the Deputy President are to cease to be senators during a long adjournment, a special resolution is passed empowering the holders of those offices, as named persons, to exercise the power of altering the time of meeting (12/6/1981, J.401).

The adjournment of the Senate may be moved at any time by or on behalf of a minister (SO 53(2)), but such a motion may be moved only when there is no other business before the chair, so that debate on a matter under consideration must be adjourned before the adjournment of the Senate is moved.

A senator who is not a minister may not move the adjournment of the Senate except by leave of the Senate or pursuant to a suspension of standing orders (see under Leave of the Senate and Suspension of standing orders, below).

At the time specified by standing order 55 for each sitting day, the President proposes the question that the Senate do now adjourn, without a motion being moved (SO 54). If the Senate is in committee of the whole at that time, the Chair of Committees leaves the chair and reports to the Senate, and on that report being made the President proposes the question for the adjournment.

The question that the Senate do now adjourn is open to debate, and matters not relevant to the question may be debated (SO 53(4)). This means that senators speaking to the motion may refer to any matters, and the question for the adjournment is one of the principal opportunities for senators to raise matters they wish to debate. A speaking time limit of 10 minutes per speaker applies. **(See Supplement)**

There are, however, limitations on the debate. The normal rules of order, for example, relating to offensive words (SO 193), apply to the debate. It is not in order to anticipate debate on a matter on the Notice Paper (SO 194(1), subject to (2)), although this rule is interpreted liberally, as explained in Chapter 10, Debate. It is also not in order to attempt to revisit a debate adjourned or concluded earlier in a sitting. It has been ruled, however, that this does not prevent a senator during the adjournment debate seeking an explanation about a matter relating to a debate earlier in the sitting (SD, 30/10/1975, p. 1654). Unconcluded proceedings in a committee cannot be debated (SO 119).

The President adjourns the Senate without putting the question at the conclusion of debate on Tuesdays, and on other days at the conclusion of debate, at the expiration of 40 minutes or at the time specified, whichever is the earlier.

When a minister moves the adjournment, this is normally by agreement. If the adjournment were moved by a minister at a time not specified by order of the Senate, and it appeared that there was opposition to the adjournment, the chair would be obliged to put the question for the adjournment. This would prevent the Senate being adjourned against its will, and would be in keeping with standing order 53(1).

The question for the adjournment of the Senate may not be amended (SO 53(3)).

On 12 September 1972 President Cormack ruled that the question for the adjournment at 10.30 pm be not put until a point of order had been resolved. He considered that it was proper that there should reside in the chair a discretion to delay the question for the adjournment until a point of order had been determined, especially when it involved a serious matter of the conduct of a senator. This ruling is supported by standing order 197(3), which provides that all questions of order, until decided, suspend the consideration and decision of every other question. The President further ruled that, as the time taken after 10.30 pm was outside the normal debating time and was for the purpose of finalising the matter of order, the speaking time of the senator affected would be calculated to 10.30 pm (SD, pp 790, 809).

An order may be made that the Senate adjourn at a certain time. When the specified time is reached, the President interrupts the debate then proceeding and adjourns the Senate forthwith to the next sitting day.

Summoning of the Senate when not sitting

Apart from the power of the President to alter the specified time of the next meeting, the standing orders require the President to summon the Senate to meet during an adjournment at the request of an absolute majority of senators, represented, in the case of senators who are members of a party, by their party leaders or deputy leaders (SO 55(2)-(5)).

This provision began its life as a special order first agreed to in 1967, was regularly incorporated in resolutions specifying the time of the next meeting, was incorporated into sessional orders in 1985, and finally included in the new standing orders adopted in 1989.

Meetings of the Senate under this provision were held on 20 June 1967 to consider the disallowance of postal and telephone charges regulations, and 9 July 1975 to consider the government's overseas loans activities. A meeting on 21 January 1991 was called to consider the Gulf war at the request of the government when it was apprehended that party leaders representing an absolute majority of senators would ask the President to summon the Senate. A meeting of the Senate was called on 7 November 2003, within a period of sittings, under this provision, to deal with urgent legislation (7/11/2003, J.2672). A similar meeting was called on 3 November 2005 (a day on which estimates hearings were also held) to consider legislation relating to terrorism (3/11/2005, J. 1300).

Meetings after prorogation or dissolution of House

Under section 5 of the Constitution, the Governor-General may by proclamation prorogue the Parliament. Prorogation, on the conventional interpretation, has the effect of terminating a session of Parliament until the date specified in the proclamation or until the Houses are summoned to meet again by the Governor-General, and of terminating all business pending before the Houses.

Prorogation is regarded as dispensing with sittings of the Senate which have been fixed by order of the Senate. Orders of the Senate setting its sitting days are regarded as operating only so long as the parliamentary session continues and as having no effect if a prorogation intervenes, unless express provision is made for sittings after prorogation (see below). Similarly, orders of the Senate directing committees to meet, for example, for estimates hearings, do not operate if a prorogation intervenes. Most committees have the power to meet after a prorogation and could meet if they choose to do so.

The Senate has not met after a prorogation and before the opening of the next session by the Governor-General. The question of whether it could do so has been the subject of differing opinions. These were contained in documents presented to the Senate on 19 and 22 October 1984. The documents were:

> Letter from the Attorney-General (Senator Greenwood) to the President of the Senate (Senator Cormack), 24 October 1972.
> Opinion by Mr R.J. Ellicott, when Solicitor-General.
> Opinion by Professor C. Howard, University of Melbourne, March 1973.
> Opinion by Professor G. Sawer, Australian National University.
> In the matter of the Power of the Senate or its Committees to sit after dissolution or prorogation—Opinion by the Solicitor-General, Dr G. Griffith, 9 October 1984.

> The Power of the Senate or Its Committees to meet after a dissolution of the House of Representatives or a prorogation of the Parliament and the publication of a Committee Report when the Senate is not sitting—Paper by Senate Clerk-Assistant (Committees), Mr H. Evans, 18 October 1984.

The generally accepted view is that a prorogation, as well as terminating a session and pending business, prevents the Houses of the Parliament meeting until they are summoned to meet by the Governor-General or they meet in accordance with the proclamation of prorogation. The opinion of Professor Howard, however, is that a prorogation does not prevent the Senate meeting. The basis of this view is that, while a prorogation prevents the Parliament as a whole meeting for legislative purposes, under Australia's constitutional arrangements the Senate may meet to transact its own business as it chooses.

The provisions in standing order 55, relating to the calling of the Senate to meet at the request of an absolute majority of senators, apply only to periods when the Senate is adjourned, as their history and their context in the standing orders indicate.

A prorogation does not, however, prevent Senate committees meeting if they are authorised by the Senate to do so. It may appear paradoxical that the Senate may authorise its committees to do what it cannot do itself, but the generally accepted view is that this is one of the powers of the Senate under section 49 of the Constitution (see, for example, of the opinion of 9 October 1984 of the Solicitor-General). Most Senate committees are empowered by the Senate to meet after a prorogation.

Under section 5 of the Constitution, the Governor-General may also by proclamation dissolve the House of Representatives.

Before 1928 it was the practice to prorogue the Parliament prior to a dissolution of the House of Representatives. This is also the practice in the United Kingdom. From 1928 to 1993 dissolutions of the House of Representatives occurred without a preceding prorogation. Due to an error in the wording of the dissolution proclamation, which arose from a misunderstanding of the procedures, the dissolution proclamations during that period included a phrase purporting to discharge senators from attendance, a phrase without any constitutional basis. The matter was the subject of correspondence between the Clerk of the Senate and the Official Secretary to the Governor-General, which was tabled in the Senate on 14 August 1991. At the 1993 general election the practice of proroguing the Parliament before a dissolution of the House of Representatives was restored.

The question arises whether the Senate may meet after a dissolution of the House of Representatives in the absence of a prorogation of Parliament. This question was also the subject of the various opinions tabled in the Senate on 19 and 22 October 1984. The government's legal advisers attempted to argue that the inclusion in a dissolution proclamation of the phrase purporting to discharge senators from attendance was the equivalent of a prorogation, ignoring the fact that that phrase was an error arising from confusion about the wording of previous proclamations. The Senate, however, concluded that there is nothing to prevent it meeting after a dissolution of the House of Representatives. A resolution was passed on 22 October 1984, in effect asserting the Senate's right to meet at that time. The resolution declared that, should the Senate meet after a dissolution of the House, the powers, privileges and immunities of the Senate

under section 49 of the Constitution would be in force in respect of that meeting. The resolution also asserted the right of committees empowered by the Senate to do so to meet after a dissolution of the House.

The Senate has not met during a period when the House was dissolved, but Senate committees have often done so, and have also often met after a prorogation. Proceedings at such meetings have included the hearing of evidence in public session.

If the Senate were to meet after a prorogation, the business before the Senate would be the business pending at the prorogation, and it would be for the Senate to determine which business it should pursue. The Senate's agenda, and those of its committees, are therefore regarded as continuing until the day before the opening of the next session.

For further treatment of this matter see Chapter 19, Relations with the Executive Government, under Effect of prorogation and of the dissolution of the House of Representatives on the Senate.

Times of meeting

The days and times of meeting of the Senate are specified in standing order 55. It provides for meetings on Monday to Thursday of each week. The times of meeting are 12.30 pm on Mondays and Tuesdays and 9.30 am on other days.

There are normally three periods of sittings during a year, from February to March, May to June and August to December, with adjournments in between.

This pattern of sittings specified by the standing order is normally subject to some alteration in each period of sittings by a special order. At the beginning of each period a resolution specifies the days of sitting; usually the starting times are as provided by the standing order. It is now not normal for the Senate to sit on Fridays, which are reserved for committee meetings.

Suspension of sittings

During any sitting there are usually suspensions of the sitting, which means that the sitting is temporarily interrupted and resumes at the point in the routine of business at which the Senate left off (a suspension of a sitting is often followed by business taken at a fixed time, such as question time at 2 pm). A suspension of a sitting is therefore to be distinguished from an adjournment, which ends a sitting, so that when the Senate sits again the routine of business is commenced anew. Standing order 55 provides for suspensions of sittings at particular times.

A sitting may also be suspended by a motion moved and carried when there is no other business before the chair. A minister may move such a motion without notice under standing order 56, but a senator who is not a minister may not move such a motion except by leave of the Senate or pursuant to a successful motion for the suspension of standing orders (these matters are explained in Chapter 8 under Leave of the Senate and Suspension of standing orders).

Occasionally a sitting is suspended over one or more days so that the Senate can resume on another day at the point in its business where it left off without beginning the routine of business

anew. For example, the sitting of the Senate which began at 10 am on Thursday, 12 November 1992 continued until 6.11 am on Friday, 13 November, because of 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 pm 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. The sitting continued until 12.41 am on Tuesday, 17 November. A motion to suspend the sitting until 9.30 am that morning was then carried. When the sitting resumed consideration of the appropriation bills continued until concluded that afternoon. Similarly, the sitting which began on Thursday, 16 December 1993 continued on 17, 18, 20 and 21 December, with protracted proceedings on the Native Title Bill 1993, and the sitting of 9 July 1998 continued on 10 and 11 July 1998, mainly because of telecommunications legislation. In some instances the Senate has provided by order in advance for the suspension of its sittings (12/8/2004, J.3904).

The advantage of suspending a 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 (on 17 November 1992, however, a special order was made to allow for question time on that day). If used excessively by a determined majority, the procedure could be severely restrictive of the rights of individual senators. The suspensions have been rationalised by the need to pass the appropriation bills and other urgent legislation, 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 raises 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 6 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. Departments responsible for forwarding delegated legislation for tabling have been advised that to avoid any doubts they should assume that the days to which sittings are suspended are separate sitting days for the purposes of statutory tabling requirements. (see also Chapter 15, Delegated Legislation)

Chapter 8

CONDUCT OF PROCEEDINGS

THIS CHAPTER describes how the Senate conducts its business once it has met, and how the business to be dealt with is determined.

Quorum

Section 22 of the Constitution provides:

> Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

By the *Senate (Quorum) Act 1991*, which was introduced in accordance with a recommendation of the Senate Select Committee on Legislation Procedures in 1988, the quorum of the Senate was altered to one quarter of the senators, that is, 19 out of 76 senators.

The standing orders of the Senate contain provisions to ensure that a quorum is kept during a sitting of the Senate.

If a quorum is not present when the President takes the chair at the beginning of a sitting, the bells are rung for a further five minutes, and if a quorum is not then present, the President adjourns the Senate till the next sitting. A senator present at this time is not allowed to leave the chamber while a quorum is being formed (SO 51).

At any time during a sitting, a senator may draw attention to the lack of a quorum, and for that purpose may interrupt a senator who is speaking (SO 52(3), 197(1)). The bells are then rung for four minutes, and if a quorum is still not present the President adjourns the Senate till the next sitting. The doors remain unlocked after the bells have been rung and when the senators are being counted. A senator who enters the chamber at that stage may be counted for the purpose of a quorum, but not one who enters after the President has finally declared that a quorum is not present.

If a division reveals that a quorum is not present, the President adjourns the Senate till the next sitting, and no decision is taken as a result of the division (SO 52(1)).

If attention is drawn to the lack of a quorum in committee of the whole, and if a quorum is still not present after the bells have been rung for four minutes, or if a division in the committee reveals the lack of a quorum, the Chair of Committees leaves the chair and reports to the Senate

(SO 147). When that report is made the bells are rung for four minutes, and if a quorum is not then present the President adjourns the Senate till the next sitting day (SO 52(2)).

A senator present in the chamber may not leave the chamber while a quorum is being formed (SO 52(4)). A senator who leaves or attempts to leave the chamber contrary to this standing order may be required by the chair to return.

If a quorum is called for when a senator is speaking, the time taken to form a quorum does not come out of the senator's speaking time. Nor does it reduce the time for a debate (SO 52(7)).

If the Senate is adjourned for lack of a quorum, which is called a "count-out", the names of the senators present are recorded in the Journals (SO 52(6)).

Occasionally it is suggested that the ability of a senator to call attention to the lack of a quorum should be restricted, because the frequent use of that procedure may disrupt the transaction of business. The requirement for a quorum has been virtually eliminated in the British House of Commons for this reason. In view of the explicit terms of section 22 of the Constitution, however, any restriction on the right of a senator to call attention to the absence of a quorum may be regarded as unconstitutional, as a procedural rule of the Senate cannot be inconsistent with the Constitution. (For a discussion of this point, see Finance and Public Administration Committee, additional estimates 2007-08 hearing, transcript, pp 6-7.)

It is not the practice for the President to call attention to the absence of a quorum. The President must be satisfied that a quorum is present before taking the chair but, once the chair is taken, the presence of a quorum is the responsibility of the Senate.

The oft-made assertion that it is the responsibility of the government to maintain a quorum is not supported by the rules. The responsibility rests with all senators. This principle was affirmed by a resolution agreed to by the Senate on 4 October 1989 (J.2083-5).

Notice Paper

On each sitting day a Notice Paper is issued showing all outstanding business on the Senate's agenda. There is no Notice Paper for the first sitting day of a new session, as the business before the Senate lapses on the previous day: see Chapter 7, Meetings of the Senate, under Meetings after prorogation or dissolution of House. The full Notice Paper appears on the Internet and an abbreviated version is issued in printed form.

In principle the business set out on the Notice Paper may be transacted on the day for which it is listed, which is usually the sitting day for which the Notice Paper is issued, and in the order indicated on the Notice Paper. Usually, however, the Senate has before it more business, particularly business initiated by senators who are not ministers, than can possibly be transacted over a session, and only a fraction of the business on the Notice Paper is reached on any sitting day. Business not reached remains on the Notice Paper for the next day of sitting and for each successive day until it is disposed of (SO 80(2), 97(2)).

The Notice Paper shows the order in which the listed business should be transacted, in accordance with the rules relating to the order of business set out in standing orders.

Ministers, however, may arrange the order of items of government business on the Notice Paper, which usually consist of government bills, in the order they choose (SO 65). This provision is used by the government to rearrange the order of government business from day to day, so that government business does not appear on the Notice Paper in the same order from day to day.

It is also open to the Senate to rearrange the order of business (see under Rearrangement of business, below), and therefore the Notice Paper does not necessarily indicate the order in which business will be transacted.

Because of this, another, briefer document, the Order of Business, or Senate "Red", is issued on each sitting day, showing the business which it is intended to deal with on that day and the order in which it is expected that business will be transacted. Even this document, however, is not an infallible guide, because some business may not be reached and the order of business may be rearranged during the day. (For further information on procedural publications, see Chapter 3, Publication of Proceedings.)

Although the Senate begins a new session after a prorogation with an empty Notice Paper, business which has lapsed because of a prorogation may be restored to the Notice Paper by motion on notice, and consideration of that business resumed where it was left off. It is the practice to restore such items of business to the Notice Paper at the beginning of each session. (See also Chapter 12, Legislation, under Revival of bills.)

Routine of business

The routine in which the Senate deals with its business is set out in standing order 57. This routine varies according to whether the Senate sits before or after 2 pm, because question time on most days commences at 2 pm, and other items which are taken after question time then follow, such as debates on urgency motions and matters of public importance. The routine of business is as follows:

Monday:

(i) Government business only
(ii) At 2 pm, questions
(iii) Motions to take note of answers
(iv) Petitions
(v) Notices of motion
(vi) Postponement and rearrangement of business
(vii) Formal motions - discovery of formal business
(viii) Any proposal to debate a matter of public importance or urgency
(ix) Government business
(x) At 9.50 pm, adjournment proposed
(xi) At 10.30 pm, adjournment.

Tuesday:

(i) Government business only
(ii) Questions
(iii) Motions to take note of answers
(iv) Petitions
(v) Notices of motion
(vi) Postponement and rearrangement of business
(vii) Formal motions - discovery of formal business
(viii) Any proposal to debate a matter of public importance or urgency
(ix) Government business
(x) At 6.50 pm, consideration of government documents for up to 30 minutes under standing order 61
(xi) At 7.20 pm, adjournment proposed
(xii) Adjournment.

Wednesday:

(i) Government business only
(ii) At 12.45 pm, matters of public interest
(iii) At 2 pm, questions
(iv) Motions to take note of answers
(v) Petitions
(vi) Notices of motion
(vii) Postponement and rearrangement of business
(viii) Formal motions - discovery of formal business
(ix) Any proposal to debate a matter of public importance or urgency
(x) Consideration of committee reports under standing order 62(4)
(xi) Government business
(xii) At 6.50 pm, consideration of government documents for up to 30 minutes under standing order 61
(xiii) At 7.20 pm, adjournment proposed
(xiv) At 8 pm, adjournment.

Thursday:

(i) Petitions
(ii) Notices of motion
(iii) Postponement and rearrangement of business
(iv) Formal motions - discovery of formal business
(v) Consideration of committee reports under standing order 62(4)
(vi) Government business
(vii) At 2 pm, questions
(viii) Motions to take note of answers
(ix) Any proposal to debate a matter of public importance or urgency
(x) Not later than 4.30 pm, general business
(xi) Not later than 6 pm, consideration of government documents under general business
(xii) Not later than 7 pm, consideration of committee reports and government responses under standing order 62(1)

(xiii) At 8 pm, adjournment proposed
(xiv) At 8.40 pm, adjournment.

Notices of motion, formal motions and postponement and rearrangement of business occur before the Senate embarks on any business for the day except for the "quarantined" government business on Monday, Tuesday and Wednesday; these matters are explained below.

Special precedence for certain business

Certain business is given special precedence over all other business.

A notice of motion for the reference of a matter of privilege to the Privileges Committee is listed on the Notice Paper as a matter of privilege and takes precedence over all other business on the day for which the notice is given, provided that the matter has been raised in writing with the President and the President has given it precedence in accordance with standing order 81 (see Chapter 2, Parliamentary Privilege, under Raising of privilege matters).

Certain business is categorised as business of the Senate, a category separate from government business, that is, business introduced by ministers, and general business, that is, business which is introduced by senators who are not ministers. Business of the Senate takes precedence over government and general business on the day for which it is listed (SO 58). The following matters are classified as business of the Senate:

(a) a motion for leave of absence for a senator;

(b) a motion concerning the qualification of a senator;

(c) a motion to disallow, disapprove, or declare void and of no effect any instrument made under the authority of any Act of Parliament which provides for the instrument to be subject to disallowance or disapproval by either House of the Parliament, or subject to a resolution of either House of the Parliament declaring the instrument to be void and of no effect (see Chapter 15, Delegated Legislation);

(d) an order of the day for the presentation of a report from a committee;

(e) a motion to refer a matter to a standing committee.

By special order of the Senate, other items of business may be classified as business of the Senate, and placed on the Notice Paper and given precedence accordingly. In recent years it has been the practice to make the consideration of reports from the Procedure Committee business of the Senate.

A business of the Senate item which is adjourned continues to take precedence over government and general business on the day to which it is adjourned.

Government and general business

Government business (business initiated by ministers) takes precedence over general business (business initiated by other senators) at all times except for two and a half hours on Thursday at the stage indicated in the routine of business (SO 59).

During the three "quarantined" periods for government business, 12.30 pm to 2 pm on Mondays and Tuesdays and 9.30 am to 12.45 pm on Wednesdays, only government business may be transacted, and everything else requires leave or a suspension of standing orders (30/8/2004, J.3947).

Ministers occasionally initiate business with an indication that they do so in a private and not a ministerial capacity. Such business is entered on the Notice Paper as general business.

A motion for the consideration or adoption of the report of a committee of the Senate and any government statement on such a report takes precedence over other general business on the day on which it is set down for consideration (SO 60).

In practice, the order of business is usually rearranged to determine the items of general business which will be considered each Thursday. This is often done by a motion moved by a minister under standing order 56; the items of business specified in such a motion are the only items to be considered during the available time. The items to be considered are usually determined by agreement between the non-government parties in the Senate. Committee reports are usually not considered at the time for general business, but in accordance with the special provisions for their consideration under standing order 62 (see below).

If a business of the Senate item is under consideration or not reached at the time for the commencement of general business, it takes precedence in accordance with standing order 58.

The Senate may extend the time for consideration of general business (11/4/1991, J.924-6).

Consideration of committee reports and Auditor-General's reports

There is a period of one hour on Wednesday and Thursday for debate on committee reports then presented, with a speaking time limit of 10 minutes for each senator speaking to a report (SO 62(4)). This procedure applies to any document presented by a committee at that time.

Another period of one hour on Thursday is provided for consideration of committee reports and government responses to such reports, and each senator may speak to any adjourned debates on motions for the consideration or adoption of committee reports and government responses for not more than 10 minutes (SO 62). A senator who has already spoken in a debate may speak again under the standing order, and the exercise of the right to speak under the standing order does not prevent a senator speaking for a third time if a motion for the consideration or adoption of a committee report or a government response is called on during the consideration of general business. Because this third opportunity, "in the normal course of business", does not in practice arise, senators are allowed to speak for a third time if an adjourned debate is called on again on Thursday.

Auditor-General's reports are also considered at this time, after committee reports.

Any outstanding notices of motion for the consideration or adoption of committee reports, which are relatively rare, are first considered at that time on Thursday because of the special precedence they are given (SO 60).

Consideration of government documents

A special time is provided on Tuesday and Wednesday for the consideration of documents presented by ministers. Under standing order 61, 30 minutes are set aside for senators to move motions to take note of one or more of such documents, and each senator may speak for not more than five minutes to such a motion.

Documents which are presented at any time and not considered under the standing order are automatically placed on the Notice Paper for future consideration.

An hour of the time provided for general business on Thursdays is allocated for consideration of adjourned motions to take note of government documents or documents not considered in the 30 minute period. A senator who has already spoken in a debate during the 30 minute period may then speak again, and may speak for a third time if an adjourned debate is again called on. Because this third opportunity, "in the normal course of business", does not in practice arise, senators are allowed to speak for a third time if an adjourned debate is called on again on Thursday.

Documents tabled on any day of the week are carried over for consideration each day until they appear on the list for consideration under general business on Thursday.

A relevant amendment may be moved to a motion to take note of a document, but an amendment to take note of a different document is not a relevant amendment (see ruling of Deputy President West, SD, 24/3/1998, pp 1152-3).

Curtailment of non-government business

The Senate sometimes dispenses with some or all of the elements of general business on Thursdays, usually to devote more time to government business.

If general business is dispensed with in advance by special order on Thursdays, government business automatically occurs at that time. This is because standing order 59 provides that general business takes precedence over government business at the time provided on Thursdays, but does not require that only general business be considered at that time. (Business of the Senate takes precedence over both.) If, however, general business is not dispensed with by special order but is called on and concludes early, the consideration of committee reports then occurs and the question for the adjournment is then proposed in accordance with standing order 54(4). Dispensing with any element of business on Thursdays after the commencement of general business has the same effect of the adjournment being proposed early. The basis of this distinction is that, once general business has commenced,

there is no provision in the routine of business for government business to be resumed, and there is therefore an expectation that there will be no further government business considered that day.

If consideration of government documents at 6.50 pm on Tuesdays and Wednesdays is dispensed with by special order this results in the business before the Senate at 6.50 pm running to 7.20 pm. The basis of this is that there is then nothing to prevent the continuation of that business, and there is no possibility of senators being caught unawares by the resumption of business as there is on Thursdays.

On the same basis, if general business and consideration of committee reports are both dispensed with by special order together and in advance of their commencement, government business runs to 8 pm.

If there are no orders of the day relating to committee reports or government documents but consideration of them is not dispensed with by order, this is regarded as the equivalent of the item being called on and concluding early.

Presentation of other documents

Reports from committees and other documents ordered by the Senate to be produced may be tabled, documents may be presented by ministers (apart from those which have a specified time for consideration in the routine of business) and documents required by statute to be tabled may be presented, at any time when there is no other business before the chair. (SO 63 refers to reports of committees and documents ordered to be produced; SO 166 to documents tabled by ministers and under statute.) Such documents are usually presented before business is commenced in the afternoon and may be debated on motions moved by leave. Such motions are subject to special time limits: 30 minutes per motion, 60 minutes for all motions moved consecutively and 5 minutes per speaker (SO 169(2)).

Matters of public interest

Between 12.45 pm and 2 pm on Wednesdays senators may speak on matters of public interest without any question before the chair, and with a time limit of 15 minutes for each speaker (SO 57(2)).

Notices of motion and orders of the day

Within each category of business listed on the Notice Paper, there are two types of business: notices of motion and orders of the day.

A notice of motion is a statement of intention by a senator that the senator intends to move a motion in the terms of the notice on the day for which the notice is given. Notices of motion are given at the time indicated in the routine of business, and may not be given at other times except by leave (except notices for references to legislative and general purpose standing committees: SO 25(11)).

There is an opportunity, at the time indicated in the routine of business, for motions of which senators have given notice to be put and determined without debate or amendment, if no senator objects to that course (SO 66). At that time the President asks whether there are any formal motions, and a senator may ask that a motion of which the senator has given notice be taken as formal. If no senator present objects to that course, the motion is then put and determined without amendment or debate. Motions which are not determined in this way are dealt with in accordance with the rules relating to the routine and order of business.

Further information on notices of motion and formal motions is contained in Chapter 9, Motions and Amendments.

Orders of the day are items of business which the Senate has ordered to be taken into consideration on a particular day. Most orders of the day consist of adjourned debates on matters which have been considered earlier, and most are listed for the next day of sitting.

Notices of motion and orders of the day listed for a sitting day which are not reached on that day are automatically deferred till the next day of sitting and are listed on the Notice Paper accordingly (SO 80(2), 97(2)).

A notice of motion may be withdrawn by a senator who has given the notice. As a notice of motion is simply a statement of intention by a senator to move a motion, it is entirely under the control of the senator who has given the notice, and who may choose not to carry out the stated intention. (Special provisions apply to the withdrawal of notices of motion for the disallowance of delegated legislation: SO 78; see Chapter 9, Motions and Amendments, under Notice of motion.) A senator may also alter the terms of, or the day for moving, a motion of which notice has been given, provided that this is done at least a day before the motion is due for consideration (SO 77).

An order of the day, being a matter which the Senate has ordered for consideration on a particular day, can be removed from the Notice Paper only by a motion duly moved to discharge the order of the day (SO 97(4)).

New business

New business may not be commenced after the question for the adjournment of the Senate has been first put on any sitting day (SO 64). The purpose of this rule is to promote certainty in the conduct of business; senators should be able to assume that business in which they have an interest will not be commenced after the prescribed adjournment time. New business means any business on which the Senate is not engaged at the time when the adjournment is put. This means that, if the adjournment of the Senate is deferred and the Senate continues to transact business after that time, the only business dealt with is the business on which the Senate was engaged at that time.

This prohibition may, however, be suspended by motion on notice or by an absolute majority of senators (see under Suspension of standing orders, below), and this may occur at the end of a period of sittings due to the pressure of business (a contingent notice has been used for this purpose: 16/6/1992, J.2444). Such a motion must be moved before the question for the

adjournment is put, but there are precedents for the motion being moved by leave after the adjournment is put (see under Leave of the Senate, below).

Rearrangement of business

As has been indicated, it is common for the Senate to rearrange the order of its business, so that business is dealt with in an order different from that specified by the standing orders.

There are two ways in which this can be done under the standing orders.

A minister may at any time without notice move a motion connected with the conduct of the business of the Senate (SO 56). This standing order empowers ministers to move motions at any time when there is no other business before the chair to rearrange any of the business before the Senate. The standing order thus confers upon ministers a special right which is not possessed by other senators.

The standing order is now regarded as permitting any motion to specify the order in which the Senate will deal with business which is before it, to postpone any business at any time, to adjourn debate on any business before the Senate, or to have the question before the Senate put (in relation to the adjournment and the closure, see SO 199(3) and 201(6)).

The standing order does not allow a motion to bring on for consideration some matter of business not in some sense before the Senate. Nor does it allow a motion to dispense entirely with a category of business which the Senate has ordered (including by standing order) to be dealt with at a particular time. For example, it does not allow a motion to dispense with questions, with the reporting of a proposal for an urgency motion or a matter of public importance or with general business, but it would allow a motion to postpone any of those matters to a particular time later in a day. Once a category of business has been commenced, a minister may, under standing order 56, move a motion (but not so as to interrupt the consideration of a particular item of business without first adjourning the debate) that that business not be further proceeded with; for example, when general business is under consideration a minister may move that general business not be further proceeded with. The rationale of this is that it is analogous to adjourning a debate, and those senators who have an interest in general business would then be in attendance.

In earlier times the provision in the standing order was regarded as allowing a minister to move virtually any motion to have the Senate consider any business and in any order regardless of the standing orders. In more recent times questions of interpretation have arisen because of the provisions now in the standing orders which fix the order of business in much greater detail than formerly, in particular, provisions which require that particular business be taken at particular times or stages in the routine of business. Because the power conferred by standing order 56 is not a power to suspend standing orders without notice and without an absolute majority, and because the rights of senators could be severely infringed by, for example, a motion to dispense with the consideration of government documents, some refinement of the interpretation of the standing order has occurred.

The other method by which business may be rearranged under the standing orders is by the postponement of business by a senator who has charge of it. Before the time provided in the

routine of business a senator may lodge with the Clerk a notice that any notice of motion standing in the senator's name, or order of the day of which the Senator is in charge on the Notice Paper for that day, be a notice of motion or order of the day for a subsequent day. At the time provided the Clerk reads a list of the postponement notices, and the items of business are postponed accordingly, but at the request of any senator the question is put on any item, and such a question is determined without amendment or debate (SO 67). Before an amendment of the standing order in 1999, the senator in charge of any particular item of business had to move a motion for a postponement. In the absence of the senator in charge of any business, a postponement may, at the request of such senator, be made by any other senator. Normally the Senate accepts a postponement by a senator under this standing order. (For a postponement notification required to be put, see 18/8/2003, J.2178; 19/8/2003, J.2213.)

If a senator moves a motion by leave to postpone business at other times, it is regarded as a motion to rearrange business (see below) and therefore subject to debate.

In addition to exercising these rights under the standing orders, senators may seek to rearrange business by leave of the Senate or by the suspension of standing orders (see below). (For rearrangement of government business by non-government senators, see Chapter 12, Legislation, under Control of bills.)

Interruption of business

Business the consideration of which is interrupted, for example, by the calling on of other business at a prescribed time or the putting of the question for the adjournment of the Senate at the time specified in the standing orders, is deemed to have been adjourned. If the interruption occurs in the course of the day the adjournment is till a later time of the day. If interrupted business is not reached later in the day, or the adjournment of the Senate intervenes, the business is listed on the Notice Paper as business for the next day of sitting (SO 68).

In practice, where debate is on a non-substantive question which does not require a definite decision of the Senate, and it would not be rational to retain the item on the Notice Paper, the Chair puts the question when the time for debate has expired. An example is a motion to take note of a question after question time.

Standing order 68(2)(c) provides that if a vote is being taken the vote shall be completed. This is taken to refer to the whole process of determining a question, so that if the process of determining the question has commenced it is concluded when the time has expired. Thus, on 28 August 1997 in debate on an opposition general business motion concerning tariffs, the motion to close debate was put just before the time for the debate expired. The division on the closure was then concluded. That motion having been carried, this started the process of determining the question. The process was then completed by putting the amendment on the question and then putting the main question.

Urgency motions under standing order 75 are subject to the special provision in paragraph (7) whereby the question on an urgency motion is put when the time expires.

Resumption of postponed and adjourned business

Normally business is postponed or adjourned till the next day of sitting, and therefore remains on the Notice Paper to be called on in its due order. Sometimes, however, business is postponed till a later hour, that is, later on the same day. This includes business interrupted in the course of a day, which is deemed to be adjourned till a later hour. There is then a question of when it is to be called on.

Where a government business notice of motion or order of the day is postponed or adjourned till a later hour, it is called on during a time when government business may be considered, when a minister indicates that it is to be called on.

Where an item of general business is postponed or adjourned till a later hour, it is not called on unless and until it is reached in the normal course of consideration of general business (which in practice does not happen), or unless the order of business is rearranged to have it called on.

A business of the Senate item which is postponed or adjourned till a later hour is called on when the senator in charge of the item indicates that it is to be called on, provided only that it does not interrupt the consideration of business which, under a standing or other order, is considered at a fixed time or place in the routine of business, such as questions, a matter of public importance or urgency, consideration of government documents under standing order 61 and consideration of committee reports under standing order 62. Such a business of the Senate item is called on at the direction of the senator in charge of it notwithstanding that it intrudes upon the time available for government business or general business; the rationale of this is that business of the Senate takes precedence over government and general business under standing order 58. A business of the Senate item which is interrupted is called on again when business other than fixed-time business is resumed, regardless of whether government or general business would otherwise be considered at that time.

Leave of the Senate

A motion otherwise requiring notice may be moved without notice by leave of the Senate (SO 88). Senators may also seek leave to take other courses of action which would not otherwise be in accordance with standing orders, for example, to make a statement or to present a document.

Leave of the Senate means unanimous consent of senators present, and is granted when no senator present objects to the course of action for which leave is sought.

A senator seeking leave must make clear to the Senate the course of action for which leave is sought. The President then asks: “Is leave granted?”. A senator may object simply by saying “no”. If there is no objection, the President states: “There being no objection, leave is granted”, and the senator granted leave then proceeds on the course of action for which leave has been granted.

Leave is restricted to the particular purpose for which it has been sought, and is subject to any limitations contained in the application for leave. Thus a senator granted leave to make a statement cannot then move a motion, and a senator granted leave to move a motion relating to one subject cannot then move a motion relating to another subject; similarly, a senator who has successfully sought leave to speak for two minutes cannot speak for longer than that time.

The granting of leave does not suspend the other requirements of the standing orders. For example, a senator who has successfully sought leave to make a statement cannot in the course of the statement make any remarks which would be out of order under the rules of debate in standing order 193.

In practice, a great deal of the Senate's business is transacted by leave, and during any typical sitting senators frequently seek leave to move motions, make statements and take other actions which would not be permissible under the standing orders. A senator normally cannot move a motion without giving notice, and a motion of which notice has been given by a senator who is not a minister would normally not be reached in the course of a session because of the large number of notices of motion and other business on the Notice Paper. The granting of leave therefore provides an expeditious and convenient way of transacting business by unanimous consent.

Suspension of standing orders

Another method of transacting business which would not otherwise be in accordance with standing orders is for the Senate to suspend its standing orders to allow a particular course of action to be undertaken.

In cases of urgent necessity standing orders may be suspended on motion without notice if the motion is carried by an absolute majority of the whole number of senators (SO 209). The proviso relating to urgent necessity is a matter for the Senate to judge. If a senator moves the suspension of standing orders, the Senate determines whether the matter for which the suspension is sought is a matter of urgent necessity by its determination of the motion (ruling of President Gould, SD, 21/7/1909, p. 1378).

If notice of a motion to suspend standing orders is given, however, the motion may be carried by a simple majority, that is, a majority of the senators present and voting. Such a notice of motion has no special precedence over other business, so that if a senator who is not a minister gives such a notice it is placed on the Notice Paper as general business and in all likelihood will not be reached in the normal course of business.

In order to move for the suspension of standing orders and to avoid the requirement for an absolute majority, which is difficult to achieve, senators have devised a number of contingent notices of motion. These notices indicate that, contingent on a particular stage being reached in the Senate's business, the senators will move the suspension of standing orders in order to allow a particular course of action.

This device of moving for the suspension of standing orders under a contingent notice is particularly used for the rearrangement of business. As has been explained above, a minister may

move a motion relating to the rearrangement of business before the Senate at any time without notice under standing order 56, but a senator who is not a minister may move only to postpone items of business of which the senator has charge. There is no right of a senator who is not a minister to move for the rearrangement of business. Thus party leaders and independent senators usually place on the Notice Paper contingent notices that they will move to suspend standing orders to allow them to move a subsequent motion to rearrange business before the Senate. A notice of motion which allows this to be done at the time for the postponement for business is in the following terms:

> **LEADER OF THE OPPOSITION IN THE SENATE**: To move (contingent on the President proceeding to the placing of business on any day)—That so much of the standing orders be suspended as would prevent the Leader of the Opposition in the Senate moving a motion relating to the order of business on the *Notice Paper*.

Pursuant to this notice, at the time for the postponement of business a senator may move that so much of the standing orders be suspended as would prevent the senator moving a motion relating to the order of business on the Notice Paper. This motion requires only a simple majority to be carried, and if it is agreed to the senator may then move a motion to rearrange the business of the Senate, for example, to give precedence over all other business to some item of business standing on the Notice Paper in the senator's name.

Senators have also devised contingent notices to allow them to bring on for consideration some completely new item of business which is not on the Senate Notice Paper, for example, some completely new motion. This contingent notice is in the following terms:

> **LEADER OF THE OPPOSITION IN THE SENATE**: To move (contingent on the Senate on any day concluding its consideration of any item of business and prior to the Senate proceeding to the consideration of another item of business)—That so much of the standing orders be suspended as would prevent the Leader of the Opposition in the Senate moving a motion relating to the conduct of the business of the Senate or to provide for the consideration of any other matter.

It will be seen that the suspension of standing orders sought by a motion moved pursuant to this notice would allow a senator to move any motion which a minister may move under standing order 56 or a motion to give precedence to some completely new item of business. Because standing order 56 is not interpreted as allowing a minister to move for the consideration of a completely new item of business, a contingent notice in the following terms is employed by ministers:

> **LEADER OF THE GOVERNMENT IN THE SENATE**: To move (contingent on the Senate on any day concluding its consideration of any items of business and prior to the Senate proceeding to the consideration of another item of business)—That so much of the standing orders be suspended as would prevent a Minister moving a motion to provide for the consideration of any matter.

These contingent notices have virtually overcome the safeguard contained in standing order 209, that a motion for the suspension of standing orders moved without notice requires an absolute majority. It may seem at first sight, therefore, that that safeguard could be removed. If the safeguard were removed, it might also appear that, to avoid complexity in the proceedings, senators should be allowed to rearrange the business without a suspension of standing orders.

The requirements to give a contingent notice and to suspend the standing orders before a motion to rearrange the business can be moved, however, still provide some safeguard. The Senate must make a deliberate decision to depart from the standing orders in order to allow some course of action to be undertaken, and the Senate has an opportunity to determine whether standing orders should be suspended, that is, whether the matter proposed to be raised is of urgent necessity, before making a decision on the merits of that matter. It is therefore considered that the limitations contained in standing order 209 should be maintained.

It has been ruled that a contingent notice of motion of this type may be used only once by any senator at each occurrence of the contingency to which it refers. The rationale of this ruling is that once the Senate has been asked to suspend the standing orders to depart from the order of business on one such occasion and has declined to do so, the request should not be capable of being repeatedly made, because this would provide a means of permanently obstructing the business of the Senate. (The rulings, and expositions of them, occurred on 3/12/1991, J.1826; 5/12/1991, J.1870-1; 16/11/1992, J.3063-4; 30/11/1992, J.3157; the Procedure Committee recommended that the Senate uphold the rulings: 1st Report of 1993, PP 158/1993, 29 September 1993. See also ruling of President Sibraa, 20/12/1993, J.1106; ruling by President Calvert, 14/9/2005, J.1108-9; 15/9/2005, J.1141-2; Procedure Committee, 2nd Report of 2005, PP 280/2005, endorsed by the Senate 9/11/2005, J.1380-1. As a result of the last decision of the Senate, the Chair is able to exercise a discretion in applying the ruling to ensure that adequate opportunity is given to senators to state a case for a suspension of standing orders.)

These general purpose contingent notices for suspension of standing orders are designed to allow the rearrangement of business to bring on any item of business, which of course is not specified in the contingent notices. The use of such notices therefore involves suspending standing orders first, then moving to rearrange the business, then moving the motion concerned. Contingent notices designed to deal with particular circumstances often have suspension of standing orders built into their terms, so that the intermediate step is not necessary (18/10/1996, J.756).

A motion for suspension of standing orders moved during consideration of a matter must be relevant to that matter (SO 209(3)). This means that contingent notices of motion to suspend standing orders to rearrange the business can be employed only when there is no other business before the chair.

Suspension of standing orders is limited to the particular purpose for which the suspension has been sought (SO 210). Thus, if a senator is successful in moving a motion to suspend standing orders to allow the moving of a substantive motion, the only standing orders which are suspended are those which would prevent the moving of the motion, and the motion and any debate on it are still subject to all other provisions of the standing orders, such as standing order 193 relating to rules of debate.

Debate on a motion to suspend standing orders is limited to five minutes for each senator speaking and 30 minutes in total (SO 209(4)). This limitation does not suspend the requirement for relevance to the question of whether standing orders should be suspended (ruling of President Sibraa, 20/12/1993, J.1106). A compound motion incorporating a suspension of standing orders

is subject to these time limits only if the suspension is its primary purpose and not merely incidental to the motion.

A motion for suspension of standing orders may be moved in committee of the whole, provided that it is relevant to the matter under consideration in the committee (SO 209(3). Precedents: 23/10/1956, J.185; 4/6/1969, J.521; 9/11/1977, J.396; 16/5/1980, J.1349). It may be regarded as anomalous that a committee of the whole can suspend the standing orders, but standing order 144(7) provides that in committee of the whole the same rules of procedure apply as in the Senate, except where the standing orders explicitly otherwise provide. Moreover, in dealing with a motion to adopt a report of a committee of the whole the Senate has the opportunity to approve of anything the committee has done in considering the matters referred to it (see Chapter 14 on Committee of the Whole Proceedings).

A question arises as to the effect of the procedural motion to allow a substantive motion to be moved, or some item of business to be called on, after standing orders are suspended. This procedural motion takes the form: "That a motion to ..... may be moved immediately (or, that the order of the day relating to ..... be called on immediately) and have precedence over all other business this day till determined". The question is whether this motion has the effect of suspending the consideration of all other items in the routine of business, such as question time, or whether it merely gives precedence over other business in the strict sense of the word, that is, government and general business. The interpretation which has been followed is that if such a motion is passed before any business is embarked upon, the subsequent substantive motion has precedence over all other business including business which has a fixed place or time in the routine of business. This was the case with the motions agreed to on 9 December 1991 and 5 November 1992 (J.1885, 2965). If, however, the procedural motion is passed at discovery of formal business, at the placing of business or during consideration of government business, the subsequent substantive motion has precedence only over business in the narrow sense, and may be interrupted by other items in the routine of business which have a fixed place or time in the routine, such as question time. This was the case with the motion agreed to on 25 June 1992 (J.2610).

In neither circumstance does continuing debate on the substantive motion interfere with suspensions of the sitting or the putting of the question for the adjournment of the Senate.

Items of business taken together

By special order of the Senate items of business may be taken together. Usually such an order provides for the items to be considered together but for the questions in relation to them to be put separately. (For examples see 14/4/1988, J.628; 19/10/1988, J.1031; 23/11/1988, J.1143, 1144; 13/6/1989, J.1862; 29/8/2000, J.3139-40; 27/11/2000; J.3573.) This procedure of ordering items to be taken together is to be distinguished from the procedure known as a cognate debate, whereby separate items of business remain as separate items but by leave are debated together when one of them is before the Senate (19/5/1988, J.727; 26/5/1988, J.765; 23/11/1988, J.1146). (For the procedures for taking bills together, see Chapter 12, Legislation, under Initiation.)

Questions to senators concerning business

At the time provided for questions, in addition to questions to ministers concerning public affairs and to committee chairs, questions may be asked of senators concerning business of which they have charge (SO 72(1)). As such questions may not anticipate debate on a matter on the Notice Paper (SO 73(2)), they are in effect confined to asking senators when they intend that items of business should be dealt with, and similar questions not going to the merits of the business. (See also Chapter 6, Senators, under questions to senators.)

Recording of proceedings

The proceedings of the Senate are recorded in the Journals of the Senate, which are kept by the Clerk and published (SO 43). The Journals record the proceedings only, that is, matters considered by the Senate and action taken in relation to them; they do not record debate, which is recorded in the transcript known as Senate Debates or Hansard.

The Journals show all votes taken by division in the Senate and how senators present have voted. The Journals also record the attendance of senators; this is important because, under section 20 of the Constitution, the place of a senator becomes vacant if the senator is absent from the sittings of the Senate for two consecutive months without the Senate's permission (see also Chapter 6, Senators, under Leave of absence).

Section 15AB of the *Acts Interpretation Act 1901* provides that the Journals of the Senate may be referred to by courts to assist in interpretation of statutory provisions in accordance with that section.

Further information on publication of proceedings is contained in Chapter 3.

Senate Routine of Business

Monday		Tuesday		Wednesday		Thursday	
12.30 pm	Prayers	**12.30 pm**	Prayers	**9.30 am**	Prayers	**9.30 am**	Prayers
	Government business only		Government documents (*Presented pursuant to order*)		Government documents (*Presented pursuant to order*)		Petitions
			Government business only		Government business only		Notices of motion
2 pm	Questions			12.45 pm	Discussion of matters of public interest (*SO 57(2)*)		Placing of business
	Motions to take note of answers (*Time limit: 30 mins*)	2 pm	Questions	2 pm	Questions		Discovery of formal business
	Petitions		Motions to take note of answers (*Time limit: 30 mins*)		Motions to take note of answers (*Time limit: 30 mins*)		Tabling and consideration of committee reports (*SO 62(4)—Time limit: 1 hr*)
	Notices of motion		Petitions		Petitions		Committee memberships
	Placing of business		Notices of motion		Notices of motion		Messages from House of Representatives
	Discovery of formal business		Placing of business		Placing of business		Order of business
	MPI or urgency motion (*Time limit: 1 hr, or if no motions to take note, 90 mins*)		Discovery of formal business		Discovery of formal business	12.45 pm	If agreed to, 'non-controversial' legislation
	Ministerial statements		MPI or urgency motion (*SO 75—Time limit: 1 hr, or if no motions to take note, 90 mins*)		MPI or urgency motion (*SO 75—Time limit: 1 hr, or if no motions to take note, 90 mins*)	2 pm	Questions
	Tabling of documents		Ministerial statements		Tabling and consideration of committee reports (*SO 62(4)—Time limit: 1 hr*)		Motions to take note of answers (*Time limit: 30 mins*)
	Committee memberships		Tabling of documents		Ministerial statements		MPI or urgency motion (*Time limit: 1 hr, or if no motions to take note, 90 mins*)
	Messages from House of Representatives		Committee memberships		Tabling of documents		Ministerial statements
	Order of business		Messages from House of Representatives		Committee memberships		Government responses to parliamentary committee reports
6.30 to 7.30 pm	Sitting suspended—(DINNER BREAK)		Order of business		Messages from House of Representatives		Tabling of documents
7.30 pm	Order of business continued	6.50 pm	Consideration of government documents tabled earlier in the day (*SO 61—Time limit: 30 mins*)		Order of business	Not later than 4.30 pm	**General business** (*Notices of motion and orders of the day*)
9.50 pm	Adjournment proposed (*Time limit: 40 mins*)	7.20 pm	Adjournment proposed (*No time limit*)	6.50 pm	Consideration of government documents tabled earlier in the day (*SO 61—Time limit: 30 mins*)	Not later than 6 pm	**General business, cont.** (*SO 61(3)—Consideration of government documents. Time limit: 1 hr*)
				7.20 pm	Adjournment proposed (*Time limit: 40 mins*)	Not later than 7 pm	Consideration of committee reports and government responses and Auditor-General's reports (*SO 62—Time limit: 1 hr*)
						8 pm	Adjournment proposed (*Time limit: 40 mins*)

Chapter 9

MOTIONS AND AMENDMENTS

THIS CHAPTER describes how the Senate comes to decisions on items of business before it, by resolutions or orders which begin as motions moved by senators and which may be amended by the Senate before they are agreed to.

Resolutions and orders

The Senate makes decisions by resolutions and orders. A resolution is a statement of the Senate's opinion which does not direct that any action be taken in relation to the matter which is the subject of the resolution; for example, a resolution expressing concern about a situation in a foreign country. Orders are requirements that some action be taken by some person or body subject to the direction of the Senate; for example, an order directing that a standing committee inquire into and report upon a particular matter, and an order that documents be produced to the Senate by the person who has the custody of the documents. (For duration of resolutions and orders, see below.)

This distinction between resolutions and orders is not observed in usage. Generally speaking, only procedural orders, for example, the standing orders, and orders for the production of documents, are referred to as orders, while all other decisions, including many that are technically orders, are referred to as resolutions. Thus the group of orders concerned with matters of privilege agreed to by the Senate on 25 February 1988 are referred to as the Privilege Resolutions.

Motions

A resolution or an order begins as a motion, that is, a proposal submitted to the Senate by a senator. A motion moved by a senator is accepted by the chair only if the standing orders empower the senator to move it at the relevant time, and the terms of the motion conform with the rules of the Senate. If the chair accepts a motion moved by a senator, the chair puts the motion to the Senate in the form of a question. Debate may then ensue if the question is one which, under the rules of the Senate, may be debated. The question is then put again by the chair and voted upon by the Senate. If the Senate agrees to the motion it then becomes a resolution or order of the Senate.

Notice of motion

Motions cannot be moved unless at least one sitting day's notice has been given (SO 76(10), 79), except for motions which the standing orders authorise to be moved without notice. Notice of a

motion is given by a senator stating its terms to the Senate and handing a signed copy to the Clerk, or by lodging the copy only, at the time provided in the routine of business for the giving of notices. Notices cannot be given at any other time except by leave of the Senate, but an exception to this rule is a notice of motion to refer a matter to one of the legislative and general purpose standing committees (SO 25(11); see also SO 81 for privilege motions).

If the Senate dispenses with or alters the routine of business in such a way as to supersede the time for giving notice, this removes only the opportunity to give notices orally, and senators may still lodge notices in writing. This is significant in respect of disallowance motions, where the time for giving notice is statutorily limited for most kinds of delegated legislation (see Chapter 15, Delegated Legislation and Disallowance).

Notice is not required for the following motions:

(a) for the adjournment of the Senate, when moved by or on behalf of a minister (SO 53(2))

(b) connected with the conduct of the business of the Senate, when moved by a minister (SO 56)

(c) to determine the postponement till another day of business for which a senator has lodged a postponement notification (SO 67)

(d) for the reference of a bill to a committee after the second reading (SO 115(2))

(e) for a bill to be taken to the stage of the second reading being moved, without the delays otherwise imposed by the standing orders (SO 113(2))

(f) for the consideration of a bill as an urgent bill, and subsequent motions, when moved by a minister (SO 142)

(g) for the chair of the committee of the whole to report progress and ask leave to sit again (SO 148(2))

(h) for a message to be sent to the House of Representatives communicating a resolution of the Senate (SO 154)

(i) for a petition not to be received (SO 69(3))

(j) for taking note of a document presented by a minister after notices (SO 61)

(k) relating to a committee report, at the times allocated on Wednesday and Thursday for the consideration of reports then presented (SO 62(4))

(l) in relation to a question or an estimates question on notice, or an order for documents, not answered within 30 days, after a minister is asked to explain that failure (SO 74(5), 164(3))

(m) in relation to a committee report on a bill, when the bill is considered (SO 115(5))

(n) for the recommittal of a bill, at the report and third reading stages (SO 121, 123)

(o) for a document quoted by a senator to be laid upon the table (SO 168)

(p) for the printing or consideration on another day of a document which has been presented (SO 169)

(q) for the extension of time for a senator to speak, in general debate (SO 189(1))

(r) for dissent from a ruling of the President, and that the question of dissent requires immediate determination (SO 198(1))

(s) for the adjournment of a debate (SO 201(1))

(t) for the closure of a debate (SO 199(1))

(u) for the business of the day to be called on, moved during discussion of a matter of public importance (SO 75(8))

(v) for a senator to be suspended from the sitting of the Senate, in case of disorder (SO 203(3))

(w) in cases of urgent necessity, for the suspension of standing or other orders (SO 209(1)).

A motion which otherwise requires notice may be moved by leave of the Senate, that is, unanimous consent of all senators present (SO 88).

When the Senate has directed that a report, for example, a report of the Procedure Committee, be considered on a day, so that there is an order of the day for the consideration of the report, motions may be moved without notice in relation to the report, for example, to adopt or endorse the recommendations of the report.

Notices are statements of intention by senators that they intend to move particular motions on particular days indicated by the notices. Notices are technically not business which is before the Senate.

Notices are entered on the Notice Paper in the order in which they are given. If they are given by a minister they are placed under government business, and if given by a senator who is not a minister under general business. Other categories under which notices of motion may appear are business of the Senate and matters of privilege; special precedence is given to those notices under standing orders 58 and 81 (see also Chapter 8, Conduct of Proceedings, under Special precedence for certain business).

The opportunity for senators to carry out the intentions stated in their notices and to move the motions of which they have given notice does not arise until the notices are reached in

accordance with the rules relating to the conduct of proceedings. As explained in Chapter 8, the Senate usually has more business before it than can be dealt with in a session, and notices of motion, particularly general business notices, will not necessarily be reached in the normal course of proceedings.

The following rules apply to notices of motion (SO 76):

- a notice must not contain matters not relevant to each other
- a notice must consist of a clear and succinct proposed resolution or order of the Senate
- a notice must deal with matters within the competence of the Senate
- a notice must not contain statements, quotations or other matter not strictly necessary to make the proposed resolution or order intelligible.

The President is empowered to delete extraneous matter from notices, to divide notices containing different matters, and to require a senator giving a notice which is contrary to the standing orders to reframe the notice. (See Procedure Committee, 4th Report, 63rd Session, PP 463/1989; statement by President Sibraa, SD, 13/11/1991, p. 2999.)

A senator may give a notice on behalf of another senator who is not present (SO 76(4); it is a general practice of the Senate to allow senators to take actions in the course of proceedings on behalf of other senators).

Two or more senators may join together as joint movers of a motion, and their names are placed on the notice (SO 76(4)).

A senator may give notice of a motion in general terms, provided that, at least one day before the day on which the notice is to be moved, the senator provides a written copy of the complete motion. A senator may, for example, give notice of intention to move on a future day a motion relating to the report of a committee or other body, and may provide before the day for moving the motion the terms of the motion asking the Senate to make particular decisions in relation to the report (for precedent relating to the summoning of certain witnesses: 12/6/1975, J.809). This procedure is not often used.

A senator may not give two notices of motion consecutively if another senator has a notice to give (SO 76(9)). The rationale of this rule is that a senator giving a number of notices could take up a number of places in the queue of business on the Notice Paper, and thereby make it less likely that subsequent notices would be reached. For convenience, however, the chair may allow senators to give notices consecutively, on the basis that they are placed on the Notice Paper in the order in which the senators would normally have received the call (SD, 25/11/1980, p. 9).

Because a notice of motion is simply a statement of intention by a senator and not business before the Senate, it is entirely in the control of the senator who gives the notice (ruling of President Givens, SD, 1/9/1916, p. 8408). Thus a senator may change the terms of a notice before the day on which it is to be moved, may specify a later day for moving the motion, and

may withdraw a notice at any time before it is moved or when it is reached in the order of business (SO 77; but see below in relation to disallowance motions). It follows that a senator cannot be compelled to move a motion of which the senator has given notice, and if a senator has given notice for a future day the senator cannot be compelled to move the motion earlier; this can come about only by leave (28/9/1993, J.515; 30/9/1993, J.550; 25/11/1993, J.889-90). There are precedents for motions, moved pursuant to a suspension of standing orders, to have motions of which notice was given called on and thereby debated and determined early (9/10/1986, J.1273; 28/2/1989, J.1392-3). This was done, however, as an agreed strategy to bring on an early debate; it could not have prevented the senators moving the motions on a later day in accordance with their notices. **(See Supplement)**

If a senator does not move a motion when it is called on, it lapses and is removed from the Notice Paper (SO 83(2), but see below and Chapter 15, Delegated Legislation, for the special case of a disallowance motion). A senator may postpone a notice at the appropriate time in the routine of business (SO 67). A notice not reached on the day for which it is given remains on the Notice Paper for the next day of sitting (SO 80(2)).

The provision in standing order 77(2) for the terms of a notice to be altered by lodgment in writing on any day earlier than the day for proceeding with the motion has been used to alter the day for moving a motion. It cannot be used, however, to change the day for moving a motion to a day earlier than that originally designated. This would defeat the condition in standing order 77(1) that only a later day can be set, and would be objectionable in principle in that it would allow a motion to be brought on earlier without senators being aware, except by looking at the Notice Paper for the day, that the motion is to be moved. On this basis a request by a senator to designate by letter an earlier day for moving a motion is not effective.

An alteration of a notice of motion under standing order 77(2) may be used to divide a notice into two or more notices, provided that the original notice contains a motion which could be divided under standing order 84(3) and the effect of the division is not to give notice of a distinctly new motion. This was done on 28 October 1997, when a government business notice of a motion to exempt a list of bills from the operation of standing order 111(5) was divided to distribute the bills on the list over 3 notices. Similarly, a notification under standing order 77(2) may be used to combine two or more notices into one, provided that they deal with related matters and a new notice is not sought to be introduced by that means. Notices in different categories of business, such as business of the Senate and general business, could not be combined by that means.

Special procedures apply to the withdrawal of notices of motion for the disallowance of delegated legislation. Various statutory provisions provide that, for delegated legislation to be validly disallowed by the Senate, the notice of motion for disallowance must be given within a statutorily-specified period after the legislation is laid before the Senate (see Chapter 15, Delegated Legislation). If a senator were to give notice of motion for the disallowance of an instrument of delegated legislation and then withdraw the notice after the expiration of the statutory period for giving notice, another senator who wished to move for the disallowance of the delegated legislation could not do so by giving a fresh notice. Standing order 78 therefore provides that a senator who has given notice of a disallowance motion may not withdraw it until an opportunity has been provided for any other senator to take over the notice.

It was ruled in 1982 (21/4/1982, J.853-4) that a senator could not give notice of a motion in the same terms as a notice already on the Notice Paper. This ruling was not correct and has not since been followed. There is nothing in the standing orders to prevent senators giving identical notices of motion. The ruling seems to have been based on an analogy with the anticipation rule (see below), but that rule clearly does not apply to notices. If the ruling were followed a senator could give notice of a motion with no intention of ever moving it, for the purpose of preventing, or attempting to prevent, a matter coming before the Senate.

Contingent notices

Senators may give contingent notices of motion, that is, notices that particular motions will be moved contingent upon some event occurring in the course of proceedings of the Senate or some stage in the proceedings being reached.

Most contingent notices of motion are to the effect that, contingent on a certain stage in proceedings being reached, a senator will move the suspension of standing orders to enable the moving of a subsequent motion to rearrange the business of the Senate or to have some new item of business considered (see Chapter 8 under Suspension of standing orders). These contingent notices are designed to overcome the requirement that a motion to suspend standing orders moved without notice must be supported by an absolute majority of senators to be carried (SO 209). By giving contingent notices, senators are able to have motions for the suspension of standing orders carried by a simple majority of senators present.

A contingent notice of motion does not allow a senator to move any motion which the senator would not otherwise be entitled to move under the standing orders. A senator could not, for example, give notice that, contingent on government business being called on, the senator would move a particular motion. The senator would not be able to move such a motion regardless of the contingent notice, because business must be called on in the order prescribed by the standing orders, and a senator is not entitled to move a motion out of that order, particularly a general business motion in the time for government business. This explains why most contingent notices of motion are for the suspension of standing orders, because it is only by the suspension of standing orders that a senator can move any motion or bring on for consideration any matter which has not been reached in the prescribed order of business.

Sometimes, however, contingent notices are given as an indication that, contingent on the stated event or stage in the proceedings occurring, the senators giving the notices will move motions or amendments which they are in any case entitled to move without notice under the standing orders. For example, contingent notice is sometimes given of amendments to motions or to bills; as explained under Amendments, below, senators are entitled to move amendments without notice, but may give notice of amendments as an indication of their intentions (24/10/1974, J.287; 27/10/1982, J.1166-7).

On 18 September 2002 a senator moved a motion for a reference to a standing committee, the notice of the motion being expressed to be contingent on an order for documents not being fully complied with by a specified date. As the motion was a business of the Senate item, it took precedence over government business and therefore could be moved in the time for

government business (other than in the three government business only times: see Chapter 8, Conduct of Proceedings, under Government and general business). The contingent character of the notice did not give the motion any precedence to which it was not otherwise entitled (18/9/2002, J.760).

Standing order 115(2) provides that a motion for an instruction to the committee of the whole on a bill may be moved after the second reading of the bill, provided that notice of the instruction has been given. Such a notice is expressed to be contingent on a bill being read a second time.

Contingent notices are usually expressed to operate on any future day, so that they do not have to be given afresh each day.

Formal motions

An opportunity is provided in the routine of business of the Senate for motions of which notice has been given to be put and determined without debate or amendment, provided that no senator present objects to that course. When notice of a motion has been given for a particular day, at the time provided on that day a senator may ask that the motion be taken as formal. If no senator present objects, the motion is then moved, put and determined without debate or amendment. This process is called "discovery of formal business". This procedure provides a means whereby senators may seek to have their motions determined without waiting for the notice of the motions to be reached in the normal course of proceedings, subject to the concurrence of all senators present, and at the price of forgoing debate on the motion.

A motion may be divided under standing order 84(3) and one part of it determined as a formal motion (28/5/1996, J.241-2).

While most motions taken as formal are uncontroversial and are agreed to, some are negatived and some are taken to a division.

For consideration of the use of the formal motions procedure, see SD, 27/3/2003, pp 10334-8; 30/10/2003, pp 17222-8; Procedure Committee, 1st Report of 2004, PP 82/2004.

Determination of motions

When a motion has been duly moved, in accordance with a notice if notice is required, and accepted by the chair as a motion conforming with the rules of the Senate, the senator moving the motion may speak to it and debate may ensue in accordance with the rules relating to the conduct of debate. Senators may move amendments to the motion (see under Amendments, below), and those amendments may be debated in accordance with those rules. At the conclusion of the debate, the chair puts the questions for any amendments to be agreed to and then for the motion, as amended if amendments have been made, to be agreed to, and the Senate votes on the motion.

A senator may move a motion on behalf of another senator. A motion not moved when called on lapses and is removed from the Notice Paper. Once moved, a motion is in the possession of the Senate, and cannot be withdrawn without leave (SO 83).

A motion need not be seconded when moved, the procedure of seconding having been abolished in 1981.

The chair may divide a complicated motion into two or more parts (SO 84(3); see Chapter 10, Debate, under Dividing the question).

Avoidance of question

There are several procedures by which the proceedings on a motion may not be concluded, so that the motion remains unresolved, at least at that stage. Some of these are procedures whereby the Senate may deliberately avoid making a determination on a motion.

The Senate may avoid making a decision in relation to a motion by the following means (SO 89):

- the adjournment of the debate on the motion
- the adjournment of the Senate
- a motion for the orders of the day to be called on
- the moving of the previous question.

In the course of debate on a motion, a senator who has not spoken in the debate or previously moved the adjournment, or a minister who has spoken or previously so moved, may move that the debate be adjourned. That question must be put and determined without debate or amendment. When debate is adjourned the resumption of the debate is an order of the day for the next day of sitting, unless some other time is fixed for the resumption (SO 201). Debate on a motion may be adjourned as a means of avoiding the determination of the motion.

The adjournment of the Senate leaves unresolved any motion not then determined. The adjournment of the Senate may be moved only by a minister and cannot be moved so as to interrupt a senator speaking, so that debate on a motion must be adjourned before the adjournment of the Senate can be moved (see Chapter 7). The motion for the adjournment of the Senate is therefore not a procedure which can be readily used deliberately to avoid the determination of a motion.

During debate on a motion, a senator may move that the orders of the day be called on, and that question is put without amendment or debate. This motion, which is now not used in the Senate, may be moved only during the consideration of motions which have been first moved on the day concerned. It cannot be moved when the Senate is considering a motion which has been called on as an order of the day, because the Senate is already considering orders of the day and a motion that the orders of the day be called on would be meaningless. This motion therefore has limited use as a means of avoiding the determination of a motion.

The previous question is provided for in standing orders 94 and 95. During debate on a motion a senator may move, but not so as to interrupt a senator speaking, that this question be not now put. The previous question cannot be moved to an amendment. It is debatable. If it is passed, this disposes of the motion before the Senate, and the Senate proceeds to the next business. If it is not passed, the Senate, in effect, has resolved that the question should be put immediately, and the

motion and any amendment are then put and determined without further debate. The previous question can be used to avoid coming to a determination on a motion, but if it is not agreed to it has the effect of requiring that the motion be determined without further debate. Thus a senator wishing to avoid a vote on a question should not move the previous question unless certain of the Senate's agreement, because the motion may have the opposite of the intended effect. The previous question is seldom used in the Senate. As it is debatable, it is less effective than the motion for the adjournment of the debate.

A motion which has been superseded by these procedures or withdrawn may be moved again (SO 83(4), but subject to the anticipation and same question rules, see below).

In committee of the whole a question may be avoided by the motion that the Chair of Committees report progress (see Chapter 14, Committee of the Whole Proceedings).

If debate on a motion is subject to a total time limit, a decision can be avoided by continuing the debate until the allotted time expires. This is referred to as "talking out" a motion. It may occur, for example, during the limited time available for general business.

Rescission of resolutions and orders

A resolution or order of the Senate may be rescinded only if seven days' notice is given of the rescission motion and if the motion is carried by an absolute majority of senators (SO 87).

A rescission properly so called has the retrospective effect of annulling or quashing a decision from the time that decision was made as if it had never been made. Rescission motions are therefore rare: it is seldom the intention to achieve that effect.

It is not necessary to rescind a resolution or order if the intention is simply to cease the operation of the resolution or order prospectively; this can be done by a new resolution or order and does not require a rescission motion.

The Senate and committees frequently make decisions which reverse or modify previous decisions with prospective effect. Such amending decisions are not treated as rescissions or as in any way different from other decisions which have a prospective effect. For example, the Senate may agree to an order that it meet on a particular day but subsequently alter the times of its meetings so that it does not meet on that day. This is not regarded as a rescission of the original decision, but simply as an amendment or modification of it with effect for the future. Similarly, a committee which has agreed to part of a draft report may decide to reconsider that part without rescinding its original agreement to it. Many decisions of this character are frequently made. At one time it was thought that the presence in an order of the words "unless otherwise ordered" was vital to the ability to change a decision in this way, but decisions have been altered regardless of the absence or presence of those words, and they are not now usually used in orders of the Senate.

In the distant past procedural difficulties ensued when rescission was thought, mistakenly, to be necessary. Rescission motions were occasionally used, instead of a suspension of standing

orders, to circumvent the rule against considering a proposal the same as one already determined (see Same question rule, below).

Under section 48 of the *Legislative Instruments Act 2003*, an instrument that has been disallowed by a House of the Parliament may not be remade within six months of the disallowance unless the disallowing House has rescinded its resolution of disallowance. Motions for the purposes of the equivalent provision in the past were regarded as rescission motions within the meaning of standing order 87, and therefore as requiring seven days' notice and an absolute majority. As such a motion, however, in effect gives permission for the remaking of a disallowed instrument and therefore has only a prospective effect, it is not technically a rescission motion and is now not subject to those requirements (13/5/2004, J.3415). **(See Supplement)**

Privilege motions

Motions to refer matters of privilege to the Privileges Committee and relating to contempts of the Senate are subject to special requirements (SO 81, 82). A matter of privilege cannot be moved unless it has first been advised in writing to the President, and does not have precedence unless the President has so determined. A motion to determine that a person has committed a contempt or to impose a penalty for a contempt requires seven days' notice. (See Chapter 2, Parliamentary Privilege, under Raising of matters of privilege.)

Same question rule

A motion may not be moved if it is the same in substance as a motion which has been determined during the same session, unless the latter was determined more than six months previously (SO 86). (An exception is made for motions for disallowance of delegated legislation the same in substance as legislation previously disallowed. This exception was inserted in case of the remaking of disallowed delegated legislation; it is complemented by the statutory provision which is referred to under Rescission of resolutions and orders, above.)

This rule, known as the same question rule, is seldom applied, because it seldom occurs that a motion is exactly the same as a motion moved previously. A motion moved in a different context, for example, as part of a different "package" of proposals, is not the same motion even if identical in terms to one already moved (SD, 8/11/2000, pp 19358-9). Even if the terms of a motion are the same as one previously determined, because of elapse of time it almost invariably has a different effect because of changed circumstances and therefore is not the same motion. There may also be different grounds for moving the same motion again.

This consideration arises particularly in relation to delegated legislation. A senator may move to disallow an instrument of delegated legislation on policy grounds, and the Regulations and Ordinances Committee may give notice of a motion to disallow the same instrument on grounds related to the committee's criteria of scrutiny; the two motions are regarded as entirely separate, and the determination of one does not affect the other. Moreover, it could be argued that the same question rule could not prevent the operation of the relevant statutory provisions, which provide for disallowance subject only to the statutory time limit. Therefore any disallowance motion may operate (and operate automatically if not withdrawn or determined) provided only that notice of it is given within the statutory time. (See Chapter 15, Delegated Legislation; for

precedents of two disallowance motions identical in terms: 8/12/1993, J.940; 3/2/1994, J.1190; 29/5/1997, J.2030.)

Anticipation rule

A motion or amendment may not anticipate an order of the day or another motion of which notice has been given, unless the new motion or amendment is a more effective method of proceeding (SO 85).

This rule is seldom applied, and it is interpreted liberally. As the Senate now normally has a large number of notices of motion and orders of the day on its Notice Paper, virtually any motion could be regarded as anticipatory of some item of business before the Senate, and the rule if applied strictly would be unduly restrictive of the rights of senators. The proviso relating to a more effective method of proceeding is also interpreted as having a wide application. Thus in 1967 the President ruled that an amendment, moved to a motion to take note of a ministerial statement, requiring that certain documents be laid before the Senate, was in order notwithstanding that there was on the Notice Paper a notice of motion for the tabling of the same documents (ruling of President McMullin, SD, 5/10/1967, pp 1254-8).

Amendments

A motion which has been duly moved and has become a question before the Senate may be the subject of an amendment, which may be moved without notice, except where the standing orders provide that particular motions are not open to amendment.

The following motions are not open to amendment:

(a) for the adjournment of the Senate (SO 53(3))

(b) formal motions (SO 66)

(c) to determine the postponement of business for which the senator in charge has lodged a postponement notification (SO 67)

(d) for the first reading of bills, except bills which the Senate may not amend (SO 112(1))

(e) for a bill to be considered an urgent bill (SO 142(1))

(f) for the chair to report progress and ask leave for the committee of the whole to sit again (SO 144(6))

(g) that an objection to a ruling by the chair requires immediate determination (SO 198(2))

(h) for an extension of time for a senator to speak (SO 189(1))

(i) for a debate to be adjourned (SO 201(2))

(j) for the closure of a debate (SO 199(1))

(k) for a senator to be suspended from the sitting of the Senate, in case of disorder (SO 203(3))

(l) urgency motions (SO 75(6))

(m) for the business of the day to be called on, moved during discussion of a matter of public importance (SO 75(8)).

Some of these standing orders provide only that motions are not debatable, but such non-debatable motions also cannot be amended, because senators cannot receive the call to move amendments to them. (The standing orders may provide explicit exceptions to this principle: under SO 24A(7), an amendment may be moved to a motion to adopt a report of the Selection of Bills Committee even when the time for debate on the motion has expired.)

There are three kinds of amendments:

- to leave out words of the motion
- to leave out words in order to substitute other words
- to insert or add words.

The mover of an amendment must submit it in writing and sign it (SO 90(2)). Normally copies of amendments are circulated in the Senate chamber. These rules are not enforced where an amendment is simple and easily understood (ruling of President Turley, SD, 4/12/1912, p. 6329).

Although not required to do so, senators occasionally give notice of amendments, to alert other senators of the content of amendments to be moved (12/2/2008, J. 17; Notice Paper 13/2/2008, p. 3).

An amendment must be relevant to the motion to which it is moved (SO 90(3)). This requirement is interpreted liberally so as not to restrict unduly the rights of senators. If an amendment relates to the subject matter of a motion or to a closely related subject matter it is accepted.

An amendment may not be moved if it is a direct negative to the question (rulings of President Baker, SD, 17/11/1904, p. 7072, 19/10/1905, p. 3757). An amendment is not regarded as a direct negative unless it would have exactly the same effect as negativing the motion (ruling of acting Deputy President Wood, SD, 14/8/1968, p. 68).

An amendment may not be moved if it is the same in substance as an amendment already determined to the same question, or would have the effect only of reversing an amendment already made (SO 92). This rule prevents issues already decided being canvassed again by means of amendments. An amendment is accepted, however, if its effect is in any way different from one which has already been determined. An amendment moved in a different context, for example, as part of a different "package" of proposals, is not the same amendment even if identical in terms to one already moved (SD, 8/11/2000, pp 19358-9; 18/8/2003, p. 13832).

A senator who has moved a motion or who has spoken in the debate on it may not move an amendment, and a senator may not move more than one amendment to a motion (SO 90(4)). Either of those actions would involve a senator receiving the call more than once in relation to a motion. These rules do not apply in committee of the whole, however, where a senator may speak more than once on any question (see Chapter 10, Debate, under Right to speak, and Chapter 14, Committee of the Whole Proceedings, under Right to speak and Time limits).

When an amendment to a motion has been proposed, it must be disposed of before another amendment may be moved (SO 91(2)). So that the rights of senators are not unduly restricted, by long-established practice a senator who speaks in a debate after an amendment has been moved and who wishes to move another amendment may foreshadow the further amendment and move it when the original amendment is determined.

As with an original motion, an amendment once moved is in the possession of the Senate and may not be withdrawn except by leave (SO 91(3)).

Where a motion is the subject of an amendment, at the conclusion of the debate the President puts the question that the amendment be agreed to, and then the question that the motion (as amended, if the amendment has been passed) be agreed to.

An amendment may be moved to a proposed amendment as if the proposed amendment were the original question (SO 93). The procedure of moving an amendment to an amendment is used where, for example, a senator wishes to agree to words which are proposed to be inserted or added to a motion but wishes to modify them. Where an amendment to an amendment is moved, the chair first puts the amendment to the amendment, then the amendment (as amended if the amendment to the amendment is agreed to), and finally the original motion (as amended if any amendment has been agreed to). This procedure ensures that the motion which finally emerges, if it is passed, has the support of a majority of senators present and voting, and that a senator is not compelled to vote on a motion until there has been opportunity to put it into a form with which the senator could be in complete agreement.

As an alternative to the moving of an amendment, a senator, usually the mover of a motion, may amend a motion by leave before it is put.

Where the Senate has before it a resolution of the House of Representatives to which the Senate's agreement is sought, the Senate cannot amend the resolution, and therefore may agree to the resolution subject to specified amendments or modifications.

Duration of resolutions and orders

A resolution or order of the Senate is regarded as continuing in effect unless its terms indicate that it has a limited life, or it is spent by the effluxion of time or the circumstances to which it applied no longer exist. Thus the standing orders of the Senate adopted in 1903 continued in effect until they were replaced in 1989. The Privilege Resolutions of 25 February 1988 continue to apply to privilege matters, as do various procedural orders of the Senate. On 13 February 1991, after some debate about whether various resolutions and orders of the Senate should be regarded as having continuing effect, the Senate, on the recommendation of the Procedure

Committee, adopted a resolution indicating that it would add a form of words to future resolutions and orders to indicate that they are intended to have continuing effect. This decision, however, has not been consistently followed.

Urgency motions and matters of public importance

Standing order 75 provides a procedure whereby a senator can raise for debate, without the usual notice of not less than one day, any matter which is regarded by five or more senators as warranting immediate debate.

A senator has a choice of proposing that a matter of public importance be submitted to the Senate for discussion, in which case the matter may be debated without any question being put to a vote, or moving a motion that in the opinion of the Senate a specified matter is a matter of urgency. A proposal under the standing order is made by delivering in writing to the President not later than 12.30 pm on a sitting day a statement of the proposed matter of public importance or urgency. Proposals are not received until 8.30 am each sitting day.

If more than one proposal is submitted on any day the proposal first provided to the President is reported, and if two or more proposals are presented simultaneously the proposal to be reported is determined by lot.

A proposal under standing order 75 may be signed by more than one senator, in which case any of the joint proposers may move the motion of urgency or speak first to the matter of public importance (8/4/1970, J.51; 2/5/1973, J.137; 26/11/1991, J.1734-5).

If a proposal is in order the President reads it to the Senate at the time provided in the routine of business, and, if four senators, not including the proposer, by rising in their places, indicate their support of the proposal, the debate proceeds. (For a proposal read again by leave when not supported on the first occasion, see 17/2/1999, J.467.)

A senator who has submitted a proposal may withdraw it when it is read to the Senate or prior to that time (19/2/1975, J.526; 14/2/1991, J.746; 8/3/1995, J.3048; 28/10/1996, J.765; 24/3/1999, J.613; 31/8/1999, J.1608).

Special time limits apply to the debate. There is a total time limit of 90 minutes, or 60 minutes if motions to take note of answers are moved after question time, and a speaking time limit of 10 minutes for each speaker. The time allowed does not commence until the debate actually starts. If the debate proceeds by way of an urgency motion, at the expiration of the time, or if the debate is interrupted by other business taken at a fixed time, the question on the motion is put.

Except as otherwise provided in standing order 75, urgency motions and matters of public importance are subject to the normal rules relating to motions and debate. The mover of an urgency motion may speak in reply if time permits.

Rulings have been made that a proposed urgency motion or matter of public importance must relate to a matter of Commonwealth ministerial responsibility, but proposals are accepted if there is any element of such responsibility in the matter in question (ruling of President McMullin,

5/3/1969, J.399). The rationale of such rulings is that the procedure under standing order 75 gives special precedence to a discussion over all other business at the relevant time, not by majority decision but at the request of five senators. The procedure should not therefore be used to debate matters merely of interest to senators, when there are other opportunities without precedence, such as the adjournment debate, to discuss such matters.

An urgency motion may not be amended. This rule is sometimes circumvented by the suspension of the standing order to allow an amendment to be moved, and senators usually place on the Notice Paper contingent notices of motion to allow them to move motions to suspend standing orders to allow amendments to be moved to urgency motions (see Chapter 8, Conduct of Proceedings, under Suspension of standing orders). When an amendment has been moved by these means, it is in order to move amendments to the amendment. A suspension of standing orders to authorise an amendment to an urgency motion would not authorise an amendment not relevant to the subject of the motion. If an urgency motion is amended pursuant to a suspension of standing orders, the motion as amended must be put (ruling of Deputy President, 9/4/1991, J.888). Amendments are sometimes moved to urgency motions by leave (30/3/2004, J.3273-6).

The procedure in standing order 75 is designed to allow debate on a matter without the Senate making a decision on a substantive question. In voting on an urgency motion the Senate does not give its decision on a substantive motion, but simply indicates whether in its opinion the matter raised is a matter of urgency. The vote is often regarded, however, as a vote on the matter itself. A motion may therefore be cast in terms which make it difficult for a party to vote either for or against a motion. For example, if the motion is to declare that the level of unemployment is a matter of urgency, a vote on the motion is regarded as a test of the Senate's attitude to the level of unemployment. If the party supporting the ministry votes against the motion this may be regarded as an expression of indifference on unemployment, but if the party votes for the motion this may be regarded as a confession of ministerial failure. It is because of this potential of an urgency motion to embarrass a party that the rule against amendment is often circumvented.

An urgency motion may not be divided (ruling of President McClelland, 18/9/1985, J.468). This ruling was based partly on the prohibition of amendment of an urgency motion.

It is not in order for an urgency motion to be framed so as to build a substantive motion into the statement of the matter of urgency (see report of Standing Orders Committee, 17 August 1971, PP 111/1971, p. 2).

The closure (that is, the motion that the question be now put) may be moved during debate on an urgency motion (see Chapter 10, Debate, under Closure of debate). The standing order provides a means whereby discussion on a matter of public importance may be terminated. At any time during the debate, but not so as to interrupt a senator speaking, a senator may move that the business of the day be called on. This question is immediately put without debate or amendment, and if it is agreed to, the matter of public importance is disposed of and the Senate proceeds with its business.

There are precedents for debate on an urgency motion being adjourned till a later hour of the day (30/8/1956, J.135; 13/9/1961, J.107; 27/9/1972, J.1137, 1141). It is not clear how it was

determined in these cases which items of business could be transacted before the adjourned debate was called on, or when it was to be called on; presumably this was done by agreement (see Chapter 8, Conduct of Proceedings, under Resumption of postponed and adjourned business). The precedents have not been followed. The terms of standing order 75 clearly prevent adjournment of a debate till a subsequent day, and if a debate adjourned till a later hour were not called on or concluded before the Senate adjourned it would lapse (20/5/1969, J.469).

Similarly, an urgency motion or matter of public importance lapses if it is not reached on a day or is superseded by business which is called on at a fixed time (23/3/1995, J.3134; a matter of public importance was lodged but not reached on 11/5/1995). Where debate is interrupted by order for some business of limited duration (such as a senator's first speech), however, the debate is resumed if time permits (21/8/2002, J.629).

On 23 October 1997, during debate on an urgency motion, a motion for suspension of standing orders to allow an amendment to be moved to the motion was moved and debated, and debate on the suspension motion had not concluded when the time for the main debate expired. The motion for suspension of standing orders was then taken to have lapsed and the question on the urgency motion was put in accordance with standing order 75. The rationale for this is that the motion for suspension of standing orders is not related in any substantive way to the actual question before the Senate, but is a procedural motion designed to allow, but not to require, the moving of an amendment, which would be substantively related to the question before the Senate. Even if the suspension motion had been passed just before the time expired, its effect would have been merely to allow the moving of an amendment, not to require an amendment to be moved, and it would be anomalous to allow an amendment to be moved after the time had expired. If the suspension motion had been successful and an amendment had been moved before the time expired for the debate, at the expiration of the time the amendment would have been put and then the main question, because the amendment then would have been part of the substantive matter before the Senate for determination.

Chapter 10

DEBATE

BEFORE THE SENATE makes decisions by means of resolutions and orders which begin as motions, that is, propositions submitted to the Senate by senators and accepted by the chair as questions to be put to the Senate (see Chapter 9, Motions and Amendments), the Senate usually debates those questions. Debate fulfils one of the primary functions of the Senate, that of informing itself and the public by deliberation before decisions are made.

Motions debatable

Every motion moved in the Senate may be debated before the question on the motion is put to a vote, except where the standing orders explicitly provide that a question is to be decided without debate.

The following motions are not debatable:

(a) formal motions (SO 66)

(b) to determine the postponement of business for which the senator in charge has lodged a postponement notification (SO 67)

(c) for the first reading of bills, except bills which the Senate may not amend (SO 112(1))

(d) for a bill to be considered an urgent bill (SO 142(1))

(e) for the chair to report progress and ask leave for the committee of the whole to sit again (SO 144(6))

(f) that an objection to a ruling by the chair requires immediate determination (SO 198(2))

(g) for an extension of time for a senator to speak (SO 189(1))

(h) for a debate to be adjourned (SO 201(2))

(i) for the closure of a debate (SO 199(1))

(j) for a senator to be suspended from the sitting of the Senate, in case of disorder (SO 203(3))

(k) for the business of the day to be called on, moved during discussion of a matter of public importance (SO 75(8)).

Committee reports, on their presentation, are also not debatable (SO 39). Special provision for debate on committee reports is made by standing order 62, and committee reports are also frequently debated by motions moved by leave.

Personal explanations and explanations of speeches made in the course of debate are not debatable (SO 190, 191).

Debate must be directed to a motion, and without a motion there can be no debate. The only exceptions to this rule are in explicit provisions in the standing or other orders of the Senate which provide that debate may proceed without a question before the chair, for example, on a matter of public importance proposed under standing order 75.

Some motions are designed as vehicles for debate without calling upon the Senate to make any decision, for example, motions to take note of documents. Such motions, however, may be the subject of amendments which call upon the Senate to make decisions (see Chapter 9 under Amendments), for example, to endorse or repudiate the contents of a document.

Sometimes motions are debated together (see Chapter 8, Conduct of proceedings, under Items of business taken together).

Right to speak

When a motion is moved by a senator and accepted by the chair the mover of the motion may speak to it, thus initiating the debate. Other senators wishing to speak in the debate seek the call of the chair to speak by rising in their places and addressing the President (SO 186(1)). The President determines which senator speaks next in the debate by granting the call to speak to a senator who has risen. Standing order 186(2) provides:

> Subject to the practices of the Senate relating to the call to speak, when 2 or more Senators rise together to speak, the President shall call upon the Senator who, in the President's opinion, first rose in the Senator's place.

The practices of the Senate referred to in the standing order were set out in the 2nd Report of 1991 of the Procedure Committee (PP 466/1991).

Presidential rulings of the past have explicitly identified the following practices:

(a) Senators are usually called from each side of the chamber alternately.

(b) The call is given to the Leader of the Government in the Senate and the Leader of the Opposition in the Senate before other senators.

(c) A minister in charge of a bill or other matter before the Senate is usually given the call before other senators.

The following practices have also been applied:

(d) An Opposition senator leading for the Opposition in relation to a bill or other matter before the Senate is usually given the call before other senators.

(e) Leaders of other non-government parties are usually given the call before other senators, subject to the foregoing practices.

(f) Senators who have a right to the call under these practices are discouraged from exercising it if that would have the effect of closing the debate when other senators wish to speak.

The Procedure Committee explained that these practices should be regarded as being applied in the order indicated, so that each practice is subject to those that precede it in the list. If interpreted in this way, the various practices are consistent with each other.

In many debates an agreed speakers' list is compiled by the party whips and provided to the chair, and senators normally seek and receive the call in accordance with the list. The Standing Orders Committee in 1974, having considered the status of this list, reported that the list is "unofficial and no curb on the President, whose duty and privilege it [is] to say which senator .... [has] a prior right to speak", and that the list could be used "on the understanding that it is unofficial and must not be referred to in debate". The Senate adopted the committee's report (3rd Report, 56th Session, PP 277/1974; 11/2/1975, J.498). The list should also be regarded as subject to each of the practices outlined above. For example, the principle of balance between parties takes precedence over the list (statement by President Calvert, SD, 15/11/2002, p. 6475).

In debate in the Senate, each senator may speak once on a motion, subject to the right of reply and the right of a senator to speak to any amendment (SO 188(1)).

The mover of a substantive motion may speak in reply at the end of a debate, and this reply closes the debate (SO 192). There is, of course, no right of reply on a non-debatable motion, nor on a procedural motion such as a motion to suspend standing orders.

The right to speak to any amendment is exercised as follows:

- when an amendment is moved to a motion, a senator who has spoken in the debate may speak again to the amendment

- a senator who has spoken after an amendment has been moved is taken to have spoken to the motion and the amendment and to have exhausted the right to speak, unless a further amendment is moved after the first amendment is resolved, in which case senators who have already spoken may speak to the further amendment

- a senator first speaking to a motion after an amendment has been moved, however, may speak only to the amendment and reserve the right to speak to the motion and move a further amendment after the first amendment is determined

- a senator who has spoken to a motion may not move an amendment, but if there is an amendment before the chair when the senator speaks the senator may foreshadow a further amendment and move it when the original amendment is determined.

The principles relating to the right of a senator to speak to an amendment which are summarised here were set out in a ruling of President Baker, Report of the President to the Standing Orders Committee, 17 August 1905, PP S1/1905.

One of those principles was that the mover of a motion should not speak in reply, thereby closing the debate (see under Reply, below), until any amendments had been determined. The rationale of this rule was to avoid senators losing the opportunity to move further amendments by the closing of the debate. The usual current practice, however, is for senators to foreshadow any further amendments during the debate, for the reply to be made before an amendment is put, and foreshadowed further amendments to be formally moved and put after the original amendment is resolved.

In committee of the whole, each senator may speak more than once to any question before the chair (SO 188(2)).

Time limits on debates and speeches

Time limits are imposed on debates in the Senate and on senators' speeches.

A senator may not speak for more than 20 minutes in any debate in the Senate (SO 189(1)).

This time limit applies to debates generally, but special time limits are imposed on particular debates and on speeches under other provisions in the standing orders, as follows:

(a) election of President (SO 6(2)):
each senator: 15 minutes

(b) motions on Selection of Bills Committee reports (SO 24A(7)):
each senator: 5 minutes
total limit: 30 minutes

(c) adjournment of the Senate (SO 54(5)):
each senator: 10 minutes
total limit: 40 minutes **(See Supplement)**

(d) matters of public interest at 12.45 pm on Wednesdays (SO 57(2)):
each senator: 15 minutes
total limit: till 2 pm

(e) government documents (SO 61):
on Tuesdays and Wednesdays:
each senator: 5 minutes
total limit: 30 minutes

at general business on Thursdays:
each senator: 5 minutes
total limit: 1 hour

(f) committee reports and government responses (SO 62):
each senator: 10 minutes
total limit : 1 hour

(g) motions to take note of answers after question time (SO 72(4)):
each senator: 5 minutes
total limit for all motions: 30 minutes

(h) urgency motion or matter of public importance (SO 75):
each speaker: 10 minutes
total limit: 1 hour or 90 minutes if no motions moved to take note of answers at question time

(i) first reading, non-amendable bill (SO 112(2)):
each senator: 15 minutes

(j) motions and amendments to refer bills to committees (SO 24A(7), 115(6)):
each senator: 5 minutes
total limit: 30 minutes

(k) bills declared to be urgent — allotment of time (SO 142):
each senator: 10 minutes
total limit: 1 hour

(l) motions by leave to take note of documents (SO 169(2)):
each senator: 10 minutes
total limit: 30 minutes per motion, 60 minutes for consecutive motions

(m) motions for suspension of standing orders (SO 209(4)):
each senator: 5 minutes
total limit: 30 minutes

Where the general time limit of 20 minutes applies to a debate, a senator may move that the time limit be extended by not more than 10 minutes, and that motion is put without debate (SO 189(1)). This procedure applies only to the time limit specified in that standing order, that is, the general time limit of 20 minutes, as the terms of the standing order clearly indicate. Such a motion may not be moved when other speaking time limits apply; in those circumstances a speaker's time may be extended only by leave (a motion to extend such a speaking time limit could be moved pursuant to a suspension of standing orders).

The 20 minute limit applies to a senator speaking in reply to a general debate, and there is no provision for that limit to be extended (SO 189(2)).

In committee of the whole, a senator may not speak for more than 15 minutes on each occasion on each question, but where the speech of a senator is interrupted by this provision and no other senator rises to speak, the senator speaking may continue for a further 15 minutes (SO 189(3)). This means that if only one senator seeks the call to speak on a question there is effectively a total time limit of 30 minutes. In practice, senators are, in effect, granted extensions of time by other senators rising and seeking the call for the purpose of allowing the senator speaking to continue.

Time occupied in raising and determining points of order and in forming quorums does not affect the time allowed for a senator to speak (SO 52(7), 197(6)).

The Senate may set special time limits for particular debates by special order.

A debate which is interrupted by the expiration of a total time limit for the debate is taken to be adjourned (SO 68; see Chapter 8, Conduct of Business, under Interruption of business).

Reading of speeches

A senator may not read a speech (SO 187).

The rationale of the prohibition on the reading of speeches is that reading speeches destroys real debate, which is intended to be an exchange of views and arguments, and that if speeches are read there is greater danger of abuse of proceedings by senators delivering speeches written by others.

This prohibition is modified by well-established practices. It is not applied when a senator is formally making a statement giving the considered views of a committee, the ministry or of a party, for example, a chair of a committee making a statement on behalf of the committee, a minister delivering a second reading speech on a bill or a ministerial statement, or a senator making a statement on behalf of a party. Senators referring to intricate or technical matters may also read parts of their speeches, and, particularly in that circumstance, may refer to copious notes. It is for the chair to determine when these practices apply and whether the prohibition is breached (ruling of President McMullin, SD, 21/8/1969, p. 231).

On several occasions there were attempts to remove the prohibition on the reading of speeches and to qualify the practices whereby the prohibition is modified, but these proposals were rejected by the Senate.

Quotation of documents

A senator may quote documents during a speech, and for that purpose may read from documents.

A statement by a senator that a document is confidential does not prevent another senator quoting it (ruling of Acting Deputy President Giles, 17/6/1992, J.2473).

In quoting a document, a senator is not permitted to utter words which would not be permitted under the rules of debate if uttered in the normal course of speaking. For example, if a document

uses offensive words in relation to another senator which would not be permitted under standing order 193(3) if uttered in debate, the senator may not read those words from the document.

This principle was the subject of debate in 1979 when it was applied by a ruling by the chair. The Privileges Committee and the Standing Orders Committee were each required to report upon the principle, and both supported it as a sound principle (Committee of Privileges, 4th report, Quotation of Unparliamentary Language in Debate, 20 September 1979, PP 214/1979; Standing Orders Committee, 5th Report of 59th Session, 31 March 1980, PP 50/1980; statement by President Reid, SD, 10/8/1999, p.7112; see also statement by President Calvert, SD, 17/10/2006, p. 36). This principle ensures that senators cannot circumvent the rules of debate simply by quoting documents.

The principle applies even to Senate committee reports. A committee should not allow disorderly expressions to appear in a report, but if this occurs it is not in order to quote the expressions in debate (statements by President Calvert, SD, 11/11/2002, p. 5878; 3/8/2004, pp 25361-2).

The right of a senator to quote a document is subject to the right of the Senate to require the production of the document, and a special procedure is provided to enforce the latter right.

When a senator quotes a document, another senator, at the conclusion of the speech, may move a motion without notice that the document be produced. A minister who has quoted a document may state that the document is of a confidential nature, in which case the motion for its production cannot be moved (SO 168(1)). Because a minister may prevent a motion for the tabling of a quoted document by claiming confidentiality, in practice senators do not move motions in relation to documents quoted by ministers but ask ministers to table quoted documents. A senator who is not a minister, however, does not have this exemption, and if a motion for the tabling of a document quoted by a senator is agreed to the senator is required to table the document.

The interpretation of these provisions was twice considered by the Standing Orders Committee. In a report in 1983 the committee considered the question whether the passage of a motion requires the tabling of a document not actually in the possession of the senator who has quoted it. There were conflicting precedents. The committee observed in relation to these precedents:

> Each of the two interpretations of the procedure under the Standing Order involves difficulties. If the procedure requires the tabling only of documents actually in the immediate possession of a Senator, the intention of the Standing Order, that a Senator may be required by the Senate to produce a document which he purports to quote, so that the accuracy and context of the quotation may be ascertained, may be frustrated by a Senator simply leaving outside the Chamber any document which he wishes to quote. On the other hand, if the procedure requires the tabling of the original document regardless of whether the Senator has it in his immediate possession, a Senator is prevented from quoting anything unless he can bring it to the Chamber with him and be able and willing to table it, however voluminous, difficult to produce or confidential it may be.

The committee concluded:

> On balance, it would seem that the better interpretation, in spite of the precedents referred to, is that the procedure requires the tabling only of the document actually in the Senator's immediate possession, which means that if the quotation is contained in speech notes or a copy of the original document, it is those notes or that copy which should be tabled, and that if the Senator is quoting by memory, he is clearly unable to comply with the order of the Senate that the document be tabled. If other Senators consider that a Senator may be making unfair or improper use of quotations from a document which he is not willing to produce, or misrepresenting the contents of a document without giving the Senate an opportunity to check the quotation, these are matters which may be raised in debate.
>
> The committee recommends that the Standing Order be so interpreted in future. (2nd Report, 61st Session, 20 October 1983, PP 111/1983)

The committee's recommendation has been followed in interpreting the standing order.

In a subsequent report the committee examined the standing order in relation to the tabling of documents quoted by ministers and rulings under the standing order, and concluded:

> Those rulings and the terms of the Standing Order clearly indicate that it is intended to apply only to a document relating to public affairs which is actually quoted by a Minister in the course of the Minister's remarks, and has no application to speech notes used by a Minister. The Committee has advised Mr President to rule accordingly. (1st Report, 62nd Session, 14 November 1985, PP 504/1985)

This advice also has been followed, although ministers asked to table documents from which they have quoted often table briefing notes or speech notes.

A motion for the tabling of a quoted document may be debated, but the rule of relevance (see below) applies, so that the debate is confined to the question of whether the document should be tabled.

An order to table a document refers to the whole of the document in the possession of the senator (ruling of President Laucke, SD, 7/9/1977, pp 635-42).

The chair has no responsibility to judge the accuracy or correctness of a document tabled (ruling of President Laucke, SD, 19/5/1976, p. 1728).

Motions for the tabling of quoted documents may be moved in committee of the whole, under the rule that procedure in committee of the whole is the same as in the Senate (SO 144(7)).

Personal explanations and explanations of speeches

There are two procedures for senators to make explanations to the Senate without speaking in debate on a motion.

By leave of the Senate, a senator may explain matters of a personal nature, although there is no question before the Senate, but such matters may not be debated (SO 190). As with other procedures requiring leave of the Senate, an objection by one senator present prevents the making of a personal explanation, but leave is usually granted.

The procedure is usually employed to respond to some misrepresentation of a senator in an earlier debate in the Senate or in some other forum or publication. It is not necessary for a senator to claim to be misrepresented to use this procedure, but the explanation must relate to matters personally affecting the senator (ruling of President Givens, SD, 2/3/1917, p. 10849).

A senator who has spoken to a question before the Senate may explain, without leave, some part of the senator's speech which has been misquoted or misunderstood, but may not interrupt a senator speaking or introduce any new or debatable matter (SO 191). This right to correct misquotations, misunderstandings and, in practice, misrepresentations of a senator's words may be used only where a senator has spoken in a debate, and must be used during that debate or at the conclusion of the debate. It cannot be used to respond to matters in debates which have occurred at an earlier stage in the proceedings. It also cannot be used simply to respond to arguments raised in debate; to use the procedure a senator must claim to be misquoted, misunderstood or misrepresented. (Rulings of President Baker, SD, 2/8/1905, p. 460; 3/8/1905, p. 516.)

Relevance

In speaking to a question a senator may not digress from its subject matter (SO 194).

This rule of relevance is interpreted liberally, so as to give senators the maximum freedom in debate. If a senator appears to be speaking irrelevantly to the question, the senator should be given the opportunity to show how the remarks in question relate to that subject (ruling of President Brown, SD, 5/10/1950, p. 333).

The rule is subject to the proviso that on the motion for the address-in-reply to the Governor-General's speech (see Chapter 7, Meetings of the Senate, under Address-in-reply), any matter may be discussed. The rule also does not apply to debates in which, under the standing orders, any matter may be discussed, including debate on the motion for the adjournment of the Senate (SO 53(4)) and debate on the motion for the first reading of a bill which the Senate may not amend (SO 112(2)).

Closely related to the rule of relevance is the rule against tedious repetition. The chair may call the attention of the Senate to continued irrelevance or tedious repetition and may direct a senator to discontinue a speech, but that senator may require that the question whether the senator be further heard be immediately put to the Senate and determined without debate (SO 196). Because of the time limits applying to debates, the standing order is seldom invoked.

Anticipation rule

In debating a question before the Senate a senator must not anticipate discussion of any subject which appears on the Notice Paper, with the proviso that any matter on the Notice Paper not discussed during the preceding four weeks may be debated (SO 194).

This rule is also interpreted liberally, quite apart from the proviso, because the large amount of business usually on the Senate Notice Paper could prevent discussion on virtually any matter if the rule were strictly enforced. The rule is seldom invoked except where a senator speaking on

another matter appears to be entering upon debate on a bill which has recently come before the Senate and which is expected to be discussed within a short period of time.

References to committees

While it is generally considered inappropriate in debate in the Senate to prejudge the findings or recommendations of a committee, there is nothing to prevent debate canvassing issues which are before committees (statement by President Reid, SD, 27/10/1997, p. 8064).

Uncompleted committee of the whole proceedings on a bill, however, may not be debated (SO 119).

Sub judice convention

The sub judice convention is a restriction on debate which the Senate imposes upon itself, whereby debate is avoided which could involve a substantial danger of prejudice to proceedings before a court, unless the Senate considers that there is an overriding requirement for the Senate to discuss a matter of public interest.

The convention is not contained in the standing orders, but is interpreted and applied by the chair and by the Senate according to circumstances.

The concept of prejudice to legal proceedings involves an hypothesis that a debate on a matter before a court could influence the court and cause it to make a decision other than on the evidence and submissions before the court. A danger of prejudice would not arise from mere reference to such a matter, but from a canvassing of the issues before the court or a prejudgment of those issues.

This concept of prejudice was well explained in the context of contempt of court by the Federal Court in a case before it in 1989, in which the court restrained a state commission of inquiry from conducting a public inquiry into matters before the court in a civil action. Justice Spender explained:

> It seems to me that there are really two aspects of the question of contempt in the context of a public prejudgment. The first concerns whether the prejudgment will be likely to hinder the Court in reaching a correct conclusion. Publicity which might taint the impartiality of the jurors or which might inhibit witnesses from giving evidence are of this kind; that is to say, they have a tendency to affect whether the right result was achieved. Because jurors are less resistant than judges in resisting improper influences, considerations of this kind are of much the greater concern when there is a jury. This factor, as well as the concern of courts when a person is in jeopardy of a criminal conviction, explains the concentration of attention on the effect of public prejudgment on criminal proceedings.

The justice referred to an additional reason for restraining public prejudgment of a case:

> The second aspect of contempt in the context of public prejudgment relates not so much to whether the process is likely to be poisoned, but to the judgment itself. The first, as I said, affects whether the result obtained might not be the right result. Yet, if the effect of a public prejudgment is to undermine public confidence in that judgment, even though it does not affect the process by which that judgment is reached, that equally is a contempt. It seems to me that a public

> prejudgment of a central issue in the Federal Court proceedings would work a usurpation of the function of the Federal Court and lower the respect and authority to which its determination is entitled. (*Sharpe v Goodhew* 1989 90 ALR 221 at 240-1)

The first paragraph is a succinct statement of the rationale of the sub judice principle, a rationale it shares with contempt of court. The second paragraph is a statement of an additional dimension of contempt of court which has not been regarded as part of the rationale of the parliamentary sub judice convention; this aspect is further analysed, under Discussion of court decisions, below.

As the court suggested, the danger of prejudice to court proceedings is much greater where a jury is involved in the proceedings, because judges are unlikely to be influenced in the formation of their judgments by public or parliamentary debate (for an application of this principle, see the exchange in the Senate, SD, 11/8/1999, p. 7275). There may also be a case for apprehending a greater danger of prejudice if a matter is before a magistrate.

In earlier years there was a tendency for the chair to restrain debate in the Senate on any matter which was before a court. In the 1960s and 1970s, however, there was a change in emphasis and a greater focus on the question of whether there was a danger of prejudice to proceedings.

In 1969 President McMullin ruled:

> As a general rule the Chair will not allow references to matters which are awaiting or under adjudication in the courts if such reference may prejudice proceedings. But it does not necessarily follow that just because a matter is before a court every aspect of it must be sub judice and beyond the limits of permissible debate in Parliament. That would be too restrictive of the rights of Parliament. (SD, 20/5/1969, p. 1368)

In 1972 President Cormack stated that he had reviewed the sub judice principle, which he thought had been too restrictive in the past, and indicated the approach the Chair would take:

> The prime question I must ask myself is, I think: Is parliamentary debate likely to give rise to any real and substantial danger of prejudice to proceedings before the court? (SD, 19/9/1972, pp 907-8)

An exposition of the sub judice convention was provided by the then Minister for Justice, Senator Tate, in debate in the Senate on 30 May 1989 in which a senator sought to discuss matters relating to the 1978 Sydney Hilton Hotel bombing when a criminal prosecution was pending. (A person had been arrested and charged with criminal offences in relation to the bombing.) Senator Tate said:

> Mr President, you are faced with a very difficult situation, as indeed is the Senate. In all questions of sub judice you have to balance the absolute privilege of this place with the absolute privilege of the courts. It is a contest between the two. I think in this particular instance, the question of the Hilton bombing, the subsequent court actions and, indeed, the public inquiry, the pardon, the compensation, and the events surrounding the allegations are matters of very genuine public interest of a greater scope than attends normal trials to do with the killing of persons in our community. Unless this chamber were convinced that what Senator Dunn is speaking about could cause real prejudice to the trial in the sense of either creating an atmosphere where a jury would be unable to deal fairly with the evidence put before it, or would somehow perhaps affect a future witness in the giving of evidence, whether for the prosecution or the defence, and unless

> we thought that the matters Senator Dunn was trying to speak about were likely to cause real prejudice to the outcome of that committal proceeding or trial, I think, on balance, given the nature of the matters surrounding this whole incident over many years, that the public interest probably would allow her to continue.

The President ruled:

> I will allow Senator Dunn to continue but I would advise her that she cannot question the merit or otherwise of likely evidence that could be used in the prosecution case, because it is obvious that this would prejudice any case that came before a jury. (SD, 30/5/1989, pp 3062-5)

On a subsequent occasion, the same senator was asked to reframe her remarks when committal proceedings relating to the matter were in progress before a magistrate (SD, 27/9/1989, pp 1472-3).

This treatment of this matter illustrates the three important principles of the sub judice convention:

- there should be an assessment of whether there is a real danger of prejudice in the sense explained by Senator Tate
- the danger of prejudice must be weighed against the public interest in the matters under discussion
- the danger of prejudice is greater when a matter is actually before a magistrate or a jury.

It would be an undue restriction on the freedom of the Senate to debate matters of public interest if debate were to be restrained simply on the basis that matters may come before a court in the future. Thus the fact that writs have been issued, which does not necessarily mean that proceedings will ensue, does not give cause for the sub judice convention to be invoked (ruling of President Sibraa, SD, 10/5/1988, p. 2224).

In 1979 debate on a motion which sought an inquiry into prosecution evidence in a case then before a magistrate was not permitted (SD, 13/11/1979, pp 2162-7).

A point of order was taken on 15 August 1991 to the effect that a notice of motion given by a senator was contrary to the principle relating to matters which are sub judice. The basis of the point of order was that the notice of motion was making allegations against a person who was the subject of criminal proceedings, which proceedings were mentioned in the notice but which were not connected with the allegations. This point of order raised an interesting question of principle, as it may be possible to prejudice the trial of a person by making allegations against that person which are not connected with the matters at issue in the criminal proceedings. The President, in accordance with the less restrictive interpretation of the sub judice principle in recent years, ruled that so long as the notice did not refer to the merits of the legal proceedings it was in order (15/8/1991, J.1372).

A significant and difficult case involving the sub judice convention was the Westpac documents case.

On 12 February 1991 President Sibraa made a statement in response to conflicting submissions which had been made to him by a senator and by Westpac Banking Corporation on the question of whether the senator should be allowed to disclose in the Senate documents belonging to Westpac. The question for determination was whether the disclosure of the documents in Senate proceedings should be prevented under the sub judice principle. The President stated that disclosure of the documents could be prejudicial to legal proceedings, in that it could terminate proceedings whereby Westpac was seeking the suppression of the documents on the basis of legal professional privilege. He indicated that, having weighed the contrary factors of prejudice to the legal proceedings and the right of the Senate to debate a matter of public interest, he had determined that disclosure of the documents in proceedings of the Senate should not be permitted. The President stated:

> The very subject matter of the case immediately before the courts, and in respect of which the sub judice claim is made, is the question as to whether the documents involved should be suppressed: to disclose the documents now would ipso facto abort that case. No clearer example of real and present danger to current legal proceedings could be imagined: indeed, it is not merely a matter of the present proceedings being prejudiced, but rather a particular litigant's rights being denied absolutely (SD, 12/2/1991, p. 356).

This ruling was disputed in debate on 14, 20 and 21 February and 5 March 1991. On 7 March 1991 the President withdrew the prohibition on the disclosure of the documents after they had been disclosed in the South Australian Parliament and subsequently published with the concurrence of Westpac. The documents were tabled on that day and debated on 13 March 1991.

Important features of the case were:

- the prejudice which was to be apprehended by disclosure of the documents in proceedings in the Senate was of an unusual character: such disclosure could render the court proceedings undertaken by Westpac ineffectual, in that the court would be unlikely to order the suppression of documents which had been tabled in the Senate and thereby made public

- the apprehension of prejudice, however, appeared to be greatly diminished by a judgment of the New South Wales Supreme Court in continuing a temporary suppression order on the documents, in that the court indicated that publication of the documents in the Senate would not necessarily terminate the action to have the documents permanently suppressed, and would not prevent further publication of the documents by the press being treated as contempt of court (For an explicit rejection of this approach in respect of documents likely to be disclosed in Parliament, see *New Zealand Post Ltd v Prebble* 2001 NZLR 360.)

- although matters contained in the documents might also be prejudicial to future proceedings, there were no such proceedings actually before the courts

- the matter was unquestionably one of great public interest, relating to the conduct of a major bank and its treatment of many clients

- any restriction on debate in the Senate under the sub judice principle could have been temporary only, in that when the court proceedings were concluded there would no longer be any impediment to the disclosure in the Senate of the documents in question, even if Westpac were successful and the courts suppressed all future publication of the documents; a document which is the subject of legal professional privilege and a document the suppression of which has been ordered by a court may be disclosed in parliamentary proceedings with complete impunity because neither the law nor any parliamentary rule prevents such disclosure.

In the President's ruling there was a suggestion that consideration should be given to the question of whether the Senate should permit the disclosure in its proceedings of a document which is the subject of legal professional privilege. There is no parliamentary rule, in the Senate or in other comparable Houses, that material which is the subject of legal professional privilege cannot be disclosed in proceedings.

The ruling also referred to other proceedings which might be prejudiced by the disclosure of the documents. No other proceedings were on foot at that time. The sub judice principle hitherto has been strictly limited to proceedings actually in progress, and to apply it to expected or possible proceedings would be to restrict debate to a degree not previously contemplated.

The ruling in this case was essentially based on balancing the apprehended prejudice to court proceedings against the public interest in the matter in question and the freedom of the Senate to debate matters of public interest. Because of the peculiar circumstances of the case, the ruling is unlikely to offer guidance in future cases.

In 1997 the Senate postponed an inquiry into the conduct of Senator Colston on the basis that it might interfere with police inquiries and possible subsequent criminal proceedings against him (7/5/1997, J.1855-6).

In 1998 the President prevented Senator Colston placing before the Senate material which would have prejudiced the trial of charges of fraud laid against him (ruling of President Reid, SD, 6/4/1998, p. 2134; 7/4/1998, J.3649).

In response to an order for production of documents relating to the waterfront dispute in 1998, the government refused to produce the documents on the ground that the documents were relevant to actions pending in the Federal Court between the parties to the dispute (SD, 28/5/1998, pp 3378-9). Advice by the Clerk of the Senate suggested that this apparent invocation of the sub judice convention was not well founded (Economics Legislation Committee, estimates Hansard, 2/6/1998, pp E124-8).

Debate should not be constrained under the sub judice convention in relation to a matter concerning the internal affairs of the Senate (ruling of President Cormack, SD, 8/4/1974, pp 704-5). In 1998 the President suggested that, while the sub judice convention was not applicable, in that there was no trial before a jury and therefore little possibility of prejudice to proceedings, debate should not canvass the merits of a petition before the Court of Disputed Returns (SD, 3/12/1998, p. 1239). This suggestion was based on the need for comity between the Senate and the Court.

The sub judice convention does not have application to matters before royal commissions and other commissions of inquiry. In the past rulings were made to the effect that matters before royal commissions should not be canvassed, but these rulings are not consistent with the subsequent emphasis on the danger of prejudice to court proceedings. A royal commission is not a court, its proceedings are not judicial proceedings, it does not try cases and it is unlikely that a royal commissioner would be influenced by parliamentary debate. Criminal prosecutions may arise from evidence taken before royal commissions, but the sub judice convention should not be invoked until such time as such prosecutions are before the courts. Thus it has been ruled that the sub judice convention does not arise in relation to inquiries by a state commission (ruling of President Laucke, SD, 15/11/1978, p. 2079; also SD, 19/10/1977, pp 1489-1505; 11/10/2000, p. 18288). In 1983 a senator was allowed to comment directly on evidence presented to a Commonwealth royal commission without any invoking of the sub judice convention (SD, 20/9/1983, p. 763). Similarly, proceedings of, and evidence before the Western Australian Royal Commission into Use of Executive Power were extensively canvassed in debate in August and September 1995 without any attempt to restrain that debate. (See also the transcript of the estimates hearing of the Employment, Workplace Relations and Education Legislation Committee, 3/6/2002, pp 63-5, 76-80; references to the royal commission on the building industry, SD, 4/3/2003, pp 9009-10.)

An inquest by a coroner, although an administrative inquiry and not a judicial proceeding, is not in the same category as executive-government appointed inquiries, and may be prejudiced by parliamentary debate, particularly where a jury is involved. Although the sub judice principle as such does not apply, the chair therefore discourages the canvassing in debate of issues before a coroner (observations by President Sibraa, SD, 17/11/1993, pp 3026, 3028). Extensive public discussion of a matter, however, may weaken the case for restraint on the part of the Senate (observation by Acting Deputy President McGauran, SD, 4/5/1994, p. 237).

The sub judice convention is regarded as applying to proceedings in committees. If, however, a committee has been directed by the Senate to inquire into a particular matter, the convention cannot be invoked in the committee to prevent the inquiry. Committees have the capacity to avoid any prejudice to legal proceedings by hearing evidence in camera. See also Chapter 16, Committees, under Privilege of proceedings. For judicial proceedings on matters which have been the subject of parliamentary inquiry, see Chapter 2, Parliamentary Privilege, under Power to conduct inquiries. (For a committee refraining from an inquiry while a coroner concluded an examination of a matter, see the case of the Rural and Regional Affairs and Transport Legislation Committee's inquiry into the search for the *Margaret J*, Chapter 16, Committees, under Disclosure of evidence and documents.)

A factor in the future application of the sub judice principle by the Senate may well be the changed attitude of the courts in recent times to public discussion of matters pending in legal proceedings. The courts are now less concerned about such public discussion, having concluded that "in the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them" (*R. v Glennon* 1992 173 CLR 592 at 603; see also *John Fairfax v District Court of NSW*, 2004 61 NSWLR 344).

Discussion of court decisions

Reference was made (above, under Sub judice convention) to the additional dimension of contempt of court, as expounded by a justice of the Federal Court in *Sharpe v Goodhew*, which has not been regarded as part of the basis of the sub judice convention. This is the consideration of principle raised by comments on the decisions and judgments of courts which do not affect the process by which those decisions and judgments are reached but which may affect public confidence in judgments.

Remarks may be made in the Senate notwithstanding that, if made outside the Senate, they could constitute contempt of court under the principle set out in that part of the judgment. There is no restriction on debate in the Senate involving critical comment on the decisions or judgments of courts; the only relevant limitation is that contained in standing order 193, which prohibits offensive words against a judicial officer (see below, under Rules of debate). Thus in 1973 Acting Deputy President Marriott ruled that it is in order to comment on a judgment but that no reflection can be made on the integrity of the judiciary (SD, 5/4/1973, p. 887). This would apply to critical comment before or after a decision or judgment, although what Justice Spender called prejudgment would obviously make it more likely that the sub judice convention could be applicable, and as a matter of comity between the legislature and the judiciary, the Senate and senators should not seek to tell courts what judgments they should make.

In 1969 the Senate debated a motion to censure a Senate minister on the ground that he had suggested in debate in the Senate that a person was guilty of an offence, a charge relating to which had been dismissed by a court. The motion was negatived. During debate on the motion reference was made to judicial authority to the effect that public criticism of the actions of courts is not unlawful provided that such criticism is not made in malice or in an attempt to impair the administration of justice (SD, 19-20/8/1969, pp 130-62, 177-201).

Rules of debate

In speaking in debate a senator addresses the President, or the Chair of Committees in committee of the whole (SO 186(1)). Other senators are referred to in the third person and are not addressed directly (ruling of President Givens, SD, 15/7/1925, p. 1018). The rationale of this long-established parliamentary mode of speaking is that it acknowledges the role of the chair in applying the processes of orderly debate and guards against any tendency to lapse into offensive language.

Certain institutions and categories of office-holders are specially protected by the standing orders against offensive words and personal reflections (SO 193). This protection is extended to:

- a vote of the Senate, except where a motion is moved for a vote to be rescinded
- the monarch, the Governor-General and governors of states
- both Houses of the Parliament and the houses of the state and territory parliaments

- senators, members of the House of Representatives and members of state and territory parliaments

- judicial officers.

The rule that a senator must not reflect on any vote of the Senate except for the purpose of moving its rescission (SO 193(1)) is seldom invoked. Senators are not prevented in practice from saying that a decision of the Senate was wrong. The rule could be invoked against gross abuse of a past decision of the Senate, which would amount to reflections on the Senate itself.

The monarch, the Governor-General and governors of states must not be referred to disrespectfully in debate, or for the purpose of influencing the Senate in its deliberations (SO 193(2)). This rule is founded upon the need for mutual respect between the branches of government and between the Commonwealth and state governments, and on the requirement that the holders of these offices remain above political disputation. This prohibition is more restrictive than the injunction against "offensive words …. imputations of improper motives …. [and] personal reflections" against senators and the members of other Houses contained in paragraph (3) of the standing order. The prohibition on references "for the purpose of influencing the Senate in its deliberations" is clearly designed to prevent statements seeking to enlist the supposed support or opposition of the Governor-General to a cause. It could also cover such things as citing the Governor-General as an example to be avoided. (For a resolution calling on the Governor-General to resign, or, if he does not, for the Prime Minister to advise the withdrawal of his commission, see 15/5/2003, J.1818-20.)

The rule against offensive words, imputations of improper motives and personal reflections directed to members of either House of the Commonwealth Parliament or to members of state and territory parliaments (SO 193(3)) is designed to ensure comity and mutual respect between houses of parliaments and between the Commonwealth and state and territory parliaments, and to ensure that debate between those who are by virtue of their offices the principal participants in political debate is conducted in the privileged forum of Parliament without personally offensive language.

The protection of judicial office-holders under the standing order is based on the need for comity and mutual respect between the legislature and the judiciary, and the requirement that judicial officers be protected from remarks which might needlessly undermine public respect for the judiciary. The protection, however, does not prevent criticism of the judgments or decisions of courts (rulings of President Laucke and acting Deputy President Robertson, SD, 31/5/1979, pp 2424, 2427-8, 19/3/1980, p. 779; also Standing Orders Committee, 5th Report of 59th Session, 31 March 1980, PP 50/1980, p. 5; see also under Discussion of decisions of courts, above). It would also not apply to proceedings on a properly framed motion for the removal of a federal judge under section 72 of the Constitution (see Chapter 20, Relations with the Judiciary).

In 2002 a senator (who was a parliamentary secretary) was censured by the Senate for recklessly making unsubstantiated allegations against a justice of the High Court, after the Deputy President ruled that his remarks were contrary to standing order 193. The Deputy President observed that senators should not make allegations of misconduct against judicial

officers unless initiating action under section 72 of the Constitution for their removal (13/3/2002, J.165; 19/3/2002, J.216-7).

Former holders of the protected offices are not protected (ruling of President Sibraa, SD, 19/12/1988, p. 4484).

Members of another house are entitled to the protection provided by standing order 193(3) when their house has been dissolved for an election and they are technically not members. It would be anomalous if the protection provided by the standing order were to cease simply because a house has been dissolved for election. There would also be the anomalous distinction between a lower house which has been dissolved and an upper house which has not and the members of which would continue to attract the protection. Therefore members of a house which has been dissolved continue to attract the protection of the standing orders until such time as the successor house meets. Members who retire or are defeated at the election then cease to attract the protection when their successors are in office. New members returned in an election are not protected until they take their seats, but nor are they protected as non-member candidates during an election.

It is for the chair to determine what constitutes offensive words, imputations of improper motives and personal reflections under this standing order. In doing so, the chair has regard to the connotations of expressions and the context in which they are used (statement by Deputy President West, SD, 25/8/1999, p. 7731; by President Calvert, SD, 27/3/2003, p. 10408).

All suggestions that members have lied, that is, deliberately and knowingly made untrue statements, are disorderly. Remarks to the effect that senators' statements are untrue or misleading are not necessarily out of order; for the chair to intervene there must be some implication that a senator has deliberately or knowingly made untrue statements. It is for the chair to judge whether that implication is present in any particular instance. (Statements by President McMullin, SD, 31/10/1967, p. 1891; by Deputy President, 15/10/1991, pp 1992-3; by President Sibraa, 9/12/1992, p. 4595; 26/5/1993, pp 1340-1; 8/12/1993, p. 4162; by President Beahan, SD, 27/11/1995, pp 3929-30.)

It has been held that it is not in order to refer to a senator's religion in debate (statement by President Calvert, referring to ruling by President McMullin, SD, 8/11/2005, pp 20, 35-6).

For the quotation of documents which contain disorderly expressions, see above, under Quotation of documents.

It is not for the chair to judge the accuracy or truthfulness of senators' statements (rulings of President Givens, SD, 28/2/1917, p. 10672; 25/7/1917, p. 415; statement by President Sibraa, 14/12/1992, pp 4809-10). Statements by senators about matters of fact, including statements about persons protected by the standing orders, do not amount to offensive words merely on the basis that they are alleged to be false; that is a matter for refutation in debate, and not a question of order for the chair (statement by President Beahan, SD, 1/9/1994, pp 801-2). Similarly, statements about the policies of parties which are alleged to be incorrect are matters for correction in debate, not subjects for ruling by the chair (statement by President Calvert, SD, 4/12/2006, pp 37-8).

The chair may require the withdrawal of words which offend against the standing order, and a refusal to withdraw words at the direction of the chair constitutes disorder and may be subject to action by the chair (see under Disorder, below).

The chair normally does not require the withdrawal of words unless the chair has determined that they are contrary to the standing order, but if a senator finds a remark personally offensive, the chair may require its withdrawal to preserve the dignity of debate (rulings of President Turley, SD, 6/9/1911, p. 98, 1/11/1911, pp 2053, 2069, 29/11/1911, p. 3307, 14/12/1911, p. 4452, 1/11/1912, p. 5005; of President Hayes, 9/6/1939, p. 1581; of President Brown, 22/3/1944, p. 1713; of President Mattner, 10/9/1952, p. 1173).

A distinction has been drawn between statements about governments and statements about particular members or groups of members of Commonwealth or state parliaments. It has been ruled that remarks may be made about a government generally which would be unparliamentary if made about a particular member or group of members, although President Sibraa observed that it is a difficult distinction to make and that perhaps it is a distinction which should not be made (SD, 26/5/1993, p. 1340; 18/11/1996, p. 5402).

Where expressions are used which are open to an interpretation that makes them contrary to the standing orders, the Chair may ask the senator speaking to clarify their meaning and intention, and, if that meaning and intention is not contrary to the standing orders, may allow the senator to proceed on that basis without withdrawing the words in question (statement by President Reid, SD, 18/3/1997, p. 1655).

The chair discountenances the making of otherwise prohibited allegations against protected office-holders by the device of reporting such allegations while not adopting them (statement by President Calvert, SD, 27/8/2002, p. 3778).

It is sometimes suggested that it is not disorderly to use offensive words against groups of members of either House as distinct from individually named members. There is no basis for this suggestion in the rules of the Senate. On the contrary, offensive words against a group of members of either House may be regarded as a worse offence than directing such words to an individual member (rulings of President Baker, SD, 14/9/1905, pp 2246-7; 19/9/1906, pp 4839-40; President Givens, 7/12/1916, pp 9496-8; President Kingsmill, 21/5/1931, p. 2154; 15/7/1931, p. 3864; 21/10/1931, p. 962; President McMullin, 9/3/1967, p. 450; President Sibraa, 10/12/1991, p. 4509; 26/5/1993, p. 1340-1; President Beahan, 30/8/1995, p. 694; President Calvert, 17/8/2006, p. 76; 28/2/2007, pp 76-7).

The chair does not wait for a senator to object to offensive words, but intervenes and requires the withdrawal of expressions which the chair regards as clearly contrary to the standing order.

Withdrawal of offensive words is accepted by the Senate, and a senator is not entitled to refer to them or debate them subsequently (ruling of President Givens, SD, 11/12/1913, p. 4115).

Occasionally suggestions are made that disorderly remarks should be expunged from the Hansard transcript of debate, but this step has not been taken in recent times. Although committees, under the Senate's Privilege Resolutions, are required to consider the

expungement of irrelevant evidence adversely reflecting on other persons (see Chapter 17, Witnesses, under Protection of witnesses), such a step is regarded as undesirable because it alters the record without altering what has actually occurred in the course of the proceedings. This is more undesirable in the case of the Senate when proceedings may be reported in print and broadcast on radio and television, and when it is considered that Hansard should be as nearly as practicable an accurate record of debate.

The Chair of Committees in committee of the whole has the same authority to enforce standing order 193 as the President, but disorder in the committee can be dealt with only in the Senate (SO 144(7)).

The expression "unparliamentary language" is used generically to refer to remarks which are contrary to the various prohibitions in standing order 193. The term is also used to refer to words which may be regarded by the chair as unacceptable in debate even when they are not directed to any of the protected institutions or office-holders listed in the standing order. (See statement by President Reid, SD, 15/5/2002, p. 1631.)

The standing orders do not give any protection against offensive words or personal reflections to persons who are not explicitly protected by standing order 193. The Senate has, however, adopted procedures to allow such persons to respond to remarks made about them in the Senate (see Chapter 2, Parliamentary Privilege, under Abuse of parliamentary immunity: right of reply; for the right of witnesses to respond to adverse evidence, see Chapter 17, Witnesses).

On two occasions it was ruled that reflections should not be made on the heads of state of friendly foreign nations (rulings of President McMullin, SD, 16/2/1956, p. 23; of President Cormack, 19/3/1974, p. 361). These rulings, while reflecting a British House of Commons rule, have no basis in the standing orders. They have not been repeated and it is unlikely that they would now be followed.

The rules concerning language in debate may be modified by motions which necessarily require such modification for their determination. Where a motion to censure a minister directly accuses the minister of knowingly giving false information the rule against allegations of lying is not enforced to that extent. Similarly, if a motion were to be moved for an address to remove a judge, it could hardly be expected that the judge would be protected from adverse reflections in debate on the motion. (SD, 14/8/2003, p. 13726. For a resolution calling on the Governor-General to resign, or, if he does not, for the Prime Minister to advise the withdrawal of his commission, see 15/5/2003, J.1818-20.)

A statement or denial made by a senator must be accepted by the Senate (rulings of President Gould, SD, 31/10/1907, pp 5374, 5385, 9/8/1907, p. 1691; of President Lynch, 28/9/1932, p. 785; of President Cormack, 30/8/1973, p. 327; of President O'Byrne, 11/7/1974, p. 101).

It was formerly the practice to refer to the House of Representatives as "the other place"; avoidance of direct reference was a means of ensuring avoidance of any improper reflections. This custom is now generally not observed.

Matters relating to the conduct of senators in debate are also the subject of the Senate's Privilege Resolutions (see Chapter 2, Parliamentary Privilege). Resolution 9 enjoins senators to exercise their freedom of speech in the Senate with regard to the rights of persons outside parliament and not to make statements reflecting adversely on such persons without proper evidence. Resolution 5 provides for the publication by the Senate of responses by persons who have been adversely affected by references about them in the Senate.

Declarations of interests

In 1994 the Senate adopted an order which required a senator to declare any relevant interest which the senator had in the subject matter of a debate. This order formalised a long-established practice whereby senators declared any interests during debate, and such declarations are recorded in the Journals. (See also Chapter 6, Senators, under Pecuniary interests.) The requirement to declare interests in debate and when voting was abolished in 2003, but senators may still declare interests.

Interruption of speaker

A senator who is speaking in debate may not be interrupted by another senator except to call attention to:

- a point of order
- a question of privilege suddenly arising in relation to the proceedings before the Senate
- the lack of a quorum (SO 81, 197(1)).

When a question of order or a matter of privilege is raised in this way, the business before the Senate is suspended until the chair determines the question (SO 197(3)). This procedure is seldom invoked in relation to a matter of privilege, and is usually used to raise a point of order arising out of the remarks of the senator speaking. When a point of order is raised the senator speaking sits down. The President may hear argument from senators on the point of order, and may determine it forthwith or at a later time (SO 197(4), (5); see below, under Questions of order).

Time taken in raising and determining a point of order does not come out of the time for a senator to speak or the time for a debate (SO 197(6)).

For the calling of quorums, see Chapter 8, Conduct of Proceedings, under Quorum.

The procedures of the Senate do not allow a motion that a senator be no longer heard (ruling of President McMullin, SD, 12/11/1959, p. 1475). Such motions are used in the House of Representatives to "gag" individual speakers even though they have the call from the chair to speak.

Interjections

Interjections by other senators when a senator is speaking are technically contrary to standing order 197 and disorderly. In practice, interjections which are not disruptive are tolerated, particularly if they facilitate the exchange of views and arguments in debate.

A senator has the right to be heard in silence, however, and the chair will protect from interjections a senator who asks to be protected (rulings of President Givens, SD, 1/10/1920, p. 5234, 17/8/1922, p. 1426; also statements by President O'Byrne, 27/2/1975, p. 523, 16/10/1975, p. 1217).

The old parliamentary practice of interjecting "hear, hear" as a sign of approbation is tolerated, but applause is disorderly.

New senator's first speech

Special conventions of debate apply to the first speech of a new senator. It is expected that the Senate chamber will be well attended for a first speech, and that the new senator will be heard without interjection or interruption. The corollary of this convention is that a first speech should not directly criticise other senators or otherwise provoke interjections or points of order. It is customary for other senators to congratulate a new senator on a first speech.

In recent years there has been a practice of passing a special order to allow senators to make their first speeches without any question before the chair. In the past it was the practice to rearrange business to bring on some item of business for the occasion of new senators' first speeches so that those senators would not be unduly restricted by the requirement of relevance. Orders of the day for the resumption of adjourned debates on matters such as the address-in-reply to the Governor-General's opening speech and motions to take note of budget statements were often employed for this purpose.

Conduct of senators

To facilitate the orderly process of debate, certain rules of conduct apply to senators in the Senate chamber.

It is the responsibility of the President to maintain order in the Senate (SO 184(1)), and for this purpose the chair ensures that the conduct of senators during proceedings in the Senate is not disruptive of those proceedings.

When a question of order is raised, the senator speaking sits down and the President determines the question of order (SO 197(4), (5)). In addition to calling for order, the President may stand, in which case the senator speaking must sit down and the Senate must be silent (SO 184(2)). Senators must not move about the chamber when the President is putting a question to the Senate (SO 184(3)).

On entering or leaving the chamber a senator must acknowledge the chair (SO 185(1)). This is done by a bow or nod to the chair. A senator may not pass between the chair and a senator who is

speaking or between the chair and the table (SO 185(2)). Senators must not stand in the chamber unless seeking the call to speak (SO 185(3)).

It is not in order for senators to hold up newspapers or placards in the chamber or display items such as badges with slogans (rulings of President Sibraa, SD, 9/12/1992, pp 4526-7; of President Reid, 21/10/1999, p.10177; 21/6/2001, p. 24881). Senators may not have on their desks items which are objectionable to other senators (ruling of President Kingsmill, SD, 24/5/1932, pp 1231, 1239). It is similarly not in order to wear in the chamber T-shirts or other clothing bearing slogans (ruling of President Calvert, SD, 19/3/2003, p. 9664). The basis of these rulings is that, not only is the holding up of placards with slogans disruptive of orderly debate, but it would allow senators to intervene in debate other than by receiving the call from the chair and participating in debate in accordance with the rules of the Senate. It would be highly undesirable to have debate in the Senate reduced to the level of displaying placards with slogans. The wearing of clothing, such as T-shirts, with slogans is the same in principle as displaying placards or badges with slogans and is objectionable and disorderly on the same grounds.

The use of dictaphones in the chamber has been discountenanced by the Chair (SD, 17/8/1993, pp 24-5). Other equipment such as portable computers may be used if there is no disruption of proceedings.

It is disorderly for a senator to smoke or eat in the chamber (ruling of President Givens, SD, 24/8/1923, p. 3493).

It is considered discourteous for a senator to leave the chamber immediately after finishing a speech, in that the next speaker may comment on the senator's speech as part of the exchange of debate, and it is proper for senators to hear each other's views.

Advisers attending on senators in the places reserved for advisers in the chamber are required to behave with decorum and not disturb proceedings (ruling of President Sibraa, 8/12/1993, J.942; statement by chair 22/2/1994, J.1289). Subject to that requirement, senators are entitled to have whomever they choose as their advisers in their advisers' benches (SD, 2/12/2005, p. 10).

Questions of order

In accordance with the President's responsibility to maintain order in the Senate (SO 184(1)), the President rules on questions of order and applies and interprets the standing orders and rules and practices of the Senate. This responsibility is not confined to occasions when questions of order are raised by senators in accordance with standing order 197; the chair may draw attention to a question of order and rule on it without awaiting a point of order by a senator.

The President may hear argument on a question of order and may determine it at once or at a later time (SO 197(5)).

A ruling by the President on a question of order must be complied with. It is the equivalent of an order of the Senate unless and until it is dissented from or altered by the Senate (rulings of President Baker, SD, 4/10/1906, p. 6089; of President Gould, 18/10/1907, p. 4909).

A point of order raised by a senator must not be used to make a debating point but should relate to some question of order (rulings of President Givens, SD, 8/7/1915, p. 4700, 19/8/1915, p. 5871, 25/9/1917, p. 2632, 19/6/1924, p. 1399; of President Sibraa, 2/12/1991, p. 3742). The chair does not deal with hypothetical points of order or points which have already been determined (rulings of President Baker, SD, 1/10/1906, p. 5765, 28/9/1906, p. 5646).

In committee of the whole the Chair of Committees has the same authority to make rulings as the President in the Senate (SO 144(7)).

Objection to ruling of the President

All rulings of the President are subject to appeal to the whole Senate. There are two methods by which the Senate may overturn a ruling of the President.

First, by motion on notice, moved and dealt with in accordance with the normal rules relating to the conduct of business, the Senate may, by a special resolution or order, change the ruling or the procedure on which the ruling is based.

Secondly, the Senate may dissent from a President's ruling, and a procedure is provided whereby a motion of dissent may be moved at the time when a ruling is made.

A senator who objects to a ruling of the President may immediately state that objection. The objection must be put in writing, and a motion moved that the Senate dissent from the President's ruling. Debate on that motion is adjourned till the next sitting day unless the Senate decides, on a motion moved without notice and put without debate, that the question requires immediate determination (SO 198).

If a motion of dissent is adjourned till the next day of sitting it is the practice to place it first on the Notice Paper for that day (Notice Papers 9/7/1919, 16/7/1919, 26/9/1938, 3/11/1938, 16/5/1950, 16/9/1952, 12/5/1970, 20/5/1970, 17/8/2005, 15/9/2005). The motion may be postponed and discharged (20/5/1970, J.113; 21-22/10/1970, J.363, 370; 29/10/1970, J.400).

If a motion of dissent is adjourned the disputed ruling stands and applies to the proceedings. The matter under consideration may, however, be adjourned until the motion of dissent is determined (ruling of President Gould, 30/10/1908, J.60-1).

If it is decided that a motion of dissent requires immediate determination, it is usual for debate to occur on the motion, which is then put to a vote of the Senate. Normally a motion of dissent is determined immediately.

On a motion to dissent from a President's ruling the greatest latitude of discussion is allowed. The President may participate in the discussion in order to clarify the ruling or respond to points which have been made (ruling of President Baker, SD, 31/10/1905, p. 4262; also statement by President Baker, 4/9/1903, p. 4630-1).

The Chair of Committees rules on questions of order in committee of the whole (SO 144(7)), but if a senator objects to a decision of the Chair of Committees, this is reported to the Senate. The President then determines the matter by making a ruling, after hearing senators in relation to the objection, and, unless objection is taken to the President's ruling, the committee of the whole resumes (SO 145).

Disorder

A senator is guilty of an offence if the senator:

(a) persistently and wilfully obstructs the business of the Senate;

(b) is guilty of disorderly conduct;

(c) uses objectionable words, and refuses to withdraw such words;

(d) persistently and wilfully refuses to conform to the standing orders; or

(e) persistently and wilfully disregards the authority of the Chair (SO 203(1)).

The President may report to the Senate that a senator has committed an offence; this is known as "naming" the senator.

A senator who has been reported as having committed an offence is called upon to make an explanation or apology. It is open to the chair to accept the explanation or apology (see, for example, ruling of Acting Deputy President Aulich, SD, 25/6/1992, pp 4626-37). If the explanation or apology is not acceptable, a motion may be moved that the senator be suspended from the sitting of the Senate, and that motion must be put and determined without any amendment, adjournment or debate (SO 203(3)).

If an offence is committed in committee of the whole, the Chair of Committees reports the matter to the President, the Senate resuming for that purpose (SO 203(2)).

If two or more senators are reported for offences, separate suspension motions are moved (4/3/1932, J.28; 30/5/1972, J.1024).

The suspension of a senator is for the remainder of that day's sitting, but if a senator commits a second offence in the same calendar year the suspension is for seven sitting days, and for any subsequent offences within a calendar year a suspension is for 14 sitting days. A senator who has been suspended from the sitting of the Senate may not enter the Senate chamber during the period of the suspension (SO 204).

The suspension of a senator from the sitting of the Senate does not prevent the senator attending a meeting of a Senate committee, and does not affect any of the senator's other entitlements.

On 19 December 1991 the suspension of a senator was rescinded after debate on the incident leading to the suspension (19/12/1991, J.1985-6, 1990).

A senator who leaves the chamber after being reported for an offence may be ordered to return (18/10/1962, J.156; 9/5/1968, J.71; 22/4/1971, J.534). A senator who wilfully disobeys an order of the Senate may be ordered to attend the Senate and may be taken into custody (SO 206).

The Senate may impose a greater penalty on a senator by special order if the Senate considers that course appropriate (statement by President McMullin, 9/5/1968, J.72). The power of the Senate to punish contempts under section 49 of the Constitution and the *Parliamentary Privileges Act 1987* extends to senators (see Chapter 2, Parliamentary Privilege).

The procedures relating to disorder are salutary in that the responsibility for maintaining order is imposed on the whole Senate, rather than the chair or any other particular authority. This principle is reflected in the rule that any senator may move a suspension motion, and the Senate must vote on it.

Suspensions of senators for disorder are now very rare in the Senate.

Adjournment of debate

A senator may move in the course of a debate, but not so as to interrupt a senator speaking, that the debate be adjourned. This motion may not be moved by a senator, other than a minister, who has spoken in the debate (SO 201(1), (6)). In practice a senator is allowed to make a few explanatory remarks before moving the adjournment of a debate. The motion for the adjournment of the debate must be put without debate or amendment (SO 201(2)).

An alternative method of adjourning a debate is for the senator speaking to seek leave to continue the senator's remarks. If leave is granted, this is the equivalent of the passage of a motion for the adjournment of the debate.

When a debate is adjourned, by motion or by the granting of leave for a senator to continue the senator's speech, the resumption of the debate is an order of the day for the next day of sitting, unless a further motion is carried fixing another time for the resumption of debate (SO 201(3)). The motion to fix another time for the resumption of the debate, unlike the motion for the adjournment of the debate, is open to debate and amendment; an amendment may be moved to fix a time other than the time proposed in the motion, and that amendment may be debated. Debate on the amendment, however, is confined to the question of the time to be fixed (ruling of President Cunningham, SD, 25/3/1943, p. 2344). The motion for the adjournment of a debate and a motion to fix a time for the resumption should be moved separately (ruling of Acting Deputy President Teague, SD, 4/5/1992, pp 2242-3). (For a debate on a motion to fix the time for resumption of debate, see 10/3/2004, J.3126, 3134.)

A motion to fix a time for the resumption of a debate which has been adjourned under standing order 201(3) does not extend to altering the routine of business under the standing orders, for example, by giving a general business item a precedence it would not otherwise have, or circumventing the ability of the government under standing order 65 to specify the order on the Notice Paper of its items of business on a day. It is not in order to move a motion

that, for example, debate on an adjourned item be resumed at 2 pm on a day, or that debate on a general business item be resumed before government business is called on on a day.

A senator on whose motion a debate is adjourned is entitled to be first heard on the resumption of the debate (SO 201(4)), but is not obliged to exercise this entitlement, and may speak later in the debate.

If a motion for adjournment of a debate is negatived, the senator moving that motion may speak later in that debate (SO 201(5)).

A senator granted leave to continue the senator's remarks who does not speak when the debate is resumed has forfeited the right to speak (ruling of President Givens, SD, 23/7/1924, p. 2327).

A debate which is interrupted by a suspension of the sitting of the Senate is resumed when the sitting resumes as if there had been no interruption (ruling of President Baker, SD, 20-1/9/1906, pp 5010, 5092).

Closure of debate

A motion may be moved in the course of a debate, but not so as to interrupt a senator speaking, that the question be now put. That motion must be put and determined without debate or amendment, and if it is carried the question before the Senate is then put and determined immediately without further debate or amendment (SO 199). This procedure provides an opportunity for the Senate to decide that debate should conclude and the question before the Senate be determined. It is known colloquially as the "gag".

The closure motion cannot be moved by a senator other than a minister who has spoken in the debate or who has previously moved the closure (SO 199(3)). In practice a senator is allowed to make a few explanatory remarks before moving the closure.

The motion may be directed only to the question before the chair, so that, if the question is for an amendment to be agreed to, it is only that question which is put without further debate, and debate on the main question may continue.

The closure may be moved in committee of the whole, but may not be repeated within 15 minutes after it has been moved (SO 144(6)).

A senator who has moved the closure, if that motion is negatived, may speak later in the debate; this practice is based on an analogy with the rule applying to the adjournment of debate.

Reply

A senator who has moved a substantive motion may speak in reply, and this reply closes the debate (SO 192). There is no right of reply in relation to a procedural motion or in relation to an amendment.

Motions which are open to debate but regarded as procedural in character and therefore not subject to the right of reply include motions for the suspension of standing orders, for an instruction to a committee of the whole and for the recommittal of a bill (ruling of President Gould, SD, 1/10/1909, p. 4021). Two of the elements of the composite motion under standing order 113(2) are regarded as procedural (see Chapter 12, Legislation, under Initiation).

Where two or more senators are joint movers of a motion, any one of them, but only one of them, may exercise the right of reply by speaking for a second time.

The chair will not call a senator to speak in reply if there is any other senator who has not spoken and who seeks the call to speak.

While the purpose of the reply is to respond to matters raised in debate, a senator speaking in reply can introduce relevant matter which has not been referred to in debate (ruling of President Baker, SD, 2/6/1904, p. 1854).

A senator who speaks in reply on behalf of another senator does not close the debate (ruling of President Brown, SD, 11/4/1946, p. 1358). A senator who moves a motion on behalf of another, however, may also speak in reply, and the mover of a motion may reply where another senator has moved the motion on the mover's behalf. Thus a speech by the minister in charge of a bill in response to the debate on the second reading is regarded as closing the debate, even though another minister moved the motion for the second reading. In this circumstance, it is the minister who moves the motion who acts on behalf of another.

Where motions are moved together, or items of business are taken together, by leave or by special order, each of the movers of motions so amalgamated may speak in reply (14/4/1988, J.628; 23/11/1988, J.1143-4; 27/11/2000, J.3584-6).

Question read

A senator may require the question to be read at any time during a debate but not so as to interrupt a senator speaking (SO 195). This procedure was virtually obsolete until revived in 1996 (SD, 18/10/1996, p. 4485; 29/10/1996, p. 4660). The Chair may decline to have the question read if it has been circulated to senators in print, which is now usually the case (ruling of President Calvert, SD, 15/9/2003, p. 15079).

Question put

When senators who wish to speak in a debate have done so, the President puts the question to the Senate and the Senate votes on the question. The putting of the question by the President ends the debate (SO 200).

In putting the question the President calls for the ayes and noes, and declares the chair's opinion of the result by declaring whether the ayes or the noes have it. This opinion may be challenged by two or more senators who are in the minority as declared by the chair by calling "divide", and a vote by division then ensues (see Chapter 11, Voting and Divisions).

Dividing the question

The President may divide a complicated question (SO 84(3)). A question is divided only if the parts of the question are capable of a distinct decision by the Senate. This may be done where preliminary words in a motion have to be understood as preceding each part of the motion (16/3/1988, J.557). In practice, the chair divides a question which is capable of being divided at the request of any senator, so that no senator is compelled to vote for or against two or more proposals in relation to which they may wish to vote differently (statement by Acting Deputy President Vanstone, SD, 12/11/1991, pp 2940-2). This procedure is particularly used where, by a previous decision, distinct questions, such as questions for the passage of different bills, have been combined. If a senator moves an amendment to one question which has been combined with another question, the amendment and the distinct questions are put separately (3/12/1985, J.684-5, 687-8; 4/12/1985, J.694-5, 696-8; 16, 17, 21/10/1986, J.1320, 1323, 1324-5, 1340-3). The chair may decline to divide a question if the request is not made for the purpose of protecting the right of a senator to vote differently on the component questions (statement by President Reid, SD, 23/6/1999, p. 6133; request to divide a question declined on the stated principle: SD, 25/9/2001, p. 27835; SD, 2/12/2005, pp 205-6). Unless this principle is adhered to, a limitation of time could be subverted by divisions on every question and amendment before the chair, in some cases resulting in hundreds of divisions.

Debating Opportunities and Time Limits

Bills

1° of non-amendable bill	15 mins	SO 112(2)
2°	20 mins	SO 189(1)
In committee	15 mins	SO 189(3)
(+ possible extension of 15 mins)		
3°	20 mins	SO 189(1)
Selection of Bills Committee—adoption of report	5 mins	SO 24A(7)
(**limit for debate:** 30 mins)		
Reference of a bill to committee	5 mins	SO 115(6)
(**limit for debate:** 30 mins)		

Committee reports and government responses

(Opportunities for debating documents and reports)

Motions relating to report on Wednesday or Thursday	10 mins	SO 62(4)
(**limit for debate:** 1 hr)		
Resumption (*Thursday*)	10 mins	SO 62(1)
(**limit for debate:** 1 hr)		

Debate

General	20 mins	SO 189(1)
Extension of time (*possible*)	10 mins	SO 189(1)
In committee	15 mins	SO 189(3)
In reply	20 mins	SO 189(2)

Documents (General)

Motions moved by leave	10 mins	SO 169(2)
(**limit for debate:** 30 mins per motion, 1 hr for all motions)		

Government documents—consideration

(Opportunities for debating documents and reports)

Motion to take note (*Tuesday and Wednesday*)	5 mins	SO 61(3)
(**limit for debate:** 30 mins)		
Resumption (*Thursday*)	5 mins	SO 61(3)
(**limit for debate:** 1 hr)		

Matters of Public Importance/Urgency

(Matters of public importance and Urgency)

All speakers	10 mins	SO 75(7)
(**limit for debate:** 1 hr, or 90 mins if no motions are moved after question time to take note of answers)		

Discussion of matters of public interest — 15 mins — SO 57(2)

Questions (Questions)

Without notice		
Asking question	1 min	SO 72(3)
Answering question	4 mins	SO 72(3)
Supplementary question	1 min	SO 72(3)
Answering supplementary	1 min	SO 72(3)
Debate on motions relating to answers	5 mins	SO 72(4)
(**limit for debate:** 30 mins)		

Suspension of standing orders

(Suspension of standing orders)	5 mins	SO 209(4)
(**limit for debate:** 30 mins)		

Debate for the election of the President of the Senate — 15 mins — SO 6(2)

Adjournment of the Senate — 10 mins — SO 54(5)

(**limit for debate:** 40 mins, except for Tuesday which has no limit on debate)

Chapter 11

VOTING AND DIVISIONS

THE CONSTITUTION entrenches the rule that decisions are made in the Senate by majority voting; it is not open to the Senate, as it is to houses of some other legislatures, to alter the principle of majority voting and to adopt some other method of making decisions by changing its internal rules of procedure. This entrenchment of the principle of majority voting is in accord with the theory of the geographically distributed majority underlying the composition of the Senate (see Chapter 1, The Senate and its Constitutional Role).

Majority voting

Section 23 of the Constitution provides:

> Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

This section clearly refers to a simple majority, that is, a majority (half plus one) of the senators present and voting. A simple majority is distinguished from an absolute majority in the Constitution by the requirement in section 128 that a bill for amending the Constitution must be passed by each House of the Parliament by an absolute majority. An absolute majority is also prescribed for the passing of a bill at a joint sitting of the two Houses in the event of further disagreement between the Houses over the bill after simultaneous dissolutions under section 57 of the Constitution. An absolute majority is a majority of the whole number of senators.

The provision in section 23 whereby the President has a deliberative vote only and not a casting vote is designed to preserve the equality of representation of the states. If the President had been given a casting vote, the state represented by the senator who happened to be President would have either an additional vote (if the casting vote were in addition to a deliberative vote) or the power to decide issues when the other senators were equally divided (if the President had a casting vote only).

Special majorities

The procedures of the Senate provide for special majorities for two kinds of procedural motions. A motion to rescind an order of the Senate (SO 87) and a motion for the suspension of standing orders moved without notice (SO 209) require an absolute majority to be carried. In the past the standing orders provided for special majorities for other questions.

Since the standing orders were adopted in 1903 the question has been raised whether any provision for a special majority in the standing orders is unconstitutional. Such a provision may be contrary to section 23 of the Constitution, which strongly implies that all questions in the Senate must be determined by the simple majority prescribed by the section. Against this seemingly conclusive argument that any provision for a special majority is contrary to section 23, it has been argued that it is open to the Senate, having regard to section 50 of the Constitution, which provides for the Senate to make rules and orders for the conduct of its proceedings, to determine that particular questions should be determined by a special majority. This argument may have greater force in relation to procedural as distinct from substantive questions. (See remarks by Chairman of Committees Best, SD, 17/6/1903, p. 980; joint opinion of the Attorney-General and Solicitor-General, SD, 20/5/1969, pp 1384-5.)

In 1968-69 a majority of the Senate, in effect, accepted the argument that requirements for special majorities are unconstitutional, and overturned the provisions in the standing orders for special majorities. Rulings by the President that motions to suspend standing orders without notice require an absolute majority were dissented from by the majority of the Senate, in accordance with standing order 198. The relevant standing orders, however, were not changed, and were subsequently adhered to and enforced (ruling of President Laucke, 17/9/1980, J.1549; of President Young, 22/9/1982, J.1096-7). It has since been accepted by the Senate that those standing orders are in force. In relation to the requirement for an absolute majority for the suspension of standing orders, senators have used contingent notices of motion in order to circumvent that requirement (see Chapter 8, Conduct of Proceedings, under Suspension of standing orders).

For a more detailed account of the controversy over section 23 of the Constitution and special majorities, see *ASP*, 6th ed., pp 393-9.

No account is taken of any vacancy in the Senate in determining whether there is an absolute majority. In other words, an absolute majority remains a majority of the whole number of senators, 39 out of 76 senators, although there may be only 75 or fewer senators actually in office (ruling of President Givens, SD, 27/6/1924, p. 1670).

Voting by voices

Every sitting day the Senate determines a very large number of questions, most of which are determined by votes on the voices, that is, votes which are taken by the President calling for the ayes and noes and declaring the result without a record of how each senator voted. Most questions are determined in this way because they are uncontested, but it is not unusual for contested questions to be so determined when senators know and accept the way in which the majority is voting.

Voting on the voices is usually not regarded as voting at all, and the term vote in common usage is confined to formal recorded votes, in which the vote of each senator is counted and recorded. Votes on the voices, however, are technically votes of the Senate.

After a question is put and the senators have called aye or no, the President declares whether the ayes or the noes are in the majority. Unless the President's determination is contested by the

senators declared by the President to be in the minority, the determination of the President is recorded as the result of the vote. Only senators determined by the President to be in the minority may contest that determination and require a formal recorded vote, that is, a division, to be taken. This is done by senators in the minority calling "divide" after the President has determined the result of the vote (SO 84(5), 98(1), (2)).

A division is held only if two or more senators call for the division, but if one senator calls for a division, that senator is entitled to have the senator's vote recorded in the Journals (SO 100(1)). If it turns out that there is only one senator voting on one side in a division, the count is not completed and the President declares the result (SO 102(2); 21/9/1906, J.147).

As a matter of practice, senators in the minority may seek leave to have their votes recorded without proceeding to a division, and leave to do this has invariably been granted by the Senate. The request for votes to be recorded often relates to senators who are not present in the chamber; for example, the request is often in the form that all members of a party have their votes recorded (see statement by President Beahan, SD, 30/5/1995, pp 524-5).

Divisions

A formal recorded vote in the Senate is referred to as a division, as the ayes and noes divide in the chamber. The senators voting on each side are then counted and recorded, and their votes are recorded in the Journals. Senators vote by sitting on either side of the chamber, the ayes to the right of the chair and the noes to the left, and are counted by tellers appointed by the President.

After a division is called for it may be withdrawn by leave of the Senate (unanimous consent of all senators present) up to the point at which the President appoints the tellers (SO 98(3)). This procedure is used where divisions are called for mistakenly or where there has at first been some uncertainty as to how particular senators are voting.

When a division is called for the bells are rung for four minutes to summon absent senators who wish to vote to the chamber. When successive divisions are taken, with no debate after the first division, the bells for each ensuing division are rung for one minute only (SO 101(3)). While the bells are ringing the doors of the chamber are held open to facilitate the entry of senators. After the bells have rung for four minutes the President directs that the doors be locked while the count takes place (SO 101(1) and (2)). This is to ensure that the counting is not confused by senators entering or leaving the chamber during the process of the count. At the direction of the President senators present on the floor of the chamber when the doors are locked proceed to either side of the chamber and remain in seats while the count is taking place (SO 101(4), (6); 19/2/1908, J.296).

The President then appoints tellers, one from each side, who call the names of the senators voting on each side. The names are taken down by the clerks and the lists, signed by the tellers, are presented to the President, who declares the result (SO 102(1)). Normally party whips are appointed as tellers (technically the President can appoint any senator as a teller, and a senator is obliged to act when appointed: ruling of President Givens, SD, 13/11/1918, p. 7761).

The divisions lists are published in the Journals (SO 102(3)).

If there is subsequently any confusion or error concerning the result of a division, unless it can be more easily corrected another division is taken (SO 104). Occasional corrections of counting errors which do not affect the result, and which are usually caused by pairing errors (see below), are made and certified by the tellers.

Divisions are taken again by leave when it is discovered that senators have been accidentally absent or some similar accident has caused a division to miscarry, on the principle that decisions of the Senate should not be made by misadventure (see SD, 5/12/1974, pp 3212-3; 9/9/1996, J.537-8; 21/11/1996, J.1081; 13/5/1998, J.3765; 27/5/1998, J.3859; 2/12/1998, J.252; 3/12/1998, J.270-2; 17/2/1999, J.458-9, 471; 21/4/1999, J.756-7; 19/8/2003, J.2221; 20/8/2003, J.2228-31; 25/11/2003, J.2722-3; 2/3/2006, J.1952-3; 28/3/2006, J.2008-9; 30/3/2006, J.2091; 15/6/2006, J.2256). For the result of a division altered by leave without the division being taken again (because some senators who participated in the division were not available to hold the division again), see 17/9/2003, J.2426).

A senator who has called for a division must not leave the chamber until the division has been completed (SO 100(2)), and a senator must vote in a division in accordance with the senator's vote by voice (SO 100(3)). These rules ensure that divisions are not called for unless the senators calling for them actually intend to vote as they have indicated.

A senator is not obliged, however, to vote for a motion which the senator has moved, the rationale being that even the mover may be persuaded against a motion by the debate; or the motion may have been amended in a way unacceptable to the mover (ruling of President McMullin, 2/10/1957, J.99; see also 20/11/1957, J.155; 5/12/1960, J.200).

There is no provision for absentee voting; a senator must be in the chamber to vote (SO 100(4); ruling of President Gould, SD, 11/2/1908, p. 7973).

Nor is there any provision in the procedures of the Senate for proxy voting by senators. Arguably, such a provision would be contrary to section 23 of the Constitution in so far as that section provides that each senator shall have one vote.

The procedures do not allow for senators formally to record an abstention from voting. All senators who are on the floor of the chamber when the count is begun must vote with the ayes or the noes, except the senator in the chair (SO 101(5)). Senators who wish to abstain in a vote can do so only by absenting themselves from the floor of the chamber. If a senator is absent during a division, it is therefore not possible to tell from the record of voting alone whether the senator has deliberately abstained from voting or has simply been absent. It is of course open to senators to declare an intention to abstain from voting during debate on a motion or otherwise to make their abstention known.

An exception to the rule that a senator who is present in the chamber must vote is made for the President in the Senate and the Chair of Committees in the chair of the committee of the whole, and in practice for any senator who occupies the chair at the time of a division (SO 101(5); see Chapter 5, Officers of the Senate: Parliamentary Administration). The rationale of this exception is that the senator in the chair cannot avoid voting by leaving the chamber as can other senators.

In practice, the President and other senators in the chair normally vote in a division. They do so by indicating whether they are voting with the ayes or the noes (SO 99(2)).

No decision is taken to have been reached by a division if a quorum of senators has not voted in the division (see Chapter 8, Conduct of Proceedings, under Quorum).

If a senator wishes to raise a point of order during a division, the senator may do so while sitting (SO 103). The rationale of this rule is that a senator standing, which senators normally must do to seek the attention of the chair, would not be conspicuous when senators are taking their places in the chamber to vote. A point of order raised during a division must relate to the division, and cannot refer to some matter which has occurred earlier (ruling of President Baker, SD, 28/9/1906, p. 5644). For observations on the method of resolving points of order during divisions, see First Report of 1997 of Procedure Committee, February 1997.

Divisions in committee of the whole are taken in the same manner as in the Senate (SO 105).

A division cannot be held after 6 pm on Thursdays (SO 57(3)). If a division is called for at that time the matter concerned is adjourned to the next day of sitting at a time fixed by the Senate. A temporary order first passed in 2004 altered this time to 4.30 p.m. (11/5/2004, J.3379). Standing order 57(2) provides for divisions called between 12.45 pm and 2 pm on Wednesdays also to be deferred, but until later on the same day. When a deferred division is called on, the practice is to put the question again, on the basis that senators who originally called the division may change their minds and allow the question to be determined on the voices. **(See Supplement)**

A division takes up to seven minutes to complete, the first four minutes being the time for the ringing of the bells to summon senators to the chamber (for successive divisions the bells are rung for only one minute: see above).

Declaration of interest

From 1994 to 2003 senators were required to declare any relevant interest as soon as practicable after a division was called for if the senator intended to vote in that division. The abolition of this requirement does not prevent senators voluntarily doing so (see also Chapter 6, Senators, under Pecuniary interests).

Pairs

By arrangement between parties in the Senate, a system of pairing operates, whereby a senator who is absent and who is expected to vote on one side in a particular question is "paired" with a senator who is expected to vote on the other side and who is either also absent or who deliberately does not vote in order to cancel out the effect of the other senator's absence. Pairs are also arranged for vacant places in the Senate. This system ensures that the result of votes is not determined fortuitously by the absence of particular senators. Pairs are usually not arranged, however, for secret ballots, for the reason that voting is meant to be secret and it should not be known how individual senators vote (for exceptions see SD, 21/4/1983, pp 6-7; 20/8/1996, pp 2676-92).

Pairing arrangements are determined by the party whips, and may last for days, weeks or months, or may be varied from vote to vote. Pairs are entirely an informal arrangement between the parties and not part of the procedures of the Senate. The chair therefore does not consider any matters relating to pairs (statement by President Calvert, SD, 7/11/2006, p. 1). In earlier years rulings were made to the effect that pairs could not be referred to in the course of proceedings. These rulings are now not followed, and it is common for senators to make statements concerning pairing arrangements. This practice has been upheld by a President's ruling (ruling of President Cormack, SD, 10/5/1973, p 1532, 15/5/1973, pp 1560-1). Pairs are not referred to in the Journals record of votes, but lists of pairs are included in the voting lists shown in Hansard.

Ballots

Provision is made in the procedures of the Senate for decisions to be taken by secret ballot. The standing orders require that secret ballots be used if there are two or more candidates in elections for President and Deputy President and Chair of Committees (SO 7, 10), and if more than the required number of senators are nominated for a committee; a ballot is used for the latter purpose if one senator so requires (SO 27(1)). By order of the Senate ballots may be used to determine other matters.

The rules applying to ballots generally provide that, after the bells have been rung as for a division, each senator is issued with a ballot paper and writes on the paper the names of the senators for whom the vote is cast. The senators having the greatest number of votes are declared to be elected, and if two or more senators have equal numbers of votes the President determines by lot which senator is chosen (SO 163).

These rules are clearly directed to a situation in which a number of senators must be selected and there are more than the required number of candidates. The situation contemplated is the appointment of senators to a committee. The rules do not provide for an exhaustive ballot, as would be appropriate for the selection of a senator for one position, and as is provided for the election of the President and the Deputy President and Chair of Committees. Nor do the rules provide for any form of preferential and proportional voting. It is open to the Senate to prescribe such procedures in any order for a special ballot (for a precedent of a special exhaustive ballot, on the site of Canberra, see 6/11/1908, J.74).

Debate may occur before a ballot is held (ruling of President Givens, SD, 1/3/1923, pp 43-4; 24/3/1992, J.2099-2100).

The use of ballots, other than for the election of the President and the Deputy President and Chair of Committees when there are two or more candidates, is now relatively rare. Ballots are occasionally used to determine contested positions on committees.

Roll call

The procedures of the Senate also make provision for a roll call of senators. Unlike roll calls in some other legislatures, this is not a method of voting, but a method of summoning senators to the Senate when an important matter is to be voted on, and of calling the roll to ascertain whether

all senators are present. This type of roll call, originally termed a call of the house, is an ancient parliamentary procedure (for historical material see *ASP*, 6th ed., p. 889).

A roll call may be ordered by the Senate by motion on notice. Special provision is made for advising each senator that notice of a motion for an order for a roll call has been given (SO 106).

A roll call does not oblige a senator to vote.

An order for a roll call must be passed at least 21 days before the day specified in the order as the day for the roll call. On the specified day an order for a roll call may be postponed or discharged as with other orders of the day. An order for a roll call takes precedence over all other orders of the day on the day on which the roll call is to take place (SO 107).

At the time for a roll call, the bells are rung as for a division, the names of all senators are then called in alphabetical order by the Clerk and senators answer their names. A senator who does not answer is called again. The result of the roll call is then reported by the President (SO 108).

A senator who is not present for a roll call may, by motion without notice, be excused from attendance or be ordered to attend at a future time (SO 109). The Senate could impose a penalty upon a senator who does not answer the summons to a roll call, but in practice senators who are absent for any legitimate reason are excused from attendance.

The standing orders provide that a roll call must take place immediately before the third reading of a bill to alter the Constitution (SO 110; see also Chapter 12, Legislation, under Bills to alter the Constitution).

A roll call may be ordered for any other purpose, but that procedure is not now used.

Free votes

Parties occasionally announce that certain votes in the Senate are free votes, that is, the parties have made no decision as to how their members should vote on the particular issue. Examples include the Parliamentary Allowances Bill 1959, Matrimonial Causes Bill 1959, Marriage Bill 1961, Death Penalty Abolition Bill 1973, family law bills 1974 and 1983, site of the new Parliament House 1968, 1969, 1973 and 1974, Sex Discrimination Bill 1984, Euthanasia Laws Bill 1997, Prohibition of Human Cloning Bill 2002 and Research Involving Embryos Bill 2002, Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU486) Bill 2005, Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006. Prior to 1936, when many amendments were made to tariff bills, votes on tariff questions were traditionally free votes. Votes on amendments to the standing orders and other procedural matters and on questions of privilege are traditionally free votes.

Electronic voting

From time to time the suggestion is made that a system of electronic voting should be adopted in the Senate, usually on the ground that this would save time spent in divisions, but sometimes with the suggestion that it would give the proceedings an appearance of modernity.

On 9 May 1990 the President, pursuant to a resolution of the Senate, tabled a paper on electronic voting. The paper pointed out that, assuming that senators would continue to vote in person in the chamber, very little time would be saved because four of the approximately seven minutes spent on each division consists of the time taken to ring the bells to summon senators to the chamber. The paper also pointed out that electronic voting would have significant disadvantages, including:

- it would remove part of a pause in the proceedings which is often convenient
- activities which now take place during the count may be transferred to other components of the time spent on divisions, so that little time would in fact be saved
- the current practice of senators sitting to the right or left of the chair has some advantages which would be lost; in particular, it makes the act of voting immediately visible and public
- more divisions may be called.

The paper pointed out that electronic voting is an advantage only with large houses; it appears to become economical with houses of 300 or more members. This was confirmed by overseas examples: the United States House of Representatives (435 members) adopted electronic voting but the Senate (100 members) did not; the French Senate (320 members) rejected electronic voting notwithstanding its adoption by the National Assembly (577 members).

The paper was referred to the Procedure Committee which, in its Second Report of 1990, PP 435/1990, presented in December 1990, recommended that the Senate not make any decision on electronic voting at that time. The matter has not been further considered by the Senate, although the paper was updated in 2004 at the request of senators.

Chapter 12

LEGISLATION

SECTION 1 OF THE CONSTITUTION vests the legislative power of the Commonwealth, that is, the power to make laws subject to the limitations provided by the Constitution, in the Parliament, which consists of the monarch represented by the Governor-General, the Senate and the House of Representatives. The agreement of each of the three components of the Parliament to a proposed law is required to make a law of the Commonwealth. In practice, with the ministry, the executive government, initiating most legislation in the House of Representatives, controlling that House through a party majority, and advising the Governor-General, the task of exercising the legislative power falls upon the Senate.

Proposed laws

The powers of the two Houses of the Parliament in relation to proposed laws are set out in section 53 of the Constitution. The Senate and the House of Representatives have equal powers in respect of all proposed laws, subject only to certain limitations imposed on the Senate. Those limitations are:

(a) proposed laws appropriating money or imposing taxation may not originate in the Senate

(b) the Senate may not amend proposed laws imposing taxation or appropriating money for the ordinary annual services of the government and

(c) the Senate may not amend any proposed law so as to increase any charge or burden on the people.

Where the Senate may not amend a proposed law, it may request the House of Representatives to make specified amendments, and may withhold its agreement to the proposed law if the House of Representatives does not agree to its requests.

The rationale of these provisions is to reserve to the executive government the initiative in proposing appropriations and impositions of taxation, without affecting the substantive powers of the Senate.

Because proposed laws imposing taxation and appropriating money are the subject of special constitutional provisions, and are treated somewhat differently by the procedures of the Senate, they are dealt with separately in Chapter 13, Financial Legislation. This chapter analyses the procedures whereby the Senate deals with non-financial legislation and those of the general procedures which also apply to financial legislation.

In parliamentary terms a proposed law is referred to as a bill. It appears with the title "A Bill for an Act to .....". This is known as the long title. Each bill also has a short title, which is the title by which it may be cited. Thus a bill with the long title "A Bill for an Act to amend the *Social Security Act 1991*" may have the short title "Social Security (Amendment) Bill 2008".

The Constitution does not make any provision for the manner in which bills are to be initiated, except the provision in section 53 relating to the origination of bills imposing taxation and appropriating money, and the provision in section 56 that a bill for the appropriation of money may not be passed unless the appropriation has been recommended by the Governor-General. These two provisions are designed to ensure that the executive government takes the initiative in relation to bills for levying taxes and appropriating money. Apart from those limitations, bills may constitutionally be initiated by either House in accordance with the procedures of that House.

The procedures of the Senate, principally contained in the standing orders, embody the principle that a bill may be introduced by any senator, and bills introduced by senators who are not ministers are not distinguished in the procedures for their passage from bills introduced by ministers on behalf of the ministry (the only exception to this principle is in relation to the limitation on debate on urgent bills; see under Limitation of debate, below).

The Senate may give precedence to bills introduced by senators other than ministers, and may defer government bills until other bills are dealt with (for precedents, see below, under Control of bills).

In practice, however, most bills passed by the Senate are government bills introduced by ministers. Most of those bills originate in the House of Representatives and are forwarded to the Senate for its concurrence, because most ministers are in the House of Representatives.

Bills introduced by senators who are not ministers are known as private senators' bills. Procedurally they are treated in the same way as government bills, but because the Senate devotes most of its time to government business (see Chapter 8, Conduct of Proceedings, under Government and general business), few private senators' bills are passed by the Senate and even fewer are passed by both Houses, because in order to be passed by the House of Representatives they must secure the agreement of the ministry which effectively controls proceedings in that House. Lists of private senators' bills which have passed into law and have been passed by the Senate since 1901 appear in appendix 5.

Private bills, that is, bills for the benefit of particular individuals or organisations, which are a feature of some legislatures and are subject to special procedures, are unknown in the Commonwealth Parliament.

Bills originating in one House of the Parliament are forwarded to the other House for concurrence. If they are amended by the other House, they are returned to the originating House with a request for agreement to the amendments. If there is disagreement over amendments, bills may be moved between the two Houses a number of times until the Houses finally agree to them

in the same form or they are abandoned. Bills which have been agreed to by both Houses are forwarded by the originating House to the Governor-General for assent.

When finally passed by both Houses and assented to by the Governor-General, a bill becomes an act of the Commonwealth Parliament and takes effect as a law in accordance with statutory provisions relating to the commencement of legislation.

Proceedings on legislation

The procedures of the Senate provide for a bill to be initiated in the Senate or received from the House of Representatives and, after an appropriate delay to allow examination of the bill, to be considered in principle. If the Senate agrees to the bill in principle, it may then be examined in detail and amended if the Senate considers that its details require alteration or adjustment. There is then an opportunity for a bill, as amended, to be considered finally and agreed to.

The principal stages of the passage of a bill are referred to as "readings", and are formally marked by the Clerk reading the long title of the bill.

The stages in the passage of a bill are:

(a) introduction or receipt from the House of Representatives and first reading

(b) second reading — consideration of the principle of the bill

(c) referral to a standing or select committee — for consideration of the details of the bill (although referral to a committee historically occurred after the second reading, a bill may be referred to a committee before the second reading)

(d) committee of the whole — this is the opportunity for the Senate to make amendments to the bill or to agree to amendments which have been recommended by a standing or select committee

(e) third reading — final consideration of the bill as amended and the opportunity finally to agree to it.

When a bill has passed through these stages and received a third reading it has been finally passed by the Senate.

Within and between these stages of a bill's passage, opportunities are provided by the procedures for the reconsideration of a bill. There are also several opportunities for a bill to be rejected by the Senate. Some procedures for rejection are designed to dispose of a bill with an indication of finality, while others involve only withholding agreement at that stage to a bill. A bill may, however, subsequently be revived or presented again in accordance with other procedures.

Initiation

The standing orders provide two alternative methods for the introduction of a bill and for the treatment of a bill received from the House of Representatives. There is a traditional deliberate method, and a method whereby bills may be taken expeditiously to the stage of the second reading being moved.

Under the deliberate method, a bill may be initiated in the Senate by:

(a) a motion moved on notice granting leave to a senator to bring in the bill

(b) a motion moved on notice forming a committee of senators to prepare and bring in a bill, in accordance with any instructions given to the committee

(c) an order of the Senate, agreed to by a motion on notice, that a specified bill be brought in (SO 111(1)).

Procedures (b) and (c) are designed to allow the Senate to direct the introduction of bill without relying on an individual senator taking the initiative to introduce a bill, but in practice are now not used.

A senator authorised to bring in a bill under procedure (a) may present it immediately, or at a subsequent stage in the proceedings when there is no other business before the chair. The bill as presented must conform with the title of the bill as specified in the motion authorising the senator to introduce it, and a bill which is contrary to that requirement is out of order (SO 111(3), (4)). There is usually no ground for this rule to be invoked, and the Senate would not be aware of any irregularity in a bill until there had been opportunity to examine it.

A bill originating in the House of Representatives is received from that House with a message requesting the Senate's concurrence with the bill. The President reports the message when there is no other business before the Senate, and the bill is then dealt with in the same way as a bill introduced by a senator (SO 128). The President is required to report a message from the House of Representatives "as early as convenient" (SO 155). In practice a message forwarding a bill is reported when the minister in the Senate representing the minister responsible for the bill in the House indicates that the government is ready to proceed with the bill (for precedents of a message made an order of the day: 14/12/1988, J.1309; a message not acted on, bill superseded: 1/6/1990, J.205; message not acted on pending government negotiations with other parties: 20/6/2002, J.423; message not acted on, bill abandoned by government: 14/8/2006, J.2463, 2474).

The expeditious method of dealing with a bill provides a procedure whereby a bill, whether introduced by a senator or received from the House of Representatives, may proceed at once to the stage of the motion for the second reading being moved, and whereby a number of bills may be taken together.

A senator may present a bill or two or more bills together after the passage of a motion, moved on notice, that the bill or bills be introduced. After the presentation of the bill or bills, or after receipt of a message from the House of Representatives, a motion may be moved without notice containing any of the following provisions:

(a) that the bill or bills may proceed without formalities (this has the effect of suspending the requirements, otherwise imposed by the standing orders, for stages of the passage of the bill or bills to take place on different days, for notice of motions for such stages, and for the printing and certification of the bill or bills during passage)

(b) in respect of two or more bills, that the bills may be taken together (this has the effect of allowing the questions for the several stages of the passage of the bills (or any of them) to be put in one motion at each stage, and the consideration of the bills (or any of them) together in committee of the whole (at each reading only the short titles of bills taken together are read))

(c) that the bill, or, where the provision referred to in paragraph (b) is agreed to, the bills, be now read a first time (SO 113(1), (2)).

The Senate may reject any of the motions which may be moved under this procedure, and at the request of any senator the motions are put separately, so that senators are able to vote for or against any of the motions (SO 113(3)). If the Senate were to reject the motion moved under paragraph (a), this would have the effect of imposing on the passage of a bill the delays provided by the standing orders for a bill proceeded with by the traditional method. If the Senate were to reject the motion moved under paragraph (b), two or more bills introduced together would have to proceed separately after that stage. It is also possible for the Senate to reject the motion for the first reading of a bill under this procedure. (For instances of the questions being considered separately, see migration bills, 20/9/2001, J.4900-1; textile, clothing and footwear bills, 7/12/2004, J.236.)

The composite motion may be moved only immediately after the receipt or introduction of bills; leave or a suspension of standing orders is required to move it at any other stage (Marriage Amendment Bill 2004, 13/8/2004, J.3927-8).

The first two elements of the composite motion under standing order 113(2), to provide that a bill may proceed without formalities and that bills may be taken together, are regarded as procedural motions, and, therefore, if they are debated, there is no right of reply.

Bills are frequently taken together, particularly in related "packages" of bills, but at the request of any senator the question for the passage of any stage of such bills is divided and put separately in respect of the separate bills (see Chapter 10, Debate, under Dividing the question). A senator may move at any time that bills which are being taken together be separated (8/6/1989, J.1842). The basis of this is that the order is that the bills *may* be taken together, and the Senate may decide that they should proceed separately. Bills may be separated by adjournment at different stages (12/3/1991, J.852; 16/6/2003, J.1851).

If bills are not taken together on introduction, however, a special order, moved on notice or by leave, is required to take them together subsequently (29/5/1989, J.1734; 8/6/1989, J.1835; 13/6/1989, J.1862; 17/8/1989, J.1948; 11/10/2000, J.3364; 27/11/2000, J.3583; 13/8/2004, J.3922-3). Bills at different stages have been taken together by this means (18/5/1993, J.175-6; 26/5/1993, J.267). For a bill negatived at the second reading, revived and taken together with other bills, see 10/9/2003, J.2329. Bills not yet received from the House may be put together with bills already in the Senate (12/9/2005, J.1073-4).

When bills or packages of bills are ordered to be taken together other than under standing order 113(2)(b), at the second or third reading stages, a senator who has spoken in the debate on one of the bills or packages but not the other may speak again when debate is resumed after the passage of the order. (See SD, 12/9/2005, p. 9.) This rule is necessary to preserve the right of each senator to speak to all of the bills. This right would also be exercisable when bills which have reached different stages are ordered to be taken together, and are brought to the same stage before proceeding together.

When there are amendments to be moved to bills taken together, the bills are considered separately in committee of the whole.

Bills which are not taken together are sometimes debated together at the second reading stage by leave. This is known as a "cognate debate".

Deadline for receipt of bills from House

A bill introduced by a minister or received from the House of Representatives is deferred to the next period of sittings unless it was first introduced in a previous period of sittings and is received by the Senate in the first two-thirds of the current period (SO 111). The term "period of sittings" refers to the Autumn, Winter and Spring sittings, and is defined as a period during which the Senate adjourns for not more than 20 days.

At the beginning of a new Parliament, all bills are new bills. Such bills may be proceeded with in the first period of sittings provided that they are received by the Senate in the first two-thirds of the sittings and the second reading debate is not resumed until 14 days after their introduction (SO 111(6)).

The deadline does not apply to bills received again in the circumstances described in the first paragraph of section 57 of the Constitution.

If the Senate changes its sitting pattern with prospective effect, before a deadline has operated, this changes the deadline (11/9/2003, J.2348), but a change made in the course of, or after, a period of sittings when a deadline has already operated does not change the deadline (7/11/2003, J.2672).

If the Senate adds to its sittings so that the period for which it is actually adjourned is shortened and one period of sittings is effectively amalgamated with the previous period, this does not mean that bills which would have met the deadline are then caught by it because they are regarded as having been introduced in the same period of sittings. (In practical terms, this

situation would usually come about by the Senate being "recalled" under standing order 55 in an adjournment which was scheduled to last for more than 20 days but is reduced to 20 days or less by the "recall".) The definition in standing order 111(8), in referring to the Senate adjourning, refers to the original decision of the Senate to adjourn rather than to the actual period of the adjournment as altered by a subsequent decision. The alternative interpretation would involve bills introduced by the government with the intention of complying with the deadline being caught by an unexpected change in the Senate's sitting pattern.

Over many years the Senate was concerned with the end-of-sittings rush of legislation, the concentration of government bills which occurs in the last weeks of a period of sittings and which results in legislation being passed with greater haste than during the earlier part of the sittings, and with inadequate time for proper consideration.

The causes of this phenomenon are not clear; a view frequently expressed was that ministers or departments deliberately delayed the introduction of legislation until late in a period of sittings in the hope that it would be passed without proper scrutiny. This suspicion was reinforced by ministers regularly claiming that all government bills accumulated at the end of sittings were urgent. There were often grounds for scepticism about these claims, particularly the failure to proclaim legislation stated to be urgent at the time of its passage (see below, under Commencement of legislation).

Whatever the causes, there was no doubt that the problem existed, and had become worse. The following table shows the concentration of bills in the last weeks of periods of sittings over several years:

Sittings	Bills passed	Length of sittings in weeks	Bills passed during last 4 sitting weeks (% of bills passed)	Bills passed during last 2 sitting weeks (% of bills passed)
Autumn 1972	59	10	41 (69.5)	22 (37.3)
Budget 1972	81	10	50 (61.7)	33 (40.7)
Autumn 1977	84	11	54 (64.3)	46 (54.8)
Budget 1977	77	12	54 (70.1)	38 (49.4)
Autumn 1982	71	10	42 (59.2)	35 (49.3)
Budget 1982	93	14	41 (44.1)	28 (30.1)
Autumn 1987	91	9	70 (76.9)	60 (65.9)
Budget 1987	96	10	73 (76.0)	66 (68.8)
Autumn 1992	104	11	75 (72.1)	58 (55.8)
Budget 1992	155	12	115 (74.2)	84 (54.2)

In 1986 an attempt was made to solve this problem by the adoption of a deadline for legislation to be received from the House of Representatives. On 14 April 1986 and in each subsequent period of sittings, with the exception of the budget sittings of 1992, a resolution was passed whereby any legislation received after the specified deadline was automatically adjourned till the next period of sittings. This resolution became known as the "Macklin motion", after its instigator, Senator Macklin (AD, Qld). It was intended to alleviate the end-

of-sittings rush by ensuring that no new bills were received from the House of Representatives in the last two or three weeks of sittings.

Subsequently, however, the procedure was criticised as aggravating the evil which it was intended to remedy. Its effect was that legislation was pushed through the House of Representatives before the deadline, the House was then adjourned for some weeks while the Senate dealt with a large volume of legislation received just before the deadline, and the House then returned at the end of the period of sittings to consider, in great haste, Senate amendments. There was still a concentration of bills in the Senate at the end of sitting periods, and the consideration of legislation in the House was even more attenuated than before the procedure was adopted. This criticism of the procedure seems to have been the reason for the cut-off date not being set for the budget sittings of 1992.

In the budget sittings of 1993 the Senate agreed to a "double deadline", whereby bills, to avoid the automatic deferral to the next sittings, had to be introduced into the House of Representatives by an earlier deadline and received by the Senate by a later deadline (18/8/1993, J.360-2, 364-6). Although strongly resisted by the government this procedure seemed to alleviate the problem.

When the "double deadline" was agreed to, the government gave an undertaking to have legislation introduced in one period of sittings for passage in the next period, subject to certain specified exceptions relating to budget and urgent legislation. The number of bills listed by the government for passage in the Spring 1994 sittings which were introduced after the commencement of the period of sittings led to suggestions that the government had not kept its undertaking, and there were moves to remedy the situation. Senator Chamarette (Greens, WA), who had initiated the "double deadline", moved a motion which would give precedence to bills introduced in the last period of sittings over those introduced in that period of sittings, but an amendment successfully moved by the Leader of the Opposition in the Senate, Senator Hill, had the effect of making a permanent order of the Senate to the effect that a bill introduced in any period of sittings will be automatically adjourned to the following period of sittings unless the Senate makes a deliberate decision to exempt the bill (29/11/1994, J.2557-60). The order was further amended on 23 March 1995 to provide that a bill introduced into the House in a period of sittings may be considered by the Senate in the following period of sittings provided that it is received in the first two-thirds of the second period of sittings (J.3128). This amendment, also moved by Senator Chamarette in response to a government attempt to modify the order, amounts to a variation of the "double deadline". The order was incorporated into the standing orders in February 1997.

The following figures suggest that the Senate's deadline may have alleviated the situation, having regard to the change from two to three sitting periods per year:

Sittings	Bills passed	Length of sittings in weeks	Bills passed during last 4 sitting weeks (% of bills passed)	Bills passed during last 2 sitting weeks (% of bills passed)
Autumn 1997	60	6	51 (85)	32 (53.3)
Winter 1997	63	6	49 (77.7)	37 (58.7)
Spring 1997	105	10	43 (40.9)	31 (29.5)
Autumn 1998	42	5	36 (85.7)	25 (59.5)
Winter 1998	68	5	48 (70.6)	22 (32.3)
Spring 1998	29	4	29 (100)	23 (79.3)
Autumn 1999*	47	8	23 (48.9)	9 (19.1)
Spring 1999*	55	7	38 (69)	23 (41.8)

* These figures do not include bills considered during the shortened winter and summer sittings in 1999.

The following figures, however, suggest that the problem has tended to creep back, probably due to the readiness with which the Senate exempts bills from the operation of the standing order at the request of the government:

Sittings	Bills passed	Length of sittings in weeks	Bills passed during last 4 sitting weeks (% of bills passed)	Bills passed during last 2 sitting weeks (% of bills passed)
Jan—June 2000	114	9	56 (49.1)	37 (32)
July—Dec 2000	70	9	49 (70)	30 (38)
Jan—June 2001	93	8	64 (68.8)	41 (64.1)
July—Dec 2001	76	5	69 (90.8)	41 (54)
Jan—June 2002	70	6	57 (81.4)	37 (52.8)
July—Dec 2002	86	10	47 (54.6)	25 (29.1)
Jan—June 2003	80	7	63 (78.7)	38 (47.5)
July—Dec 2003	74	10	38 (51.3)	34 (45.9)
Jan—June 2004	117	8	84 (71.8)	51 (43.6)
July—Dec 2004	39	6	32 (82)	27 (69.2)
Jan—June 2005	104	6	69 (66.3)	47 (45.2)

Sittings	Bills passed	Length of sittings in weeks	Bills passed during last 4 sitting weeks (% of bills passed)	Bills passed during last 2 sitting weeks (% of bills passed)
July—Dec 2005	62	9	41 (66.1)	20 (32.2)
Jan—June 2006	91	6	68 (74.7)	39 (42.8)
July—Dec 2006	81	9	49 (60.5)	23 (28.4)
Jan—June 2007	123	7	75 (60.9)	49 (39.8)
July—Dec 2007	61	4	61 (100)	44 (72.1)
Jan—June 2008	84	6	69 (82.1)	56 (66.6)

For debates on the importance of the deadline, including an expression of support for its principle by the government, see SD 5/4/2001, pp 23754-5; SD, 27/11/2006, pp 1-17.

First reading

Immediately after a bill is received, the President is required to put to the Senate the question that the bill be read a first time (SO 112(1)). In practice, the President does not put the question until the senator in charge of the bill (the senator who has introduced it or the minister representing the minister responsible for a bill received from the House of Representatives) moves a motion for the first reading. This practice recognises that the Senate should not proceed to consider a bill until the senator in charge of it is ready to do so. Normally the motion for the first reading is first moved immediately after receipt of the bill.

The motion for the first reading is put and determined without amendment or debate, except in relation to a bill which, under section 53 of the Constitution, the Senate may not amend (SO 112(1)). The Senate has the opportunity to reject a bill at the first reading stage, but in practice the first reading is normally passed without opposition and is regarded as a purely formal stage. (For an account of bills rejected at the first reading, see *ASP*, 6th ed., pp 436-7. For a bill negatived at the first reading, see the Marriage Amendment Bill 2004, 24/6/2004, J.3752. This bill was subsequently revived: 13/8/2004, J.3927-8.)

In respect of bills which the Senate may not amend, the question for the first reading may be debated, and matters not relevant to the subject matter of the bill may be discussed (SO 112(2)). This procedure provides another opportunity for senators to refer to any matters of interest to them. Requests for amendments may also be moved at the first reading to a bill which the Senate may not amend (see Chapter 13, Financial Legislation).

When a senator wishes to speak to the first reading of a non-amendable bill under standing order 112(2), but does not wish to speak to or oppose any of the other elements of the composite motion under standing order 113(2), the senator may speak to the composite

motion for the time allowed by standing order 112(2) instead of dividing the composite motion under standing order 113(3). If two or more bills are the subject of the composite motion, a senator may speak to each of the bills for the time allowed (ie., 15 minutes per bill). This procedure avoids unnecessary complexity arising from the division of the composite motion (13/11/1995, J.4087-8).

After the motion for the first reading has been passed, if a bill is proceeding by the traditional deliberate method a future sitting day must be fixed for the second reading of the bill (SO 112(4)). If the bill is being dealt with under the expeditious procedure, which is normal, the motion for the second reading may be moved immediately.

Second reading

The motion for the second reading of a bill, which is usually moved immediately after the introduction and passage of the motion for the first reading, is the most significant stage in the passage of a bill. It is on this motion that the Senate considers the principle of the bill and decides whether to accept or reject it in principle. If a bill is rejected by the Senate, it is normally rejected on the motion for the second reading.

On the motion for the second reading the second reading debate takes place, which is essentially a debate on the principle of the bill. It is during this debate that senators express their views about the principle of the bill and whether it ought to be passed by the Senate.

Normally debate on the motion for the second reading is adjourned to a subsequent day after the second reading speech of the minister or senator in charge of the bill, which speech sets out its purpose. Senators then have time to consider the bill.

Passage by the Senate of the motion for the second reading indicates that the Senate has accepted the bill in principle, or at least has allowed the bill to proceed to a consideration of its details, and the bill then proceeds to that detailed consideration and a consideration of any amendments which senators wish to propose.

The motion for the second reading is that this bill be *now* read a second time. The rejection of that motion is an indication that the Senate does not wish the bill to proceed at that particular time. Procedurally, therefore, the rejection of that motion is not an absolute rejection of the bill and does not prevent the Senate being asked subsequently to grant the bill a second reading. A senator in charge of a bill, after the motion for the second reading has been negatived, may therefore give notice of motion for the second reading of the bill for a subsequent day (17/9/1974, J.180, 186; 28/5/1975, J.708-9; 3/6/1975, J.746; 13/10/1983, J.385-6; 19/10/1983, J.397; 10/12/1986, J.1588).

In practice, the Senate often indicates its disagreement with a bill by rejecting the motion for the second reading, and that action is taken to be an absolute rejection of the bill. Rejection of that motion is also regarded as a rejection of the bill for the purposes of section 57 of the Constitution (see Chapter 21, Relations with the House of Representatives, under Disagreements between the Houses).

It was ruled in 1916 that a group of bills proposing amendments of the Constitution which had been passed by the Senate but not submitted to the electors could not be presented to the Senate again (ruling of President Givens, 14/12/1916, J.493). Clearly, however, there is nothing to prevent the Senate being asked to consider again a bill which it has dealt with (ruling of Deputy President Drake-Brockman, SD, 29/9/1966, p. 863); such a rule would prevent the proper operation of section 57 of the Constitution (see Chapter 21, Relations with the House of Representatives, under Disagreements between the Houses). The same question rule (see Chapter 9, Motions and Amendments, under Same question rule) is therefore not regarded as applying to questions for the passage of bills.

Amendments may be moved to the motion for the second reading.

Special provision is made for an amendment which has the effect of rejecting the bill with an indication of finality. To the motion that the bill be now read a second time, an amendment may be moved to leave out "now" and insert "this day six months", and if this amendment is carried the bill is "finally disposed of" by the Senate (SO 114(2); for precedent of a bill deferred till "this day 12 months", 13/6/1984, J.986: this had the same practical effect).

Other amendments may be moved to the motion for the second reading provided that they are relevant to the bill (SO 114(3)). In relation to relevance, as with relevance in debate (see Chapter 10, Debate, under Relevance), this requirement is interpreted liberally, and an amendment is accepted if it relates in any way to the subject matter of the bill. The Senate thereby gives itself maximum freedom to determine its course of action and express its view in relation to a proposed law.

Normally, an amendment to the motion for the second reading expresses the view of the Senate about some aspect of a bill. This type of amendment takes the form of adding at the end of the motion for the second reading words which express the Senate's opinion.

Some second reading amendments, however, have the effect of negativing the motion for the second reading. They are used where the Senate wishes to reject that motion and give its reasons or express its views in doing so. This type of amendment takes the form of leaving out all words after "that" in the motion for the second reading, and substituting other words, such as "the Senate rejects this bill because ..." or "this bill be withdrawn and redrafted to provide ...". As with the rejection of the motion for the second reading, the passage of such an amendment does not prevent the second reading being moved again (5/12/1973, J.568).

A second reading amendment may also be used to defer consideration of a bill (15/12/1987, J.430-1; 16/12/1992, J.3400; 20/9/1995, J.3815-6; 12/8/2003, J.2089-90).

When bills are taken together different second reading amendments may be moved to different bills by the same senator. In that circumstance the questions for the amendments and the second readings of the bills are put separately (3/12/1985, J.684-5, 687-8; 4/12/1985, J.694-5, 696-8; 16,17,21/10/1986, J.1320, 1323, 1324-5, 1340-3; 19/6/1992, J.2520-2; 2/12/1992, J.3189-90, 3192).

Reference to standing or select committee

An amendment to the motion for the second reading may also be used to refer a bill to a standing or select committee for inquiry and report. The amendment, if carried, usually has the effect of referring a bill to a committee before the Senate has agreed to the second reading of the bill. Such an amendment takes the form of leaving out all words after "that" and inserting words such as "this bill be referred to the standing committee on ... for inquiry into ... and report on ...". This is an indication that the Senate wishes the committee to consider the principle of the bill as well as its details and any amendments. When the committee reports on the bill and consideration of it is resumed, the second reading must be moved again.

A second reading amendment may, however, be framed so as to add words to the motion to give the bill a second reading and then refer it to a committee (23/8/1995, J.3667-8, 3670).

In earlier times it was thought to be anomalous that a bill should be referred to a committee before the second reading, on the ground that consideration in committee should not occur until a bill is agreed to in principle. An amendment for this purpose, however, was moved in 1959 (25/11/1959, J.225), and similar amendments have been moved frequently since that time. It was also thought that a bill could not be referred to a standing committee, as distinct from a select committee, by this method (30/9/1971, J.709), but as a bill can be referred by motion on notice to a standing committee before the second reading (28/9/1978, J.387), this superfluous distinction was also not subsequently followed. Reference of a bill to a committee may occur before the second reading is moved (17/10/1988, J.1019-21; reference of provisions before second reading: 30/10/1989, J.2177-8). Indeed, the Senate may make orders for the prospective referral of bills to committees before their introduction (eg, 4, 6/5/1992, J.2239, 2281), and for the referral of the provisions of a bill before its introduction into either House (eg, 26/3/1997, J.1799-1800; 11/5/2000, J.2702; 29/6/2000, J.2978; 25/6/2003, J.1978). **(See Supplement)**

A reference to the Community Affairs Committee in 2006 required it to consider "legislative responses" to a report on laws governing cloning and stem cell research. A draft bill tabled in the Senate and a bill presented to the President, prepared by two senators, were considered by the committee under this reference. (14/9/2006, J.2706.)

In 2007 legislation was abandoned by the government following a reference of part of the legislation to a committee and a recommendation by the committee that the legislation not proceed until the missing part of it was introduced (report by the Finance and Public Administration Committee on proposed access card, March 2007, PP 106/2007).

Bills reported on by Senate committees before the bills are received by the Senate are often amended by the government in the House of Representatives in response to the committees' reports.

For the reference of exposure drafts of government bills (wheat marketing bills) to a committee, see 12/3/2008, J.209.

A second reading amendment may be used to refer to a committee matters related to a bill, while allowing the bill to proceed (21/12/1988, J.1359).

In 1995 the government introduced two bills by leave without the normal notice and then moved by leave to have the bills immediately referred to a committee (31/1/1995, J.2799-2800).

After a bill has been read a second time, a motion may be moved without notice to refer the bill to a standing or select committee (SO 115(2)).

This is the major opportunity for the Senate to refer legislation for intensive examination to a committee. That the motion may be moved without notice is an indication that scrutiny by a committee is regarded as a normal part of the process of passing legislation.

Reference of a bill to a committee after the second reading means that the Senate has agreed to a bill in principle, and is an indication that the committee is expected to examine the details of the bill. In the absence of any specific instructions from the Senate as to how the committee is to examine the bill, however, a committee is free to deal with a bill in any way it considers appropriate. It may, for example, consider the principle of the bill in relation to alternative methods of achieving the same purpose, and hear evidence in relation to the policy of the bill.

A motion or amendment, other than a second reading amendment, to refer a bill to a committee is subject to a speaking time limit of 5 minutes per speaker and a total time limit of 30 minutes (SO 115(6)). These limitations are interpreted as applying only to a simple referral of a bill to a committee, and not to a motion or amendment which refers provisions or parts of bills, or amendments to bills, or which contain any terms of reference. This is in accordance with the intention of the limitations, which was to ensure that motions to refer only bills to committees do not have any debating time advantage over motions to adopt reports of the Selection of Bills Committee.

The Senate may give specific instructions to a committee to which a bill is referred. These instructions may be incorporated into the motion referring the bill to the committee, which may, for example, direct the committee as to the particular aspects of the bill it is to examine and the particular sources of information it is to employ. Matters other than those provided for by the bill may also be referred to the committee (ruling of Deputy President Nicholls, upheld by the Senate, 21/6/1950, J.92-3; see also 19/3/1987, J.1704-5; 9/12/1987, J.390; 10/12/1992, J.3289).

The Senate may refer the clauses or provisions of a bill to a committee rather than the bill itself (8/4/1974, J.92; 30/10/1974, J.307; 31/3/1977, J.69; 25/6/1992, J.2639-40). This is usually done so that a bill may be proceeded with by the Senate while a committee considers particular provisions, or so that a committee can consider provisions of a bill yet to be received by the Senate (see below for the circumstances in which referral of provisions of a bill is taken to be the equivalent of referral of the bill).

The Senate may also refer different parts of bills to different committees (28/9/1978, J.387-88; ruling of President Sibraa, 11/10/1990, J.322-3; 26/11/1990, J.476). Different aspects of the same bills may be referred to different committees, including a combination of select and standing committees (New Tax System bills, 24, 25/11/1998, J.143-50, 166). For a reference of proposed amendments to a bill to a select committee, see 25/11/2003, J.2708-9. For a reference to a Senate committee of proposed government amendments to be moved in the House of Representatives to bills not before the Senate, see 26/6/2002, J.488. For the establishment of a select committee to consider a bill when amendments were the subject of disagreement between the Houses and under consideration in committee of the whole, see 28/11/1994, J.2542-44.

Clauses of bills may be omitted in committee of the whole with a view to referring them to a committee subsequently (28/5/1986, J.1019; 7/10/1987, J.146; 8/12/1987, J.372; 9/12/1987, J.376-7; 25/6/1992, J.2640).

Having referred a bill to a committee, the Senate can withdraw the referral (23/3/1999, J.595).

It is normal for a motion referring a bill to a committee to specify a day by which the committee is to report, so that the Senate maintains control of the progress of the bill and knows when it may return to the bill.

When a bill is returned from a standing committee it may be proceeded with at once if a reporting date has been fixed for the committee, but if there is no fixed reporting day the sitting day after the report is presented is the first day for proceeding with the bill (SO 115(3)). This provision ensures that senators know when the bill is likely to be considered again.

When a bill is referred to a committee at any stage, standing order 115(3) operates and the bill may not be further considered until the committee has reported. When the provisions of a bill are referred to a committee before the bill is received by the Senate and the bill is received subsequent to the referral, the further consideration of the bill after its introduction is an order of the day for future consideration in accordance with standing order 115(3), unless the Senate explicitly otherwise provides. The rationale of this is that in this circumstance the Senate refers the provisions of a bill to a committee as an alternative to referring the bill when it is received so that the committee can commence its inquiry before the bill is received. When provisions of a bill or particular parts of a bill are referred to a committee after the bill has been received by the Senate, standing order 115(3) does not operate and the bill may be proceeded with by the Senate before the committee reports, unless the Senate explicitly otherwise provides. The rationale of this is that referral of provisions of a bill occurs after the bill is received only with the intention that a committee may inquire into the operation of the bill without delaying proceedings on the bill in the Senate, and the referral of part of a bill to a committee does not prevent the Senate proceeding with other parts of the bill (in that circumstance, it is for the Senate to determine whether it will omit from the bill the parts referred to a committee).

Appropriation bills, however, provide a special case: the referral to legislation committees of estimates under standing order 26 does not prevent the Senate proceeding with bills containing those estimates, although it does not usually do so. (See Chapter 13, Financial Legislation, under Scrutiny of expenditure proposals: Estimates/Legislation Committees.)

The practice is to allow a bill subject to standing order 115(3) to be taken to the stage of the second reading being moved, on the basis that this is normally the first substantive stage of the bill, although on a strict interpretation of the procedure further consideration of the message after receipt should probably be automatically deferred. After the second reading is moved, consideration of the bill is automatically deferred until the committee reports, and the bill is so listed on the Notice Paper.

When a bill is referred to a committee with a fixed reporting date, and the committee reports early, the bill cannot be proceeded with until the due date, except by leave or a suspension of the standing order (New Business Tax System (Consolidation and other Measures) Bill (No. 1) 2002, 18/11/2002, J.1131; Telstra (Transition to Full Private Ownership) Bill 2003, 27/10/2003, J.2622). **(See Supplement)**

If a committee to which a bill has been referred, or to which the provisions of a bill have been referred before the receipt of the bill by the Senate, presents an interim report on the bill, and the final report is not presented before the due reporting date, the bill remains listed on the Notice Paper as a reference to the committee, and, if the bill is before the Senate, as a bill for consideration at a future time (namely, when the committee presents its final report), until the Senate determines a motion to grant the committee an extension of time to report. The rationale of this is that there is a presumption in favour of the committee that the bill will not be proceeded with until the final report is presented, unless the Senate, by rejecting a motion for an extension of time to report, makes a deliberate decision to allow the bill to proceed without waiting for the final report.

The consideration of bills by standing or select committees allows more effective scrutiny of legislative proposals than is possible in the whole Senate. Committees may directly question ministers and officials responsible for framing bills, and hear evidence from organisations and persons who have an interest in legislation or who are likely to be affected by it. Apart from providing committees and the Senate with better means of understanding and evaluating proposed legislation, this opens the legislative process to public participation and allows the views of the public to be heard directly in the parliamentary forum.

Exposing bills to this heightened scrutiny makes for better legislation. Amendments to make improvements to bills are more likely to emerge from the process. If the framers of legislation know that it is to be subjected to this kind of scrutiny, and to the critical examination of those likely to be affected by it, they are likely to give more care and attention to their proposals, in anticipation of explaining them to Senate committees.

Committees are also able to combine greater scrutiny of bills with a more economical use of parliamentary time, because several committees may consider a number of bills simultaneously.

It is not the practice of the Senate to delegate to committees the power to amend bills, but they may recommend amendments, which may then be considered by the Senate. That consideration is apt to be expedited by the work of committees.

Procedures for regular referral to committees

The Selection of Bills Committee considers all bills before the Senate and makes recommendations about which bills should be referred to committees (SO 24A). The committee does not make decisions on its own estimation, but takes note of the general view among senators as to which bills should be referred.

A procedure for referring bills by adoption of reports from the Selection of Bills Committee is provided. Such a motion may be moved immediately upon the presentation of the report of the committee, and may be amended to refer to a standing or select committee any bill not recommended for referral in the report or otherwise alter the committee's recommendation. A time limit of five minutes per speaker and 30 minutes in total is imposed on debate on the motion, but any amendment a senator wishes to move must be put and determined. Similar time limits apply to other methods of referring bills (see above). The mover of the motion may speak in reply, if time permits.

Referral of bills may take place at any stage, but most bills are referred after the second reading, that is, after the Senate has approved the bill in principle.

Bills are usually referred to the appropriate legislative and general purpose standing committees, but the procedures also allow for referral to *ad hoc* select committees.

The procedures do not contain any instructions as to how the committees are to deal with bills referred to them. The committees may determine the appropriate method of dealing with particular bills. The committees have available to them all the committee techniques, including taking evidence from members of the public. Some bills require only minimal examination, perhaps clarification of some technical points with responsible ministers and departmental officials; others merit "full treatment", including advertising for submissions and public hearings; and some bills require some intermediate treatment, for example, the taking of limited evidence from interested bodies. The committees may not amend bills, but may recommend amendments. For a reference arising from a Selection of Bills Committee report requiring a committee to report on a bill on the next day, see 6/12/2004, J.215; 7/12/2004, J.246.

The procedures also leave unrestricted the treatment which the Senate may accord a bill when it returns from a committee. A bill which has been thoroughly examined in a committee may nevertheless be examined in detail again in committee of the whole. Particularly complex bills inevitably attract further detailed consideration and further amendment in committee of the whole. This has happened with many complex bills referred to committees.

A fast method of processing bills returned from committees is provided, however, by means of a motion for the adoption of a committee's report, thereby adopting any amendments recommended by the committee. This motion may not be moved if a senator has circulated

other amendments. In that case the bill proceeds in the normal way. This provision safeguards the right of senators to move amendments (SO 115(5)).

About 35 percent of all bills passed by the Senate are referred to committees under these procedures.

Amendments of the motion to adopt the committee's reports are reasonably common. Separate motions modifying previous orders adopting reports of the committee have frequently been passed; proposed amendments to bills, regulations and draft regulations have been referred to committees in conjunction with bills (27/11/2003, J.2747). The motion to adopt a report on a bill has been less frequently used, mainly because modifications of the committee's recommendations lead to complexity. The following precedents, however, are of interest: motion to adopt standing committee report, modification of recommended amendments, further amendments (12/11/1990, J.422); motion to adopt standing committee report, bill not referred on Selection of Bills Committee report (4/6/1991, J.1100); motion to adopt standing committee report, amendment of motion to amend bill (4/6/1991, J.1111; 6/6/1991, J.1155).

Before the adoption of these procedures in 1989 the Senate referred bills to committees on an *ad hoc* basis, and depended upon an assessment by the majority of the Senate that particular bills required examination in a committee. Many of the bills referred were those which involved significant innovations and on which there were diverse opinions. The consideration of such bills by committees almost invariably led to substantial changes to the bills, which is not surprising, because the bills referred were those most likely to be amended, but the process of amendment was greatly facilitated by consideration in committees. This led to a general view in the Senate that examination of bills by committees is a productive and worthwhile process resulting in much-improved legislation. There were therefore suggestions over many years to devise procedures for more regular referral of bills to committees.

Those suggestions led to the establishment in 1988 of a Select Committee on Legislation Procedures. This committee reported at the end of 1988 (PP 398/1988). It unanimously recommended that more bills be referred to committees and that procedures be established for that purpose. The report of the committee pointed out, amongst other things, that the Houses of the Commonwealth Parliament pass many more bills than their counterparts abroad, but sit many fewer days per year, suggesting that legislating in Australia is an over-hasty process. The select committee, however, offered the prospect of achieving two seemingly contradictory aims: speedier but more thorough examination of legislation by the simultaneous consideration of a number of bills in committees. It was also envisaged that in scrutinising legislation the standing committees would supplement, and follow up, matters raised by the Scrutiny of Bills Committee (see Chapter 16, Committees, under Scrutiny of Bills Committee).

The report of the select committee was adopted on 5 December 1989, the procedures operating as sessional orders from August 1990. The procedures were debated in the Senate on 11 September and 9, 10 and 11 October 1990, and during the debate it was alleged that the government was attempting to curtail the procedures. A motion to terminate the procedures at the end of June 1991 was rejected by the Senate on 13 February 1991. The procedures were

renewed as sessional orders until they were incorporated into the standing orders in February 1997.

The Select Committee on Legislation Procedures also made recommendations, which were adopted but subsequently modified by the Senate, concerning the consideration of proposed expenditure by committees and the procedures applying to appropriation bills. These matters are referred to in Chapter 13, Financial Legislation.

Instructions to committee of the whole

A motion may also be moved after the second reading for an instruction to the committee of the whole which is to consider the bill. Such a motion may be moved only if notice has been given (SO 115(2)). A notice for an instruction is a contingent notice, contingent on the bill being read a second time.

An instruction to the committee of the whole on the bill directs the committee as to how it is to consider the bill and as to any particular treatment it is to give the bill. A committee is bound by the instructions given to it by the Senate.

An instruction to a committee of the whole may direct the committee to divide a bill into two or more bills or to consolidate several bills into one (SO 150(1)), or require the committee on a bill to amend an existing statute to consider amendments which are not relevant to the subject matter of the bill but which are relevant to the subject matter of the statute it is proposed to amend (SO 150(2)).

These specific kinds of instructions to the committee of the whole are prescribed in the standing orders because, without such instructions, the committee of the whole would not have power to undertake the actions referred to in the instructions. Under the standing orders relating to consideration of bills in committee of the whole, a committee does not have power to divide or consolidate bills or to consider amendments which are not relevant to the subject matter of a bill. The latter restriction is not, however, very significant, because it is rare that an amendment is relevant to the subject matter of a statute proposed to be amended by a bill but irrelevant to the subject matter of the bill.

For the division and consolidation of bills, see below.

There are precedents for instructions to committees of the whole in relation to amendments of the kind referred to in the standing orders; these instances occurred in earlier times when a more restrictive view was taken of relevance (see *ASP*, 6th ed., pp 469-70, and under Committee of the whole: amendments, below).

These prescribed types of instructions, however, do not exhaust the possible instructions which may be given to a committee of the whole. A committee may, for example, be instructed to consider or make particular amendments.

Instructions to a committee of the whole are relatively rare, because, apart from the types of instructions referred to in standing order 150, an instruction may not empower a committee to

undertake any action in relation to a bill which it could not otherwise undertake, and if a majority in the Senate is in favour of a particular course of action in relation to a bill it is likely that there would also be a majority in committee of the whole in favour of that course of action. Standing order 149 refers to an instruction empowering a committee to consider matters not otherwise referred to it, or extending or restricting its order of reference. This provision has little application to a committee of the whole on a bill, except where such a committee is instructed to consolidate a bill with another bill not otherwise referred to it or to consider the enacting words in a bill (see below).

Division and consolidation of bills

As noted above, the standing orders make provision for the division of a bill into two or more bills and the consolidation of two or more bills into one bill.

Dividing a bill or consolidating two or more bills is a form of amendment. The Senate could not, therefore, undertake those actions in respect of bills it could not amend, but could request the House of Representatives to do so.

The first occasion on which the Senate divided a bill occurred on 9 June 1995, when the Human Services and Health Legislation Amendment Bill (No. 1) 1995 was divided into two bills pursuant to an instruction to the committee of the whole moved on notice. Amendments of an act which arguably should not have been included in the bill were extracted and turned into a separate bill by the addition of enacting words, titles and commencement provisions, and the resulting two bills were then passed (J.3424-5). In response to this action the government introduced two new bills into the House of Representatives containing the provisions of the divided bill. It was not explained why this course was followed rather than the simpler course of agreeing to the division of the bill in the same way as other types of amendment are agreed to. It appeared from this and subsequent cases that, although the government was willing to accept indirectly and tacitly the division of bills by the Senate, it had also accepted claims by its advisers that division of bills was a particularly undesirable step which should be resisted. No rational basis for such claims was advanced.

The Health Legislation Amendment Bill (No. 4) 1999 was divided into two bills, one of which was then held over by means of an amendment to the motion for the adoption of the report of the committee of the whole. (30/10/2000, J.3429-30; 31/10/2000, J.3440-3) The government then introduced a new bill, which was passed in June 2000, including some Senate amendments.

The Broadcasting Legislation Amendment Bill 2000, a bill initiated in the Senate, was divided into two bills on 1 March 2001 (J.3997-1), and consideration of one of the resulting bills deferred by means of an amendment to the motion for the adoption of the report of the committee of the whole. In the case of a bill initiated in the Senate, the government has only the options of accepting or rejecting the bill or bills sent to the House, or seeking by way of amendment of that bill or bills to reverse the Senate's action. In this case the government accepted the Senate's action.

The Innovation and Education Legislation Amendment Bill 2001 was divided into three bills on 28 June 2001 (J.4538-40). In this instance the government signalled its rejection of the Senate's action by moving to report progress from the committee of the whole, and the bill was not proceeded with.

The Family and Community Services Legislation Amendment (Australians Working Together and other 2001 Budget Measures) Bill 2002 was divided into two bills on 15 November 2002. The government refused to consider the division of the bill in the House of Representatives following a statement by the Speaker that the division of the bill was undesirable, apparently reflecting the government's advisers' view referred to above, but again without any explanation of the basis of this claim. The Senate then passed a resolution to the effect that division of a bill was not different in principle from any other form of amendment, and should be considered as such. The Senate did not insist on its division of the bill, but proceeded with it undivided, and made and insisted on further amendments to it (15/11/2002, J.1092-9; 12/12/2002, J.1363-81, 1413-33).

An attempt to divide non-amendable bills by request was made in 1993: 20/10/1993, J.646-8. As a request can be made at any stage, a request to divide a bill does not require an instruction to the committee of the whole. Requests to divide non-amendable bills, the Customs Tariff Amendment Bill (No. 2) 2001 and the Excise Tariff Amendment Bill (No. 1) 2001 were circulated in April 2001, but were not proceeded with when the government agreed to amend the bills.

There had been no prior precedents for instructions to divide or consolidate bills, although motions for instructions to divide bills had been moved (8/9/1981, J.474; 23/9/1981, J.530; 28/10/1981, J.606; 27/10/1982, J.1174; 4/12/1991, J.1835-7; 9/12/1994, J.2787; 18/10/1996, J.756-7; for a discussion of the power of the Senate to divide certain tax bills, see *ASP*, 6th ed., pp 461-7).

The division of bills has been relatively common in state Legislative Councils.

Committee of the whole: amendments

When a bill has been read a second time, unless the bill is at that stage referred to a standing or select committee, the Senate proceeds immediately to consider the bill in committee of the whole, regardless of whether the bill is considered under the traditional deliberate procedure or the expeditious procedure.

A bill is not considered in committee of the whole, however, unless a senator circulates amendments to the bill or requires that it be considered in committee (SO 115(1)).

A minister, under standing order 56, may move to defer consideration of a bill in committee of the whole, but other senators may not do so except by a suspension of standing orders (5/11/1987, J.268-9). Any senator may, however, move that the committee of the whole report progress (that is, postpone its consideration of a bill), and then move that the committee have leave to sit again at some future time (see Chapter 14, Committee of the Whole Proceedings; for precedent, 13/6/1984, J.986).

In committee of the whole a bill is considered in detail, and amendments may be moved to any part of the text of the bill. The rationale of considering a bill in committee of the whole is that the procedures of a committee are designed to facilitate detailed examination and amendment of bills. (For the nature of proceedings in committee of the whole generally, see Chapter 14, Committee of the Whole Proceedings; for precedent of a bill amended in the Senate rather than in committee of the whole, 3/4/1974, J.84.)

The standing orders provide that a bill is to be considered clause by clause (SO 117; a clause is a numbered paragraph of a bill which becomes a section of the resulting statute when the bill is passed). In relation to each clause the Chair of Committees puts the question that the clause stand as printed. With that question before the committee, senators may move any amendment to the text of the clause, and if amendments are agreed to the question is then put that the clause as amended be agreed to. The committee may negative the question that the clause stand as printed, and the clause is then left out of the bill as an amendment. This means that each clause of a bill must be supported by a majority of the Senate to be passed, because the question on a clause is negatived if the ayes and noes are equal (see Chapter 11, Voting and Divisions). Where bills contain long clauses or schedules consisting of numerous provisions or items, it is the practice to put those provisions or items separately as if they were separate clauses, so that senators who wish to omit any of them may vote against them. For any other kind of amendment to be agreed to, however, there must be a majority in favour of the amendment. When a clause is amended, a question is put that the clause as amended be agreed to, and there is then a further opportunity to reject the clause (SO 118(3)).

Amendments may also insert new clauses into a bill.

When an amendment has been moved, a senator may move an amendment to the amendment, as with amendments to motions (see Chapter 9, Motions and Amendments, under Amendments).

A complicated amendment may be divided, as with a complicated question (see Chapter 10, Debate, under Dividing the question; the provision in SO 84(3) applies by virtue of SO 144(7); see 27/10/1931, J.408).

The preamble and title of a bill are considered after the clauses and any schedules. The reason for this is that amendments made to the clauses of a bill may require consequential amendments to the preamble or title (SO 117(1)). An amendment of the title, however, need not necessarily arise from another amendment (8/3/1967, J.35; 24/8/1984, J.1049-50). An amendment of the title is specially reported (SO 118(4)).

The enacting words of a bill are not put to the committee (SO 116), but there are precedents for amendment of enacting words on an instruction (19/6/1901, J.37; 20/6/1901, J.42; 30/1/1902, J.268).

In the course of consideration of a bill, any clause may be postponed whether or not it has been amended (SO 117(5)). A motion to postpone a clause may be debated. Clauses may be

postponed for a particular purpose or until a particular occurrence, for example, until a minister provides information or documents (28/5/1992, J.2349-50).

In practice this prescribed order for considering a bill is often varied by leave, that is, by unanimous consent of senators present. Often a bill is taken as a whole, which means that the whole of the bill is considered and amendments may be moved to any part of it. This is usually done with short bills. The clauses of a bill are usually considered in groups of related clauses, and amendments are moved to the related clauses. This is often done with long or complex bills.

It is also established practice to allow senators to move amendments together in groups, particularly where there are closely related amendments.

When a bill is taken as a whole by leave, however, opposition to a clause or item is not put in the form of an amendment. This would raise the possibility of a clause or item being carried without a majority, because if that question is negatived with the votes equally divided, the amendment is negatived and the clause or item remains notwithstanding that it does not have majority support. The question is therefore put separately on any clause or item which is opposed, this procedure being a form of division of the question (14/11/1991, J.1709 and 1719; 18/12/1991, J.1960; 3/12/1992, J.3211, 3219). This procedure ensures that where a senator opposes a clause or item the question on the clause or item is put in the proper form and the risk of a clause or item being carried without a majority is avoided.

In proceedings on complex bills all amendments may be debated in turn and then put separately and in order at the end of that debate in accordance with an agreed schedule. This procedure is particularly useful in dealing with amendments which are circulated in the course of the debate (Social Security (Budget and Other Measures) Bill 1996 and associated bill, 13/12/1996, J.1317-31).

An amendment must be relevant to the subject matter of the bill (SO 118(1)). As with relevance in debate (see Chapter 10, Debate, under Relevance) and in relation to amendments to the motion for the second reading (see under Second reading, above), the requirement of relevance is interpreted liberally, so that senators have maximum freedom to move amendments. In determining relevance, the question is: "What is the subject matter of the bill, and does this amendment deal with that subject matter?". The long title of a bill can be taken as an indication of its subject matter, but does not conclusively determine the question. Thus, if a bill has the long title "A Bill for the Act to amend the *Social Security Act 1991*", any amendment relating to social security or to any matter dealt with by the Social Security Act is probably a relevant amendment. If, however, a bill has the long title "A Bill for an Act to amend the *Social Security Act 1991* in relation to age pensions", this is an indication that the subject matter of the bill is age pensions and amendments to deal with other matters covered by the Social Security Act would probably not be relevant to the bill. It must be emphasised, however, that the long title is indicative but not determinative of a bill's subject matter. There is no requirement, as there is in some Houses which follow British precedents, for amendments to be consistent with the scope and principle of the bill. (Rulings of President Baker, SD, 14/7/1904, p. 3243; 27/10/1905, pp 4202-4; 14/11/1905, p. 5004.)

The ability of the Senate to amend the title of a bill does not affect the rule of relevance. An irrelevant amendment cannot be made relevant by amending the title.

Amendments not relevant to a bill may be made if the Senate has so authorised by a suspension of standing orders (5/5/1986, J.967-8; 4/12/1986, J.1558-9).

The only other substantive restriction on amendments moved in committee of the whole is that an amendment cannot be moved if it is the same as one already negatived or is inconsistent with one that has been agreed to by the committee, unless the bill has been recommitted, that is, referred again to the committee by the Senate for further consideration (SO 118(2); 23/2/1944, J.44-5; for a suspension of this rule, see 23/6/1999, J.1228). An amendment moved in a different context, for example, as part of a different "package" of proposals, is not the same amendment even if identical in terms to one already moved (SD, 8/11/2000, pp 19358-9).

Rulings have been made to the effect that amendments are not in order if they are unintelligible, internally inconsistent, inconsistent with the bill, or a direct negation of the object and subject matter of the bill (rulings of President Baker, SD, 27/9/1906, p. 5591, of President Givens, 10/10/1918, p. 6776). There has been no occasion for these rules to be invoked in recent times (for amendments which significantly altered the effect of a bill: 4/6/1992, J.2432-3).

When a bill contains the text of an agreement which has been concluded, for example, an agreement between Commonwealth and state governments, it is clearly not possible for the Senate to amend the terms of the agreement, but the bill may be amended to bring about that purpose. If the bill contains a provision to approve the agreement, that provision may be amended so as to approve the agreement subject to specified amendments (30/11/1932, J.188; 16/8/1972, J.1061; 10/12/1976, J.545-6).

For the difficulty presented by national uniform legislation, see Chapter 15, Delegated legislation, under that heading.

It is usually during the committee of the whole stage of a bill that notice is taken of any comments on the bill by the Standing Committee for the Scrutiny of Bills, and amendments may be moved as a result of the committee's comments (see Chapter 16, Committees, under Scrutiny of Bills Committee).

When a bill is before a committee of the whole, or a standing or select committee, no reference may be made in the Senate to the committee's proceedings until the committee has reported to the Senate (SO 119). This rule ensures that a committee is allowed to complete its work before the bill is again discussed in the Senate.

A committee of the whole on a bill may report progress (see Chapter 14, Committees of the Whole, under Reporting progress). Progress may be reported for a particular purpose, for example, until a minister answers questions or provides information (20/5/1975, J.655-7).

When the committee of the whole has completed its consideration of a bill, the Chair of Committees puts the question that this bill (or this bill as amended) be reported, and if that question is agreed to the President resumes the chair and the bill is reported to the Senate (SO 120(1)).

On the motion for the bill to be reported an amendment may be moved to require the reconsideration of any clauses (SO 120(2); 18/6/1991, J.1216). This provides an opportunity for the committee, before the bill is reported to the whole Senate, to reconsider any parts of the bill. Clauses may also be reconsidered by leave (14/12/1989, J.2385; 22/3/1995, J.3114).

It is possible for the committee of the whole to negative the question that the bill as amended be reported. This would have the effect that the committee has declined to report the bill, and should logically occur only if the committee wishes to consider the bill further.

Where a bill is taken as a whole, questions are put that the bill stand as printed or that the bill as amended be agreed to. These questions may also be negatived, but this means that the committee has, in effect, rejected the whole bill. It is not logical that this should occur, because the opportunity to reject a bill completely is at the second reading, and if the committee of the whole has agreed to amendments it should not be rejecting the bill as amended. There have been occasions, however, of a bill being negatived in committee of the whole (11/11/1981, J.643; 4/5/1992, J.2249; 15/12/1992, J.3370; 11/7/1998, J.4343). If this occurs, the committee reports to the Senate that the bill has been negatived in committee and the Senate may adopt the committee's report, thereby agreeing with the action taken by the committee, or may recommit the bill to the committee (see under Recommittal, below). Rejection by the Senate of the question that the report of the committee be adopted would have the effect of recommitting the bill (statement by President Reid, SD, 11/7/1998, pp 5708-9).

A committee of the whole to which several bills have been referred may report separately on some of those bills, leaving the remainder for future treatment (30/6/1995, J.3629-30; 25/9/2002, J.821). When bills have been reported separately in this way, some may be proceeded with and others deferred (29/8/2001, J.4808-10). In effect, the committee decides to separate the bills, and the Senate may approve of that action by its treatment of the committee's report and its subsequent action in relation to the bills.

When a bill is reported by a committee of the whole, if it is proceeding under the deliberate traditional method the Senate must fix a future day for the adoption of the committee's report, but under the expeditious method, or if the bill has not been amended in committee, the motion for the adoption of the committee's report may be moved at once (SO 120(2)).

The motion for the adoption of the committee's report may be debated, but it is not in order to revive the discussion which took place in the committee (ruling of President Givens, SD, 18/3/1920, p. 506).

The motion may also be relevantly amended. An amendment may express the Senate's opinion concerning a matter associated with the bill (ruling of President Givens, SD, 25/11/1920, pp 7014-5; 9/12/1971, J.850-1; 14/12/1982, J.1315; 2/12/1983, J.540-1;

16/10/1984, J.1228; 24/3/1994, J.1524-6); declare the Senate's intention in making requests (24/3/1994, J.1504); seek to defer the bill (25/2/1977, J.595); refer it to a standing or select committee (11/4/1986, J.884; 24/3/1994, J.1504; 13/12/1996, J.1337); refer to a committee matters raised by amendments (17/11/1993, J.800; 22/11/1993, J.843); make a standing order for documents (24/3/1994, J.1517); make an order for a report by a statutory authority (25/3/1999, J.626); provide for the urgent despatch of a message (31/5/1985, J.381).

Recommittal on report

The Senate may recommit a bill to a committee of the whole, that is, refer it back to the committee for further consideration.

When the motion for the adoption of the report of the committee of the whole is moved, a superseding motion may be moved that the whole or part of the bill be recommitted (SO 121). The motion for the recommittal of a bill may set out the particular clauses or matters in relation to the bill which the committee is to consider (15/8/1974, J.166; 15/6/1989, J.1895-6). The recommittal motion may be debated and relevantly amended. A bill may be recommitted more than once (26/2/1932, J.19-20, 23).

A senator who has unsuccessfully moved a motion for the recommittal of a bill and a senator who has spoken to it may speak again to the motion for the adoption of the report of the committee (ruling of President Gould, SD, 1/10/1909, p. 4022).

The Senate, under this procedure, could recommit to the committee of the whole a bill which has been negatived in committee. On the principle that the committee of the whole is a subordinate body, the Senate may instruct the committee to reconsider a bill which the committee has, in effect, rejected. It may be argued, contrary to this conclusion, that if a committee of the whole, which after all has the same membership as the whole Senate, has taken the significant step of rejecting a bill, the bill should not be revived except by motion on notice, as with a bill rejected at the second reading. On the third of the occasions referred to above when a bill was negatived in committee, it was referred back to the committee only by a special motion moved pursuant to a suspension of standing orders. This was done, however, partly because the report of the committee of the whole had already been adopted. As was indicated above this question should not arise because it is not logical for a bill to be rejected in committee of the whole.

A bill may also be recommitted on the motion for the third reading (see below).

Third reading

After the adoption of the report of the committee of the whole, if a bill is proceeding by the traditional deliberate method a future day is fixed for the third reading (SO 122(1)), but if the expeditious method is being followed the motion for the third reading is moved at once.

The motion that this bill be now read a third time is open to debate, and provides the opportunity for the Senate finally to consider the bill as it has emerged from committee of the

whole and to accept or reject it. If the Senate is completely dissatisfied with the bill as it has emerged at this stage, this motion is the occasion for the Senate to reject the bill.

Debate on the motion for the third reading should be confined to reasons for then passing or rejecting the bill, but new arguments may be advanced (rulings of President Givens, SD 12/3/1926, p. 1589, 1591; of President Lynch, SD 24/10/1935, pp 1038-9, 13/11/1935, p. 1527).

Only one amendment may be moved to the motion for the third reading. This is the amendment to leave out the word "now" and substitute "this day six months". If this amendment is carried the bill is disposed of with an indication of finality greater than if the motion for the third reading is simply rejected (SO 122(3); 8/10/1985, J.490; 7/9/2000, J.3260). The rationale of this restriction on amendment is that, by the third reading stage, the Senate should finally decide whether to pass or reject the bill.

Normally the motion for the third reading is not debated, or amended in this way.

The Senate may also use the occasion of the motion for the third reading to recommit the bill to the committee of the whole, in whole or in part (SO 123). When the motion for the third reading is before the Senate, a superseding motion to recommit the bill may be moved. A motion for a bill to be recommitted on the third reading may be moved notwithstanding that such a motion has been moved on the motion for the adoption of the report of the committee (ruling of President Baker, 30/11/1904, J.159). As with the motion for recommittal at the reporting stage (see above), a senator may speak to both the motion for recommittal and the motion for the third reading.

When a bill has been read a third time, proceedings on it are completed and it has passed the Senate (SO 122(4)).

On 22 February 1979 a bill was recommitted, by a suspension of standing orders, after it had been read a third time, to correct amendments which had been erroneously agreed to in committee of the whole (J.561-3). This could be done only where a bill had not been forwarded to the House of Representatives. For the same process effected by a simpler method, see 25/11/2003, J.2722-3.

Bills have also been recommitted after being negatived and then revived; see below under Revival of bills).

The Chair of Committees is empowered to make amendments of a formal nature in the text of a bill and to correct clerical or typographical errors (SO 124). This procedure is used to make changes to a bill which are clearly required by any amendments which have been agreed to, and to correct any clear errors. The citation of a bill which originated in one year and passed in another may be altered by this means. The procedure may not be used to make changes of substance, which should be made only by amendment in committee of the whole.

Discharge of bill

An order of the day for any stage of a bill may be discharged from the Notice Paper by motion on notice, as with other orders of the day (SO 97(4); 6/12/1939, J.273; 11/11/1959, J.193; 12/2/1975, J.504; 4/3/1992, J.2060; 3/3/1997, J.1523).

Transmittal to House of Representatives

When a bill has been read a third time, it is certified by the Clerk as having passed the Senate and is forwarded to the House of Representatives with a message signed by the President.

In the case of a bill originating in the Senate, it is printed with any amendments made by the Senate and the message requests the concurrence of the House with the bill. If a bill originating in the House of Representatives is agreed to by the Senate without amendment it is returned to the House with a message indicating the Senate's agreement to it and it is then forwarded to the Governor-General for assent. If a bill originating in the House has been amended, a schedule of amendments is attached to the bill, it is returned to the House and the message requests the concurrence of the House with the amendments.

When an amendment made by the Senate to a bill received from the House of Representatives is modified by a subsequent amendment also made by the Senate, both amendments may be included in the schedule of amendments made by the Senate to the bill. The rationale of this is that the successive decisions of the Senate are taken to mean that, while the Senate wishes the first amendment to be made to the bill, it has a preference for the second amendment. The inclusion of both amendments in the schedule of amendments gives the government the options of agreeing to either or both amendments. This also provides greater flexibility for subsequent dealings between the two Houses on the matter. If the government in the House of Representatives agrees to the first amendment but disagrees with the modifying amendment, in effect it adopts the second preference of the Senate, the third preference being the relevant provision in the bill unamended. In effect, the government in that situation accepts part of the Senate's position. If the bill is returned to the Senate with only the first amendment agreed to, the Senate then may determine whether it accepts this partial adoption of its position or whether it will insist on its preferred position.

Amendments which are modified by subsequent amendments and which are included in the Senate's schedule of amendments are clearly amendments which have been made by the Senate within the terms of section 57 of the Constitution. The inclusion of such an amendment in the Senate's schedule of amendments clearly determines that question.

In 1992 it was necessary to correct a Senate schedule of amendments to a bill which included amendments not agreed to by the Senate; for an account of this case, see *OASP*, 8th ed, pp 258-9.

In 2000 the Senate repeatedly sent messages to the House requesting the House to consider a private senator's bill, the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill, which the government refused to consider (13/3/2000, J.2428; 3/4/2000, J.2491, 2503).

House amendments on Senate bills

If the House of Representatives agrees without amendment to a bill originating in the Senate, it is returned to the Senate with a message to that effect and is then forwarded to the Governor-General for assent.

If the House makes amendments to a bill originating in the Senate, the bill is returned with a schedule of the amendments and a message requesting the Senate's concurrence with the amendments.

Amendments made by the House to Senate bills usually have the effect of reversing amendments which the Senate has made to government bills in the Senate and to which the government has disagreed.

A Senate bill returned from the House is considered with the House's message in committee of the whole. The committee determines how the House amendments should be dealt with, and reports to the Senate, which may then adopt the course of action agreed to by the committee.

When the committee of the whole reports, the bill and the House's message may be recommitted by means of an amendment to the motion to adopt the committee's report (29/11/1912, J.178).

The Senate may, in response to House amendments:

- agree to the amendments
- disagree to the amendments
- agree to the amendments with amendments
- order the bill to be laid aside (that is, abandon the bill; in the case of a government bill this means, in effect, rejecting the bill) (SO 126(2)).

As in the circumstance of Senate amendments disagreed to by the House (see below, under Disagreement of House with Senate amendments), elements of these courses of action may be combined in one motion, which may then be put in divided form, or separate motions may be moved in relation to different House amendments (Sydney Harbour Federation Trust Bill 2000, 6-7/2/2001, J.3860-1, 3885-93, 3902-3).

Agreement to an amendment made in the House does not preclude an amendment to the motion for the adoption of the report of the committee of the whole expressing the Senate's opinion on relevant matters (Broadcasting Legislation Amendment Bill 2001, 28/3/2001, J.4118-9).

When House amendments to a bill are considered in committee of the whole, attention is directed exclusively to the amendments and matters relevant to the amendments, and other aspects of the bill are not open for reconsideration. An amendment may not be proposed to an amendment of the House unless it is relevant to it, and a further amendment to the bill may not be moved unless it is relevant to, or consequent on, the acceptance, amendment or rejection of a House amendment (SO 126(3)). This rule ensures that, when a bill is returned, further consideration of it is confined to the matters of disagreement between the Houses and attention is focused on attempting to secure agreement on those matters. (An exposition of the similar rule applying to bills originating in the House of Representatives (see below) was provided by President Baker, SD, 11/6/1903, pp 759-60. This rule does not apply to requests for amendments to bills originating in the House of Representatives: see Chapter 13, Financial Legislation, under Procedure on financial legislation.)

For a suspension of standing orders to allow the moving of new amendments to a bill not relevant to amendments made by the House, see International War Crimes Tribunal Bill, 1/2/1995, J.2822.

For the putting of further amendments consisting of the omission of clauses or items, see below under Disagreement of House with Senate amendments

If House amendments to a Senate bill are agreed to, the House is informed by message accordingly and the bill proceeds to the Governor-General with those amendments (SO 126(4)).

If the Senate amends the House amendments, the bill is returned to the House and its concurrence with the Senate's amendments is sought (SO 126(5)).

If the Senate disagrees to House amendments, it may lay the bill aside or return it to the House of Representatives asking the House to reconsider its amendments (SO 126(6)).

If the Senate disagrees to House amendments, the message to the House includes a statement of the Senate's reasons for not agreeing to the amendments. There are two methods of drawing up the statement of reasons; a committee may be appointed to do so, or a motion without notice may be moved to adopt a statement of reasons (SO 126(7), (8)). Usually the latter method is employed.

If the House of Representatives again returns the bill indicating that the House:

(a) insists on its original amendments to which the Senate has disagreed;

(b) disagrees to amendments made by the Senate on the original amendments of the House of Representatives; or

(c) agrees to amendments made by the Senate on the original amendments of the House of Representatives, with further amendments,

the bill and the House's message are considered in committee of the whole, and the Senate may:

(d) agree, with or without amendment, to the amendments to which it had previously disagreed, and make, if necessary, consequential amendments to the bill;

(e) insist on its disagreement to such amendments;

(f) withdraw its amendments and agree to the original amendments of the House of Representatives;

(g) make further amendments to the bill consequent upon the rejection of its amendments;

(h) propose new amendments as alternative to the amendments to which the House of Representatives has disagreed;

(i) insist on its amendments to which the House of Representatives has disagreed;

(j) agree, with or without amendment, to such further amendments of the House of Representatives, making consequential amendments to the bill, if necessary; or

(k) disagree to the further amendments and insist on its own amendments which the House of Representatives has amended. (SO 127(1))

These procedures, while focussing attention on the matters of disagreement between the Houses, give the Senate maximum freedom to seek agreement on those matters (an exposition of the similar procedures applying to bills originating in the House (see below) was provided by President Baker, SD, 8/12/1904, pp 8062-3).

If the Senate agrees to the actions of the House of Representatives, the House is so informed and the bill proceeds accordingly.

If the Senate does not agree with the actions of the House and the House of Representatives still does not agree with the course of action taken by the Senate, the Senate may order the bill to be laid aside or request a conference with the House (SO 127(1); for conferences, see Chapter 21, Relations with the House of Representatives, under Conferences).

Disagreement of House with Senate amendments

If the House of Representatives returns to the Senate a bill which has originated in the House and on which the Senate has made amendments, and the House:

(a) disagrees to amendments made by the Senate; or

(b) agrees to amendments made by the Senate with amendments,

the bill and the House's message are considered in committee of the whole, and the Senate may:

(c) insist, or not insist, on its amendments;

(d) make further amendments to the bill consequent upon the rejection of its amendments;

(e) propose new amendments as alternative to the amendments to which the House of Representatives has disagreed;

(f) agree to the House of Representatives amendments on its own amendments, with or without amendment, making consequential amendments to the bill if necessary;

(g) disagree to those amendments and insist on its own amendments which the House of Representatives has amended; or

(h) order the bill to be laid aside. (SO 132(2))

If the Senate does not insist on its amendments, the House is advised accordingly and the bill, as passed by the House, proceeds to the Governor-General. If the Senate takes any of the other actions listed, other than ordering the bill to be laid aside, the House is advised and asked to concur with the action taken by the Senate.

This procedure is also devised to ensure that the Senate has maximum freedom to seek agreement with the House, while concentrating its attention on the matters of disagreement.

To determine whether the Senate insists on its amendments, a motion may be moved in the committee of the whole that the committee does not insist on the amendments, or that the committee insists on the amendments. Normally the former motion is used; usually a minister in charge of a government bill asks the committee not to insist on amendments to which the government in the House has disagreed. If that motion is negatived by a majority, the committee has resolved to insist upon the amendments, and similarly if a motion that amendments be insisted on is negatived by a majority, the resolution of the committee is not to insist on the amendments. If either motion is negatived by an equally divided vote, however, the amendments are not insisted on and the bill proceeds without the amendments, the rationale of this being that there is then not a majority in support of the amendments, which required majority support to be carried in the first instance. If a clause is negatived in the first instance an equally divided vote on either motion indicates that the clause still lacks majority support and the amendment, that is, the omission of the clause, is insisted on. (Ruling of President Sibraa, 21/10/1993, J.690-2; Procedure Committee, Second Report of 1994, 10 November 1994, PP 223/1994, pp 4-28; statements by Deputy President, 10/2/1997, J.1400-1; 24/6/1997, J.2192-3; Taxation Laws Amendment Bill (No. 3) 1997, 30/9/1997, J.2571.) **(See Supplement)**

If an equally divided vote results in an amendment not insisted on, a similar vote could prevent the final passage of the bill by negativing either of the questions for the resolution of the committee to be reported or the report of the committee to be adopted. The bill would then not be rejected but would remain in the Senate and would not pass.

The motion that the Senate not insist on its amendments disagreed to by the House may be combined with other elements to secure agreement between the Houses; for example, the

motion may be that the Senate does not insist on such amendments and agrees to substitute amendments made by the House. Such a compound question, however, may be divided by the chair at the request of any senator so as to allow maximum opportunity to ascertain the course of action preferred by a majority of the Senate (see Chapter 10, Debate, under Dividing the question). Thus, in proceedings on the Native Title Amendment Bill 1997 in July 1998, the motion that the Senate not insist on its amendments disagreed to by the House and agree to the amendments made by the House was divided to allow consideration of groups of Senate and House amendments and proposed new amendments (6, 7, 8/7/1998, J.4200-47, 4248-9, 4252-3, 4254-9, 4262-3; see also Electoral and Referendum Amendment Bill (No. 2) 1998, 27/9/1999, J.1754-5; Australian Research Council Bill 2000 and an associated bill, 8/2/2001, J.3915-7; 7/3/2001, J.4055-9; Child Support Legislation Amendment Bill (No. 2) 2000, 28/6/2001, J.4514-22).

Agreement by the Senate to the action of the House of Representatives does not preclude an amendment to the motion for the adoption of the report of the committee of the whole expressing the Senate's opinion on relevant matters (Broadcasting Legislation Amendment Bill 2001, 28/3/2001, J.4118-9).

In relation to the Financial Sector Legislation Amendment Bill (No. 1) 2000, the government took the unusual step of moving in the Senate a compound motion including the element that the Senate insist on some amendments. This was done because the government decided to accept some Senate amendments which it had at first rejected in the House. (30/11/2000, J.3649-52; see also Trade Practices Amendment Bill (No. 1) 2000, 18/6/2001, J.4314-5)

Standing Order 132 provides that the Senate may "propose new amendments as alternative to the amendments to which the House of Representatives has disagreed". The expression *propose* new amendments would cover not only making new amendments but also making requests for amendments where the new amendments are of a character which the Senate is not empowered to make under section 53 of the Constitution. (See Chapter 13, Financial Legislation, under Procedure on financial legislation.)

Where a senator proposes new amendments consisting of the omission of clauses or items, the chair puts the question that the clauses or items stand as printed, as with clauses or items considered in the first instance. (See above, under Committee of the whole: amendments; 27/9/1999, J.1754-5.)

To any motion moved under these procedures, words may be added to express the view of the Senate, for example, to indicate that the Senate's non-insistence on an amendment should not be regarded as setting a legislative precedent (Constitutional Convention (Election) Bill 1997, 28/8/1997, J.2354-5).

To ensure that new issues are not raised when the bill is returned from the House of Representatives, a special rule is provided, as with bills originating in the Senate. No amendment may be proposed to any part of the bill which has received the concurrence of the House and which has not been the subject of, or immediately affected by, some previous amendment, unless a new amendment is consequential on an amendment already agreed on by the Senate (SO 134). A suspension of standing orders is necessary to allow an amendment

contrary to this rule (8/11/1973, J.467; 1/5/1980, J.1301; 3/12/1997, J.3162). (For an exposition of the rule by President Baker, see SD, 11/6/1903, pp 759-60.) (This rule does not apply to requests for amendments to bills originating in the House of Representatives: see Chapter 13, Financial Legislation, under Procedure on financial legislation.)

If the Senate disagrees with amendments made by the House of Representatives to the Senate's amendments, the message returning the bill again to the House of Representatives contains reasons for the Senate not agreeing to the amendments proposed by the House, drawn up in the same way as reasons for disagreeing with amendments made by the House to a bill originating in the Senate (SO 133).

Unlike the rule in standing order 127(1) relating to bills originating in the Senate, there is no limitation in the standing orders on the number of occasions on which the bill can be returned to the House of Representatives before the bill is laid aside or a conference with the House is sought. The rationale of this distinction is to give the Senate maximum freedom to review a bill originating in the House.

Bills to alter the Constitution

Section 128 of the Constitution requires that a bill to alter the Constitution must be passed by an absolute majority of each House of Parliament before it is submitted to the electors in a referendum (but see below for passage by one House only). An absolute majority means a majority of the whole number of members of each House.

The procedures of the Senate reflect this requirement by providing that if a bill proposing an alteration to the Constitution is not carried by an absolute majority of the Senate at the third reading, the bill is forthwith laid aside and may not be revived during the same session (SO 135). An absolute majority is required only for the third reading, and it is possible for a Constitution alteration bill to progress to a third reading without an absolute majority during the earlier stages of its passage. This allows the Senate freedom to consider a Constitution alteration bill at earlier stages while enforcing the constitutional requirement at the stage of the final passage of the bill. (For a discussion of the question of whether this rule conforms with the Constitution, see *ASP*, 6th ed., pp 508-9.)

Where a Constitution alteration bill which has been passed by the Senate is amended by the House of Representatives, the agreement of the Senate to the amendments must also be by an absolute majority (ruling of President Baker, 11/10/1906, J.220). Unless this rule is applied, a provision in a bill could pass without the agreement of an absolute majority as required by the Constitution. Similarly, a motion not to insist on a Senate amendment to which the House has disagreed must be adopted by an absolute majority to succeed (ruling by President Reid, 12/8/1999, J.1493-5). A motion to insist on an amendment, however, may be carried by a simple majority, as it does not alter the bill as previously passed by the Senate (5/12/1973, J.567).

The requirement for a bill to be laid aside in the absence of an absolute majority on the third reading applies where a bill received from the House of Representatives is agreed to with amendments, and is therefore returned to the House (14/3/1974, J.55).

In order to indicate that a Constitution alteration bill has been passed by an absolute majority, the names of the senators voting for the bill are recorded in the Journals even if no division is called.

Bills to alter the Constitution are subject to another special provision under the procedures of the Senate. A roll call of the Senate must take place immediately before a vote on the third reading of a bill to alter the Constitution (SO 110; for roll calls, see Chapter 11, Voting and Divisions, under Roll call). Where the third readings of several such bills are taken in succession, one roll call suffices. The requirements for a roll call, and for 21 days notice of a roll call, on a Constitution alteration bill have often in the past been suspended by motion on notice.

The Governor-General is not obliged to submit to the electors a bill which has been passed by both Houses. Certain bills so passed in 1915, 1965 and 1983 were not submitted on the advice of the ministry due to political circumstances (for observations on the propriety of this course, see speech by Senator Macklin, SD, 15/12/1983, pp 3920-2).

Section 128 of the Constitution also contains a provision whereby a bill proposing an alteration of the Constitution may be submitted to the electors if only one House has passed the bill and the other House has rejected it, failed to pass it or passed it with amendments unacceptable to the originating House on two occasions with an intervening interval of three months. It is constitutionally possible, therefore, for a proposed alteration to the Constitution to be submitted to the electors after being passed only by the Senate.

In practice, however, with the ministry effectively controlling the House of Representatives and also advising the Governor-General as to the submission to the electors of a proposal passed by only one House, a bill cannot be put to a referendum unless it has been agreed to by the government in the House of Representatives. Thus the Governor-General in 1914 declined to submit to the electors bills passed by the Senate in accordance with section 128 (24/6/1914, J.98). (In the light of the exposition by the High Court of the meaning of failure to pass in *Victoria v Commonwealth* 1975 7 ALR 1, it is seen that the bills had not actually failed to pass the House, but this was not apparent at the time.) This precedent is contrary to the intention of the provision, which is clearly distinguished from section 57 in providing for either House to bring about a referendum. The constitutional provision under this precedent, however, merely allows a bill which has been proposed by a government in the House of Representatives to be submitted to the electors against the wishes of the Senate.

The second paragraph of section 128 provides that “the Governor-General may submit” to a referendum a proposal passed by one House, whereas a proposal passed by both Houses “shall be submitted” under the first paragraph. This difference in wording does not indicate that the Governor-General is bound by the advice of the ministry, but that the Governor-General may exercise an independent judgment on a proposal passed by one House. That independent judgment is confined to whether the law to be submitted is the law “as last proposed by the first-mentioned House”, and whether the law as submitted is to be “with or without any amendments subsequently agreed to by both Houses”. In other words, the

Governor-General was given some discretion in the second paragraph because of the need for some flexibility as to the version of the proposal in dispute which is submitted to the electors.

In 1974 several constitution alteration bills were submitted to the electors after passing in the House of Representatives alone. All of the proposals were defeated in the referendum.

Amendments proposed by the Governor-General

Section 58 of the Constitution authorises the Governor-General to return bills to the originating House with suggestions for amendments.

A procedure is therefore provided whereby the Governor-General may recommend amendments to a bill which has been passed by both Houses and forwarded to the Governor-General for assent.

This procedure is, in effect, a means whereby the ministry, on whose advice the Governor-General acts, may reconsider a bill which has been passed by both Houses before it finally becomes law, although the procedure is seldom used and it is unlikely that it would be used to make substantive amendments.

A message from the Governor-General recommending amendments to a bill is forwarded to the House in which the bill originated. Amendments recommended by the Governor-General to a bill originating in the Senate are dealt with in the same manner as amendments made in the House of Representatives, but if the Senate agrees to amendments recommended by the Governor-General to a bill originating in the Senate, the amendments must be forwarded to the House of Representatives for its concurrence (SO 138). Similarly, recommendations made to the House and agreed to by the House in relation to a bill originating in the House require the concurrence of the Senate.

If amendments recommended by the Governor-General to a bill originating in the Senate are not agreed to by the Senate, or agreement on the amendments is not reached between the Houses, the President is required to present the bill to the Governor-General again for assent (SO 138(5)). There is no provision for dealing with any insistence by the Governor-General upon recommendations which have not been agreed to, but presumably that would be dealt with in the same way as amendments recommended in the first instance.

In 1986 a recommendation by the Governor-General for amendments was used, in conjunction with a resolution of the House of Representatives recommending that the Senate make amendments to certain bills, to bring about amendments of the bills (15/4/1986, J.898-899; 16/4/1986, J.904-912; 17/4/1986, 917, 918). The circumstances were unusual and unlikely to recur.

Revival of bills

A bill which has lapsed because of a prorogation of the Parliament before it has been finally passed by the Senate may be revived in the following session, subject to certain limitations

(SO 136; for prorogation, see Chapter 7, Meetings of the Senate under Meetings after prorogation or dissolution of House).

If a bill has been referred to a committee at the time of prorogation, and the committee is empowered to meet after a prorogation the committee may report on the bill, but the bill has to be revived by the Senate before it can proceed.

If a bill which has originated in the Senate was still in the Senate or a Senate committee at the time of prorogation the Senate may restore the bill to the Notice Paper and resume consideration of it at the stage it had reached at that time. If such a bill has been sent to the House of Representatives, the Senate may send a message to the House asking the House to resume consideration of the bill.

A bill which has been received from the House of Representatives may be restored to the Notice Paper, provided that a message is received from the House asking the Senate to resume consideration of the bill.

These procedures ensure that a bill is not revived except on the initiative of the House in which the bill originated.

The overriding limitation on this procedure is that it may not be employed if a general election for the House of Representatives or a Senate election has intervened between the two sessions. The rationale of this rule is that a bill which has been agreed to by one House should not be taken to have been passed again by that House if the membership of that House has changed. The procedure may be employed, however, if it is done in such a way that it is clear that both Houses have agreed to the bill with their current membership before the bill proceeds to the Governor-General.

With this principle in mind, bills have been revived after elections by suspension of the prohibition in the standing orders (22/4/1983, J.39; 22/2/1985, J.43; 20/3/1985, J.100; 9/5/1990, J.39-40; 1/6/1990, J.198; 1/5/1996, J.61-2).

On 23 August 1990, pursuant to a suspension of standing orders, the Senate forwarded a message to the House of Representatives asking the House to resume consideration of the End of War List Bill which the Senate had passed in the previous Parliament. On 13 September a message was received from the House of Representatives indicating that the House declined to consider the bill on the basis that the standing orders of the House prohibit the revival of a bill passed in a previous Parliament. In a statement to the Senate, Senator Boswell, who had moved the motion for the request to the House, explained that the House of Representatives standing order, and its Senate equivalent which the Senate had suspended in making its request to the House, were intended to safeguard the principle that a bill not be forwarded for assent unless the two Houses as currently constituted had agreed to it. Senator Boswell had waited until the newly-elected senators had taken their seats before moving the motion for resumption of consideration of the bill, thereby ensuring that, if the House of Representatives passed the bill, the two Houses as currently constituted would have agreed that it should pass. Senator Boswell stated that the House of Representatives had mistaken the standing order for the principle it was meant to safeguard. Senator Boswell

reintroduced the bill on 18 September, and it was immediately passed through all stages. The bill was therefore again sent to the House of Representatives, but the government did not provide time for it to be debated (23/8/1990, J.235; 13/9/1990, J.264; 18/9/1990, J.283).

An appropriation bill (see Chapter 13, Financial Legislation) may be revived in the same way as other bills (ruling of President Baker, SD, 30/8/1905, pp 1627-34).

A bill can be revived and its consideration resumed by the Senate even if it has been negatived at any stage (Hindmarsh Island Bridge Bill 1996, 25/3/1997, J.1757; retirement savings account bills, 12/5/1997, J.1885; Productivity Commission bills, 30/10/1997, J.2773; Interactive Gambling (Moratorium) Bill 2000, 5/12/2000, J.3730-1; Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003, 21/6/2004, J.3561; National Health Amendment (Pharmaceutical Benefits—Budget Measures) Bill 2002, 24/6/2004, J.3682; Superannuation Laws Amendment (Abolition of Surcharge) Bill 2005, 10/8/2005, J.895). For a bill negatived at the second reading, revived and taken together with other bills, see Superannuation (Surcharge Rate Reduction) Amendment Bill 2003, 10/9/2003, J.2329. For a bill negatived at the first reading and revived, see Marriage Amendment Bill 2004, 13/8/2004, J.3927-8. **(See Supplement)**

In December 2004 a constitution alteration bill, which had in effect been rejected when it did not gain the support of an absolute majority of the Senate in May 2003, was restored to the Notice Paper with consideration to be resumed at the beginning of the committee stage, but as amended in its previous consideration (1/12/2004, J.166).

Motions for reviving bills require notice, and are debatable. If a motion for restoring a bill to the Notice Paper is not agreed to, the bill may be reintroduced afresh.

Following the Senate practice, the Native Title Amendment Bill 1997 was revived in the House of Representatives in July 1998 after the government had initially rejected Senate amendments and laid the bill aside, and further amendments were made for the Senate's consideration (3/7/1998, VP 3202-4). This enabled the bill to be passed by the Senate.

When a bill is restored to the Notice Paper, so that consideration of it may be resumed at the stage it had reached in a previous session or Parliament, and the order for the consideration of the bill is called on, a senator who spoke on that stage of the bill in the previous session or Parliament may speak again. The order is not an order for the resumption of an adjourned debate, but an order for consideration of a bill at a particular stage. Therefore, if a bill is restored at the second reading stage, the mover of the original motion for the second reading may speak to the second reading, and in reply if they indicate that they again have carriage of the bill.

Control of bills

When a bill has been introduced into the Senate it is under the control of the Senate and may be considered and dealt with as the Senate decides.

Although for some purposes the standing orders refer to the senator in charge of an item of business (for example, in standing orders 67 and 97(3) relating to postponing orders of the day), a senator who has introduced an item of business is not in charge of it in the sense that the senator can determine its fate; that is for the Senate to decide.

In relation to bills, the standing orders do not distinguish between senators in charge of bills and other senators, so that any senator can move the various motions for the passage of a bill (the only exception is the procedure for the limitation of debate on urgent bills: see below). The Senate may therefore not only reject or defer a bill, but proceed with it in spite of the wishes of the senator, whether a minister or a private senator, who introduced it. The situation which occurred in the Senate on 5 and 10 October 1950, of an order of the day relating to a government bill not being called on because a minister did not wish it to be called on, was clearly contrary to the standing orders (see *ASP*, 6th ed., pp 546-9; also Chapter 8, Conduct of Proceedings, under Rearrangement of business and Suspension of standing orders).

Thus a government bill may be brought on by the non-government majority (25/10/1989, J.2147-8; 26/10/1989, J.2156-7; 30/11/1995, J.4300; 1/12/1995, J.4345-6). In 1988 the Senate made a special order that a private senator's bill was to take precedence until a minister made a speech on the second reading (15/12/1988, J.1324). In 2000 the Senate gave a private senator's bill, the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill, precedence over all government business, passed it and sent messages urging its consideration to the House, where it was suppressed by the government (13/3/2000, J.2428; 3/4/2000, J.2491, 2503). Bills have been deferred until draft regulations were tabled (5/11/1987, J.268), and until the Selection of Bills Committee reported (22/8/1990, J.227; 19/9/1990, J.294). A government bill may be discharged from the Notice Paper on the motion of a non-government senator (15/11/1995, J.4120). **(See Supplement)**

(See Supplement)

Limitation of debate — urgent bills

The time which the Senate may spend considering a bill is potentially unlimited. The opportunity for debate on the second and third readings must eventually be exhausted, even having regard to the ability of senators to move amendments and of senators who have already spoken to speak again to the amendments (see Chapter 10, Debate, under Right to speak). In the committee of the whole stage, however, senators may speak any number of times and move any number of amendments. It is therefore possible for a determined minority to prevent the passage of a bill indefinitely. The procedure for closure of debate (see Chapter 10, Debate, under Closure of debate) is not a remedy for determined obstruction of a bill by a minority, because the question for the closure has to be put on each question before the chair, and in committee of the whole it is possible for the number of questions to be multiplied indefinitely.

The procedures of the Senate therefore provide a means whereby a majority may ensure that debate on a bill eventually comes to a conclusion and the questions necessary for the passage of the bill are put to a vote. This is the limitation of debate on urgent bills provided by standing order 142, commonly known as the "guillotine". This procedure is in practice

limited to government bills, because only ministers may move the necessary motions to bring the procedure into operation.

At any stage during the consideration of a bill, a minister may declare that the bill is an urgent bill, and move that the bill be considered an urgent bill. That question must be put forthwith without debate or amendment. If that question is passed, a minister may at any time, but not so as to interrupt a senator who is speaking, move a motion or motions specifying the time to be allotted to all or any stages of the bill. That motion may not be debated for more than one hour, and each senator may speak for not more than 10 minutes. At the expiration of the hour the question on the motion and on any amendment must be put. When the time allotted for the consideration of the bill is concluded, the chair must put any question then before the Senate or the committee of the whole, including any amendment already moved, and any other questions necessary to bring proceedings on the bill to a conclusion. There is also provision for any amendments which have been circulated in the Senate at least two hours before the expiration of the allotted time to be put and determined.

The closure may not be moved during consideration of a bill for which time has been allotted under this procedure (SO 142(5)), but may be moved on the motion for the allotment of time.

A motion to declare a bill an urgent bill may be moved before or after an order of the day relating to a bill is called on, and in spite of a senator normally having a right to the call to speak on the resumption of a debate (rulings of President Cormack, 14/9/1972, J.1106-7; of President Laucke, 16/5/1980, J.1351).

Motions under this procedure may apply to a number of bills (rulings of President Cormack, SD, 6/6/1973, pp 2401-13, 2531-2, 2547-8; 29/11/1973, J.538; 13/12/1973, J.623; of President Laucke, 20/5/1980, J.1361-2).

A limitation of time continues to operate in relation to a bill in spite of the expiration of the allotted time because of, for example, time taken in divisions (ruling of President Laucke, 25/2/1977, J.599).

Motions to declare a bill urgent and to allot time for its consideration may be moved in committee of the whole on the bill, but are not effective in the Senate until the Senate has adopted the report of the committee and thereby agreed to the committee's action (ruling of President McMullin, 11/11/1954, J.103).

A bill once declared urgent remains an urgent bill until it is disposed of; thus, if a bill declared urgent in the Senate is returned from the House of Representatives, a minister may move a motion to allot time for its further consideration.

There are two methods of allotting time for consideration of a bill under this procedure. A time may be specified for concluding the proceedings on a bill. In that circumstance, if the Senate is not considering the bill at the time specified, the business before the Senate is interrupted and the questions necessary for the passage of the bill are put forthwith. When a concluding time has been specified for a bill in this way, this is regarded as overriding any requirement that proceedings on the bill be interrupted under any other procedure or that the

question for the adjournment of the Senate be put at a specified time. The other method is for a quantity of time to be allotted for the consideration of a bill, in which case, when that amount of time has been expended in considering the bill, the necessary questions are put by the chair. This is the method now normally used. It has the advantage of not disrupting other business. It is also possible to specify a time for commencement of consideration of a bill, in which case the business before the Senate at that time is interrupted and the Senate proceeds to consider the bill. An allotment of time may employ a combination of these methods.

Because the standing order allows a minister to move a motion or motions to allot time for a bill at any time after a bill is declared urgent by the Senate, a minister may at any time move a motion to extend the allotted time. Debate on a motion for that purpose is subject to the time limits already determined (ruling of President Cormack, 6/6/1973, J.264).

Since 1986 senators have placed on the Notice Paper contingent notices of motion to allow them to move for the suspension of standing orders to allow debate to take place on the motion to have a bill declared an urgent bill, to remove or modify the limitation of debate on the motion to allot time to an urgent bill, and to extend the time available for a bill when the allotted time has expired (4/6/1986, J.1060; 29/5/1987, J.1915, 1916; 3/6/1987, J.1952; 2/6/1988, J.823; see Chapter 8, Conduct of Business, under Suspension of standing orders). These notices of motion provide a means whereby the Senate can be asked to modify significantly the operation of the urgent bills procedure, and they also provide a minority with a means whereby an attempt by the majority to impose a limitation on debate may be considerably disrupted. It has been ruled that these contingent notices may be employed only once at each occurrence of the contingency to which they refer (rulings of President Sibraa, 3/12/1991, J.1826-7; 5/12/1991, J.1870-2; 9/12/1991, J.1886, 1893; a complete treatment of these rulings is in Chapter 8, Conduct of Proceedings, under Suspension of standing orders).

Prior to an amendment of standing order 142 in 1999, only government amendments were put and determined at the expiration of allotted time; the amendment provided for all duly circulated amendments to be dealt with, subject to the control of the chair as to how amendments are put (see also Chapter 10, Debate, under Dividing the question). Before the amendment of the standing order it had become the accepted practice for non-government amendments to be put and determined, by leave or by a suspension of the standing order, when the time for consideration of an urgent bill had expired.

In normal proceedings on bills a senator is not obliged to move an amendment which he or she has circulated, but when duly circulated amendments are put at the expiration of a time limitation, it is not open to a senator to withdraw a circulated amendment; to allow this could deprive senators who wished to vote for such an amendment of that opportunity (SD, 14/9/2005, p.137).

On occasions the Senate has adopted a “civilised guillotine”, that is, time limits for the consideration of legislation set by agreement between the various parties. On one such occasion the motion to set the time limits was moved by the Leader of the Opposition in the Senate (12/12/1996, J.1288-9). Special orders may be made prescribing time limits for the consideration of bills (8/2/2006, J.1839; 12/10/2006, J.2799; 7/12/2006, J.3299).

Governor-General's assent

The Governor-General's assent completes the passage of a bill and makes it a law, although the law does not necessarily have effect immediately (see below). (Provisions in the Constitution, ss 59 and 60, for the interpolation of the monarch into the legislative process do not now operate.)

The Governor-General's assent to a bill is communicated to both Houses of the Parliament by messages, which are then reported to the Houses.

The Governor-General may assent to bills after the Parliament has been prorogued or the House of Representatives dissolved (for an analysis of this matter, see Chapter 19, Relations with the Executive Government, under Effect of prorogation and dissolution of House on the Senate; also *ASP*, 6th ed., pp 520-1).

In 1976 a bill originated in the House of Representatives which had not been passed by both Houses was mistakenly forwarded to the Governor-General and assented to. There was confusion between two bills of the same title originated in the House. When the error was discovered the Governor-General revoked the purported assent and assented to the bill which had actually passed (VP, 15/2/1977, pp 575-6). A similar procedure was followed to correct an error in a House bill in 2001 (VP, 21/6/2001, p. 2379).

Commencement of legislation

While a bill becomes a law when assented to by the Governor-General, it does not necessarily come into operation, that is, have effect as a law, at that time.

Under section 5 of the *Acts Interpretation Act 1901*, a bill which has been assented to by the Governor-General comes into operation as a law on the 28th day after the Governor-General's assent, unless the bill specifies another day. Most bills specify the day of assent as the day of commencement, but some specify a particular date. Many bills provide that all or some of their provisions are to commence on a day specified by the Governor-General in a proclamation. Such a provision allows the government to delay the operation of a statute until administrative arrangements or delegated legislation (see Chapter 15, Delegated Legislation) are in place to allow the statute to operate. While this kind of provision may be administratively convenient, it confers a great power on the executive government, and virtually allows the ministry to determine when, if ever, a law duly passed by the Parliament will have effect.

For this reason standing order 139(2) requires regular reports by government on unproclaimed legislation.

There was discussion in 1988 concerning the danger of abuse of this power, and cases of statutes never being proclaimed to come into operation or proclaimed after many years were noted. (See articles by Anne Lynch, 'Proclamation of Acts — When ... How ... If?', *The House Magazine*, 13 May 1987; 'Legislation by Proclamation — Parliamentary Nightmare, Bureaucratic Dream', *Papers on Parliament* No. 2, July 1988; 'Legislation by Proclamation

— revisited', *The House Magazine*, 30 August 1989; 'Management and Mousetraps', *The Parliamentarian*, July 1994, pp 194-9 (joint authorship with David Creed).)

On 27 September 1988 the Senate made an order for the tabling of a list of provisions of laws not proclaimed, a statement of reasons for the failure to proclaim them and a timetable for their operation. The required document was presented on 24 November 1988 and was the subject of debate, senators expressing their concern over delays in proclaiming Acts and the reasons given for those delays. It was observed that legislation stated by ministers to be urgent at the time of its passage through the Senate was often not proclaimed for months or years after assent.

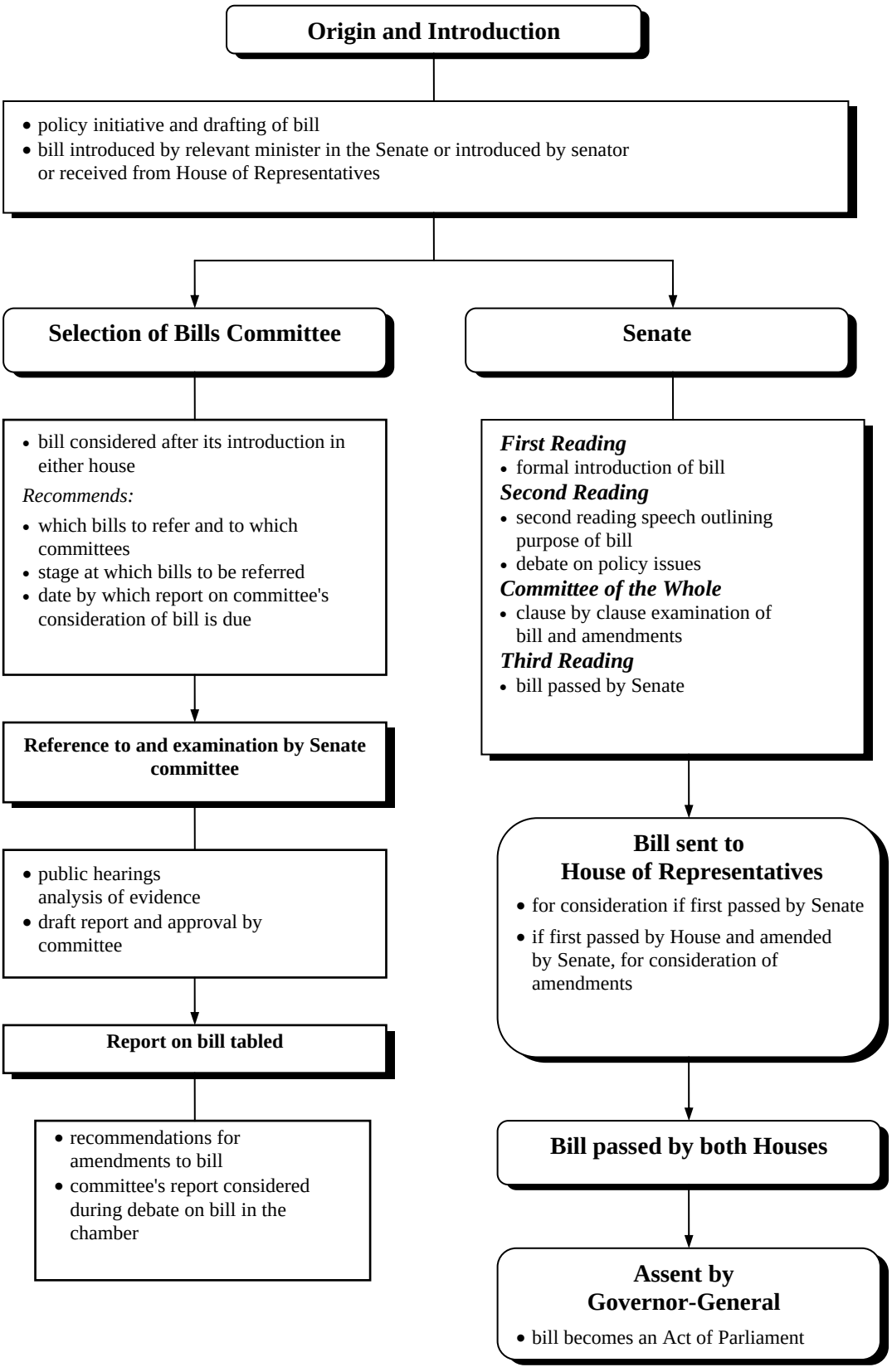
On 29 November 1988 the Senate passed a further resolution requiring such a list and statement to be laid before the Senate on or before 31 May and 30 November each year. The first such periodical return was presented on 12 April 1989, and the returns have been presented since that time. This requirement is now contained in standing order 139, which was amended in 1999 to require once-yearly reports only.

In response to the criticism of the misuse of the power to proclaim legislation, the government also adopted a type of commencement provision in bills whereby, if a statute whose commencement is to be specified by proclamation has not commenced within 6 or 12 months after assent, it commences automatically. Provisions allowing proclamations to be made at any time after assent are now not included in bills unless there is some special reason for doing so.

The Senate has amended bills to impose special conditions on their commencement. Amendments have provided that provisions were not to commence until the Senate so approved (13/6/1989, J.1869; 7/9/1989, J.2039), until regulations were approved by the Senate (12/12/1989, J.2358), and until a Senate committee reported (16/12/1992, J.3401), and that a bill was to commence within three years unless that period was extended by the Houses (10/10/1991, J.1554; 19/10/1994, J.2323).

Until 1983 the Houses were not formally notified of proclamations relating to the commencement of legislation. On 31 May of that year (J.157-8) a senator gave notice of motion for an address to the Governor-General asking that the Houses be notified of such proclamations. The practice was then adopted of tabling the proclamations (6/12/1983, J.546; SD, 6/12/1983, pp 3288-9).

PASSAGE OF LEGISLATION BY SENATE



Chapter 13

FINANCIAL LEGISLATION

THIS CHAPTER deals with financial legislation only in so far as different considerations apply to it and different procedures are followed in its consideration in the Senate; in so far as such legislation is treated in the same way as other legislation, it is covered by Chapter 12, and that chapter should therefore be read in conjunction with this chapter.

Section 53 of the Constitution

The term financial legislation refers to the two categories of proposed laws or bills which are distinguished by section 53 of the Constitution and which have different procedures applied to them by the provisions of that section.

The rationale of these provisions is to reserve to the executive government the initiative in proposing appropriations and impositions of taxation, without affecting the substantive powers of the Senate.

Because of the central importance of section 53 to the subject of this chapter, it is here reproduced in full:

> **53.** Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Section 53 thus provides that the two Houses of the Parliament have equal powers in relation to all proposed laws except as provided by the section. The categories of proposed laws to which

exceptions apply are proposed laws imposing taxation and proposed laws appropriating revenue or moneys. Section 53 provides that:

- bills to appropriate money or to impose taxation may not originate in the Senate
- the Senate may not amend a bill for imposing taxation
- the Senate may not amend a bill for appropriating money for the ordinary annual services of the government
- the Senate may not amend a bill so as to increase any proposed charge or burden on the people.

The section further provides that where the Senate may not amend a bill, it may at any stage request the House of Representatives to do so. This provision of section 53 refers to a bill which the Senate may not amend, but has always been interpreted as applying to a bill which the Senate may amend where an amendment would be contrary to the provision relating to proposed charges or burdens, the view being taken that the section does not prevent requests in that circumstance. The provision also refers to the Senate requesting "the omission or amendment of any items or provisions" in a bill which is not amendable by the Senate. This has been interpreted as not authorising a request for the insertion of a completely new item in such a bill (ruling of Chairman of Committees, 5/5/1936, J.186). This supposed implied limitation, however, was not observed in the early years of the Senate (for example, in relation to the Customs Tariff (British Preference) Bill 1906, 5/10/1906, J.190), and has also not been observed in recent times (8/11/1985, J.570-1; 7/4/1989, J.1522-4; 22/6/1992, J.2545). As with requests for amendments to bills which are amendable by the Senate, the view is taken that section 53 does not prevent requests being made other than in the circumstances listed in the section.

The provisions of section 53 are usually described as limitations on the power of the Senate in respect of financial legislation, but they are procedural limitations only, not substantive limitations on power, because the Senate can reject any bill and can decline to pass any bill until it is amended in the way the Senate requires. In particular, the distinction between an amendment and a request is purely procedural: in one case the Senate amends a bill itself, in the other it asks the House of Representatives to amend the bill. In both cases the bill is returned to the House of Representatives for its agreement with the proposed amendment. In the absence of agreement the Senate can decline to pass the bill.

The provisions of section 53 therefore have a purely procedural application, to determine whether amendments initiated by the Senate should take the form of amendments made by the Senate or requests to the House of Representatives to make amendments. The only effect of choosing a request instead of an amendment is that a bill makes an extra journey between the Senate and the House (see under Procedure on financial legislation, below). On the procedural character of section 53, see the judgment of the High Court in *Western Australia v Commonwealth* 1995 183 CLR 373 at 482.

While appropriation bills and bills imposing taxation may not originate in the Senate, this does not mean that the Senate is not an equal partner with the House of Representatives in actually making appropriations. Thus the first Senate insisted that words be removed from the preamble of the Supply Bills 1901 implying that the granting of appropriations was the work of the House of Representatives, and required details of items of expenditure (14/6/1901, J.36; 20/6/1901,

J.42). Similarly, the Senate caused to be removed from the Governor-General's opening speech words implying that in the granting of appropriations the House of Representatives had some priority (14/4/1904, J.27).

The Senate has also exercised its right to decline to pass appropriation bills and items in such bills until relevant information is provided (20/5/1975, J.655-7; 28/5/1992, J.2349-50).

Section 53 contains a qualifying clause providing that a bill is not be taken to be an appropriation bill or to impose taxation "by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services". Thus bills containing such provisions may originate in the Senate and may be amended by the Senate (see ruling of President Baker, SD, 6/6/1901, p. 763). Bills imposing fees for licences or fees for services are therefore usually treated as amendable bills, but in recent times, having regard to the possibility of fees being held by the High Court to be taxes, some bills for imposing fees have been drafted as bills imposing taxation and have been treated as such by the Senate. (*Air Caledonie v Commonwealth* 1988 165 CLR 462; but see also *Airservices Australia v Canadian Airlines* 1999 167 ALR 392.)

Legislation which requires appropriations or the imposition of taxation for its operation may be introduced in the Senate with an indication that the necessary appropriation or imposition of taxation is to be inserted into the legislation in the House of Representatives (ruling of President Givens, SD, 10/12/1921, p. 14274; see also Aluminium Industry Bill 1960, Blowering Water Storage Works Agreement Bill 1963, Chowilla Reservoir Agreement Bill 1963, Scholarships Bill 1967, Compensation (Commonwealth Government Employees) Amendment Bill 1976, Liquor Education Fund Bill 1981 and Liquor Advertising Tax Assessment Bill 1981, Plastic Bag (Minimisation of Usage) Education Fund Bill 2002 and Plastic Bag Levy (Assessment and Collection) Bill 2002).
(See Supplement)
On occasions the Senate has made requests for the insertion of appropriation provisions in bills originating in the House (4/10/1984, J.1153; 18/10/1995, J.3958-9; 18/6/1996, J.327). The better view, however, is that such amendments may not be moved in the Senate at all, in that, by turning a bill into an appropriation bill, they are contrary to the initiation provision of the first paragraph of section 53 of the Constitution (statement by President Calvert, SD, 16/9/2003, p. 15275).

Types of financial legislation

Bills which appropriate money or which deal with taxation appear in the following categories:

Appropriation bills

- annual appropriation bills (usually called Appropriation Bill (No. 1), Appropriation Bill (No. 2) and Appropriation (Parliamentary Departments) Bill), which appropriate money for the services of the government and the Parliament for the financial year

- additional appropriation bills (usually called Appropriation Bill (No. 3), Appropriation Bill (No. 4) and Appropriation (Parliamentary Departments) Bill (No. 2)), which appropriate additional funds for the services of the government and the Parliament for the financial year

- supply bills (usually called Supply Bill (No. 1), Supply Bill (No. 2) and Supply (Parliamentary Departments) Bill), which appropriate money for the services of the government and the Parliament for the period from the beginning of the financial year until the annual appropriation bills are passed, and which are subsumed by the annual appropriation bills (following a change in the budget cycle in 1994, these bills are not necessarily required)

- special appropriation bills, appropriating money for special purposes, including bills which make continuing and indefinite appropriations (these matters are further analysed below).

The annual appropriation bills and the supply bills for the services of the government always appear in pairs because the provisions which appropriate money for the ordinary annual services of the government, and which may not be amended by the Senate, must, under section 54 of the Constitution, be separated from those provisions which appropriate money for services of the government other than ordinary annual services. The funds appropriated by the supply and appropriation bills are therefore divided between two bills to separate the provisions which are amendable by the Senate from those which are not amendable by the Senate. The ordinary annual services appropriations are usually in Appropriation Bills Nos 1 and 3, and other appropriations in Appropriation Bills Nos 2 and 4. (The distinction between ordinary annual services and other services is a matter for interpretation and was delineated by an agreement between the Senate and the government in 1965, as further outlined below.)

In 1999 the Senate amended two appropriation bills for special purposes to strike out provisions which allowed grants to be made to bodies and persons without terms and conditions. The Senate took the view that the specification of terms and conditions for grants is an essential element of audit control of expenditure. (Appropriation (Supplementary Measures) Bills (Nos 1 and 2) 1999, 11/10/1999, J.1815).

Provisions in bills which were described by the government as "switching off" and "switching on" appropriations were the subject of a statement by the Chair of Committees on 14 September 2005. They appeared to be a device to avoid the injunction in section 53 of the Constitution on the initiation of appropriations in the Senate, and did not appear to derogate from the processes of the Senate (SD, 14/9/2005, p. 37).

Until 2005 it was thought that the expenditure of money under appropriations was as a matter of law limited to the purposes of the appropriations. In *Combet v Commonwealth* 2005 221 ALR 621 (21 October 2005), however, a majority of the High Court, called upon to consider the legality of certain government advertising expenditure under the post-1999 outcome-based budgeting system reflected in appropriation bills, in effect held, as the minority justices observed, that the executive government is free to expend money from appropriations on any purpose it deems appropriate. This judgment, as the Chief Justice explicitly stated, placed the

task of controlling expenditure under appropriations exclusively in the responsibility of the Parliament. (See also report by the Finance and Public Administration Committee on *Transparency and accountability of Commonwealth public funding and expenditure*, PP 47/2007; response by the Chairs' Committee presented 21/6/2007, J.4028.) **(See Supplement)**

Taxation bills

- bills imposing taxation
- bills which do not impose taxation, but which deal with taxation
- customs tariff bills, which impose customs duties
- excise tariff bills, which impose excise duties
- other taxation measures.

Bills which impose taxation must be separate from bills which otherwise deal with taxation, and bills imposing taxation must deal with only one subject of taxation, except for customs tariff and excise tariff bills. These requirements, which are contained in section 55 of the Constitution, are further analysed below.

Loan bills

When the expenditure and revenue-raising proposals of the government announced in the budget result in a deficit of revenue, it is normal for the Parliament to pass a Loan Bill authorising the government to borrow money to the extent of the deficit. Parliament thus has the opportunity annually to determine whether the government should be authorised to borrow. As these bills do not appropriate money or impose taxation, they are amendable by the Senate.

In 1985 and 1986 Loans Bills were presented to the Senate in a form which would have made permanent the statutory authority for the government to borrow money, and the bill for 1987 would have extended the authority to borrow into the supply period of the following financial year. In each case the Senate amended the bill to restrict the authority to borrow to the current financial year, thereby preserving the right of the Parliament to consider annually the government's authority to borrow.
(See Supplement)
Advances

The annual appropriation bills include sums for advances to government (called Advances to the Minister for Finance) to provide for payments in advance of appropriations, the money for which is recovered by later appropriations for the purpose, and for urgent and unforeseen expenditure. Similar advances are provided in the parliamentary appropriation bills for the President of the Senate and the Speaker of the House of Representatives for parliamentary expenditure.

The appropriation bills set out the conditions governing expenditure from the advances, and provide for particulars of such expenditure to be laid before the Houses. Following a report in 1979 of the Senate Standing Committee on Finance and Government Operations (PP 217/1979), statements of issues from the advances have also been presented since 1981. Such issues may or may not become final charges on the advances reflected in the statements of expenditure.

Statements of expenditure from the advances are referred to the standing committees for estimates hearings. The Senate considers them in committee of the whole on a motion that the statements be approved. This does not have the effect of authorising the expenditure, which is authorised by the original appropriation. Rejection of such a motion would signify dissatisfaction with a statement as an accountability document.

Terminology

Proceedings in the Senate in relation to financial legislation are often discussed without regard to the terms of section 53 and with the use of terms such as "supply" and "money bills", which confuses the discussion. There has also always been considerable confusion about the processes by which the Parliament appropriates money for the operations of government and the terminology applying to those processes. The word "supply" has come to be used for virtually any appropriation of money, and any rejection or amendment by the Senate of any appropriation bill, or even any bill having any financial content, is liable to be referred to as "blocking supply".

In order to clear up the confusion it is necessary first to clarify the terminology. Strictly speaking, supply was the money granted by the Parliament in the supply bills which, before the change in the budget cycle in 1994, were usually passed in April-May of each year, and which appropriated funds for the period between the end of the financial year on 30 June and the passage of the main annual appropriation bills. The latter appropriate funds for the whole financial year, were formerly passed in October-November and are now passed in June. The term "supply" may be loosely applied to all of the annual appropriation bills, that is, the main annual appropriation bills, the additional appropriation bills and any supply bills, since those bills together annually provide the funds necessary for government to operate. It is not legitimate to apply the term to any other appropriation bills, or to the revenue raising measures properly called tax bills.

The term "money bills" may be used to refer to all bills which appropriate money. This includes not only the annual appropriation bills, which consist of the main appropriation bills and the additional appropriation bills, but also any other bills which appropriate money. There are many bills which appropriate money for particular purposes, and, in many of these, the appropriation is continuing and does not have to be renewed annually. Under section 53 of the Constitution bills which appropriate money may not originate in the Senate, and it is therefore legitimate to use the term "money bills" to refer to all such bills. The term "money bills" is also used, however, to refer only to that category of appropriation bills which under section 53 may not be amended by the Senate, that is, bills which appropriate money for the ordinary annual services of the government. Not all appropriation bills fall into this category. The term "money bills" is also used to include bills which impose taxation, which may not originate in the Senate. Such bills, however, are more properly called tax bills.

The term "tax bills" should properly be confined to bills which impose taxation and which, under section 53 of the Constitution, may not originate in the Senate and may not be amended by the Senate. Under section 55 of the Constitution, laws imposing taxation must deal only with one subject of taxation, and must deal only with the imposition of taxation (this provision also is further outlined below). Provisions dealing with the assessment and collection of taxation are contained in separate bills, and such bills should not be referred to as "tax bills". A proper term for them would be "tax assessment and collection bills".

The term "budget measures" is used to refer to all bills which put into effect the financial measures proposed in the Treasurer's budget speech. The term covers not only the main annual appropriation bills and any bills containing increases in taxation proposed in the speech, but bills making minor adjustments to appropriations, taxes or government outlays. Thus the only distinguishing characteristic of "budget measures" is that they have been proposed in the budget speech. It is not, therefore, a useful category of bills: it does not indicate the importance of the bills, and bills appropriating money, imposing taxation or carrying out other financial measures, including bills of great importance, may not be budget measures simply because they were not referred to in the budget speech.

The conceptual confusion surrounding these categories of bills occurs because these terms are used as if they were interchangeable without any regard to the distinction between them. The terms are also used to include all bills which refer to financial matters or which have some financial implications. This category virtually includes all bills presented, because every piece of proposed legislation has some financial implications.

Appropriation bills and tax bills are the only useful categories of bills because they are the only categories which are given special treatment by the Constitution. All other bills are treated alike and the Houses have equal powers in relation to them.

The two useful categories of bills are distinguished by their defining characteristics. Money bills, which should properly be called appropriation bills, are those bills which contain clauses which state that money, of specified or indefinite amount, is appropriated for the purposes of the bills. A bill which does not have such a clause is not an appropriation bill. A tax bill is a bill which contains a clause which provides that tax is imposed upon a specified subject, either by setting a new tax or raising the level of an existing tax. A bill which does not contain such a clause is not a tax bill.

Another concept which is sometimes used in discussion is that of "measures vital to government" or "measures vital to the survival of a government". The bills which may be regarded as falling into this category are:

(a) the annual and additional appropriation bills and any supply bills (without which government would not be able to continue to fund its various services); and

(b) tax bills which impose income tax (without which there would be insufficient revenue to appropriate in the appropriation and supply bills).

If any of these bills were not passed by the Parliament the government would not be able to continue to function. The failure to pass other bills, however, would not in normal circumstances prevent the continuing operations of government.

Constitutional safeguards: sections 54 and 55 of the Constitution

The Constitution contains two sections which are designed to ensure that the Senate is not unduly inhibited in its consideration of legislation by the conditions imposed upon it by section 53.

Section 54 provides that a proposed law which appropriates money for the ordinary annual services of the government must deal only with such appropriation. This means that appropriations for purposes other than the ordinary annual services of the government, or provisions dealing with appropriations, which the Senate may amend, may not be combined in one bill with provisions which the Senate may not amend. This ensures that the Senate is not prevented from amending provisions which do not appropriate money for the annual services of the government because of such provisions being linked with such appropriations in a single bill. Such a linkage of provisions is usually referred to as "tacking", and section 54 seeks to prevent "tacking".

Section 55 of the Constitution provides:

- laws imposing taxation must deal only with the imposition of taxation and any provision dealing with any other matter is of no effect

- laws imposing customs duties must deal only with customs duties, and laws imposing excise duties must deal only with excise duties

- other laws imposing other kinds of taxes must deal only with one subject of taxation.

This section is also designed to prevent the combination in a single bill of matters amendable by the Senate with non-amendable matters, and to ensure that different taxes are not combined in one bill so that the Senate is presented with a choice of agreeing to all taxes or agreeing to none if the House of Representatives will not make amendments.

These sections use the same expressions to distinguish the categories of bills with which they deal as section 53, and interpretation of the three sections is therefore of necessity closely connected.

There is a significant difference, however, between section 55 and the other two sections. Sections 53 and 54 refer to proposed laws, and do not impose any prohibitions on the contents of laws resulting from the enactment of those proposed laws. Nor do they impose any remedies against the two Houses for any breach of the conditions relating to dealings with proposed laws set out in the sections. It is therefore generally agreed that these sections are non-justiciable, that is, the High Court cannot enforce compliance with the sections in relation to either the proceedings followed by the Houses in dealing with bills, or the contents of bills, and in no case has the High Court done so. (The non-justiciable character of the requirements of section 53 was

explicitly referred to in the Constitutional Convention Debates: Adelaide, 1897, pp 576-7; and by the High Court in *Osborne v Commonwealth* 1911 12 CLR 321 at 336, and *Western Australia v Commonwealth* 1995 183 CLR 373 at 482.)

Section 55, on the contrary, refers to laws, and is therefore justiciable. The High Court may enforce compliance with the provisions relating to the contents of laws, and has done so in numerous cases. The Court therefore has the ability to determine the interpretation of expressions used in section 55, and such interpretations, while not binding on the Houses in relation to section 53, have generally been followed by the Houses in the interpretation of that section. Thus a proposed law would be regarded as imposing taxation for the purposes of section 53 if when enacted it would be a law imposing taxation within the meaning of section 55 as interpreted by the Court. (See also below under Decision as to amendments or requests.) (For examination by the High Court of the application of section 55, see *Austin v Commonwealth* 2003 195 ALR 321; *Permanent Trustee Australia v Commissioner of State Revenue*, 2004 211 ALR 18.) The High Court has indicated that laws imposing taxation may include provisions for assessment, collection and recovery of taxation where it is difficult to separate them, contrary to the strict separation of these matters usually observed by the drafters of government bills (see below, under When requests are required: (a) bills imposing taxation).

The interpretation of the expressions contained in sections 53, 54 and 55 is further dealt with below in the context of determining when amendments moved in the Senate should take the form of requests to the House of Representatives. It must be remembered, however, that the interpretation of the expression "imposing taxation", and the other expressions referring to taxation in section 55, is a question which may be determined by the High Court for the purpose of the application of that section to the validity of laws, whereas the interpretation of the expressions used in sections 53 and 54 is a matter for the two Houses to determine in their dealings with each other.

Governor-General's messages

Section 56 of the Constitution provides:

> A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

The purpose of this section is usually stated to be the preservation of the exclusive right of the executive government to initiate appropriations.

The reference in the section to a measure being passed is taken to refer to passage by the House in which the measure originates. In accordance with this interpretation, messages by the Governor-General recommending appropriations for the purposes of particular appropriation bills are usually reported to the House of Representatives before the bills are passed. There have been occasions, however, of messages referring to bills being reported after the bills have been passed by the House. Moreover, messages are usually framed so as to refer to any appropriation required by a bill or by any amendment to be moved by a minister, without any specification of the appropriation authorised by the messages. The messages are, therefore, largely a formality, but they reinforce the ministry's control of the House of Representatives.

As appropriation bills must originate in the House of Representatives, the section applies in practice only to that House, and Governor-General's messages of this kind are therefore not produced in the Senate. The reason for the reference in the section to "the House in which the proposal originated" was perhaps that the section was intended to apply in respect of bills which impose penalties or fees, which are not appropriation bills for the purposes of section 53 and which may therefore originate in the Senate (see J. Quick and R.R. Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, pp 682-3).

When requests are required: (a) bills imposing taxation

A bill for imposing taxation may not be amended by the Senate, and any amendments to such a bill moved in the Senate must take the form of requests to the House of Representatives to amend the bill.

In order to meet the requirements of section 55 of the Constitution, bills establishing schemes of taxation have been divided into bills imposing taxation and dealing only with the imposition of taxation and bills dealing with other matters associated with the taxation scheme such as provisions for the collection of the taxation and the enforcement of payment.

Until 1993, the principle was generally followed in the presentation of legislation, and accepted by both Houses, that only the bill which contained the expression "tax is imposed" was a bill imposing taxation within the meaning of sections 53 and 55, and any other bills dealing with other aspects of taxation were not bills imposing taxation within the meaning of those sections.

The form of the government's major taxation legislation arising from the 1993 budget, however, led to claims that it breached section 55 of the Constitution, and to a reconsideration of the application of section 55, and consequently of section 53.

Section 55 requires that laws imposing taxation deal only with the imposition of taxation and only with one subject of taxation. Over many years government drafters, who classify government bills (see below, Decision as to amendments or requests), taking clues from expressions used in judgments of the High Court under section 55, had drawn a distinction between bills imposing taxation, bills dealing with the imposition of taxation (for example, setting taxation rates) and bills dealing with taxation generally (for example, providing for assessment and collection machinery). Only the bills actually imposing taxation had been regarded as subject to the restrictions of section 55. This meant that there were some bills which, by affecting assessment and rates of taxation, had the effect of increasing the incidence of taxation, but which were regarded as technically not imposing taxation, although the government drafters had not been consistent in their classification of such bills. This had also meant that bills technically not imposing taxation could be amended in the Senate by way of direct amendment, rather than requests to the House of Representatives for amendment, under section 53 of the Constitution. The sales tax legislation, for example, had always consisted of acts which imposed the sales tax and acts which, in effect, set the rates of tax for various categories of goods, and bills amending the latter had been treated as amendable in the Senate.

The separation of bills imposing taxation and bills setting rates of taxation had been accepted in the past, and had been supported, in effect, in the Senate, because it allowed the Senate to make amendments instead of requests for amendments. This past acceptance, indeed support, by the Senate of the practice of separating the bill imposing the tax and the bill, in effect, setting the rates of tax, when the practice reinforced the ability of the Senate to make amendments to taxation proposals, is best illustrated by the case of the Sales Tax Bills 1981 (8/9/1981, J.474, 16/9/1981, J.503, 23/9/1981, J.521). Senators disputed the inclusion in those bills of provisions traditionally included in the amendable bills. The Senate, before dealing with the bills in committee of the whole, passed a resolution declaring that its decision to make requests for amendments to the bills did not indicate an acceptance that matter included in the bills was properly included in bills imposing taxation. (See also rulings of President Givens, SD, 10/12/1921, p. 14274, 19/7/1923, p. 1302; the Income Tax Bill 1943, recounted in *ASP* 6th ed., 1991, pp 592-3; ruling of Acting Deputy President Sibraa, 4/5/1984, J.822-3; and the amendment made by the Senate to the Taxation Laws Amendment (Rates and Provisional Tax) Bill 1990, 17/10/1990, J.346.)

The Taxation (Deficit Reduction) Bill 1993, however, drew attention to a significant consequence of this technical classification of bills: provisions which affected the levels of various taxes could be combined into one bill without breaching section 55, if the views of the government drafters were correct. The bill increased the rates of several taxes by this means, but it was classified by the government drafters as a bill which technically did not impose taxation.

The bill had the virtue of providing a *reductio ad absurdum* of the established classification of taxation bills, and an opportunity of considering that classification properly. As exemplified by the bill it could be seen to be based on an artificial distinction which, if carried to its logical conclusions, undermines a rational interpretation of the constitutional provisions. If accepted as it was manifested in this bill, it meant that bills which propose to increase significantly the levels of taxes may technically not be bills imposing taxation, may be introduced in the Senate, may be amended by the Senate (but presumably not to increase rates of taxation: a subsidiary absurdity, see below), and, most significantly, may be combined into one bill.

It was clear that if a bill such as this were to be enacted and were challenged in the High Court, it is possible that the Court would reject the technical and seemingly paradoxical classification of bills relied upon by the government drafters, and find that bills of this sort are bills imposing taxation and therefore subject to the limits of section 55. This the Court could do without setting aside, but by developing, its previous relevant judgments, and by having regard to the plain words and stated purposes of sections 53 and 55.

Because of the political significance of the changes contained in this bill, it was immediately questioned. The Leader of the Opposition in the Senate, Senator Hill, tabled two legal opinions to the effect that the bill would impose taxation and would violate section 55 if enacted (30/8/1993, J.396). The Leader of the Government in the Senate, Senator Evans, then tabled an Attorney-General's Department opinion, in anticipation of an order for the production of documents of which Senator Hill had given notice, which expounded the government's advisers' views on the classification of taxation measures (31/8/1993, J.412). Senator Hill later tabled a supplementary opinion criticising the government opinion (2/9/1993, J.440). Questions relating to sections 53 and 55 of the Constitution and the bill were referred to the Legal and

Constitutional Affairs Committee on the motion of Senator Hill (31/8/1993, J.420). The committee found that there was a substantial risk that the bill would be held to be invalid under section 55. To the motion to take note of the report an amendment was passed, calling upon the government to heed the conclusions of the report (27/9/1993, J.498). The government had already announced that it would divide the bill into a number of separate bills to avoid the possibility of the legislation being held to be invalid.

The new bills were rushed through the House of Representatives and received by the Senate. They consisted of a bill making the assessment-type changes to taxation, a "test bill" designed to provoke a legal challenge to determine the question of whether an alteration in rates of taxation is an imposition of taxation (this bill dealt with increases in the rates of fringe benefits tax and tax on friendly societies), a bill making the changes to income tax rates, and five separate bills making the changes to sales tax. The first two bills were referred to the Legal and Constitutional Affairs Committee (30/9/1993, J.548). The majority of the committee subsequently reported that the first bill would be valid and both bills should be passed, but the non-government senators doubted the validity of the first bill as well as the "test bill".

When the Senate dealt with the bills, declaratory resolutions were passed (5/10/1993, J.570; 6/10/1993, J.587), similar to a resolution passed in 1981 when the Senate dealt with the 1981 sales tax legislation (see above). The resolutions in substance declared that the Senate, by proceeding with the bills as either amendable or non-amendable, was not committed to any view of whether they would be held to be bills imposing taxation. Requests for amendments were then made to some of the bills which the government claimed did not impose taxation (20/10/1993, J.660).

Similarly, requests were made to the sales tax bills arising from the 1995 budget to remove certain sales tax increases, and the requests were agreed to by the government in the House of Representatives, although the government claimed (in the explanatory memorandum accompanying the bills) that they were not bills imposing taxation (28/6/1995, J.3560-3). To avoid a repetition of the 1993 dispute, the government divided the tax increases between three separate bills. Government amendments moved to certain bills which increased taxation were the subject of a statement by the Chair of Committees (SD, 31/8/1995, pp 761-2).

The issues arising from these events were not resolved; in particular, the "test bill" was not challenged and the High Court was therefore not given the opportunity of resolving the disputed questions of interpretation.

The Senate, in its subsequent decisions about whether to proceed by way of amendments or requests for amendments in relation to bills dealing with taxation, has not accepted the interpretation of the government's advisers. Bills stated by the government not to be bills imposing taxation have been treated by the Senate as bills imposing taxation and Senate amendments put in the form of requests accordingly. (Statements by Chair of Committees, A New Tax System (Fringe Benefits) Bill 2000, SD, 10/5/2000, p. 14265; New Business Tax System (Alienation of Personal Services Income) Bill 2000, SD, 29/6/2000, p. 16068.) The Governor-General Legislation Amendment Bill 2001 contained provisions regarded by the Senate as imposing taxation (subjecting the salaries of governors-general to income tax for the

first time) but also other provisions not dealing with the imposition of taxation (statement by Chair of Committees, 21/6/2001, J.4376). **(See Supplement)**

If a bill does not impose taxation, the Senate may amend it, and if a bill does impose taxation the Senate may seek amendments to it by way of requests. The difference between amendments and requests is a difference of procedure only, and does not in practical terms inhibit the Senate, as the Leader of the Government in the Senate, Senator Gareth Evans, pointed out in debate in the Senate (SD, 1/9/1993, p. 740). As was also pointed out in discussion in the Senate, however, the combination of various measures in one bill, regardless of whether any of those measures impose taxation, restricts the options of the Senate in dealing with the various measures. If the measures were contained in separate bills, the Senate could reject some measures, amend some measures and agree to some measures without amendment. Those to which the Senate agreed without amendment would proceed at once to assent, and only those which the Senate rejected or amended could be the subject of further dealings between the two Houses. With the combination of the measures in one bill, the Senate can seek changes to the various measures only by way of amending the bill, including by leaving out provisions of the bill, or by dividing the bill. The procedure of dividing the bill has no practical advantage over amendment, because the concurrence of the House of Representatives to the division of the bill is required before any of the measures can proceed to assent. By declining to agree to the division of the bill, the government in the House of Representatives can insist on the various measures being dealt with as a whole, and none of them can pass until agreement is reached between the two Houses on all of them.

The combination of various taxation measures in one bill therefore limits the Senate's scope for consideration of those measures, and section 55 is designed to avoid so limiting the Senate.

Under the second paragraph of section 55 of the Constitution, bills imposing customs or excise tariffs, unlike other bills imposing taxation, may cover more than one subject of taxation. A bill which increases any tariffs is regarded as a bill imposing taxation, even though it reduces or removes other tariffs (statements by the Chair of Committees, SD, 26/11/1997, p. 9461; 4/4/2001, p. 23731).

For an analysis of the suggested application of the third paragraph of section 53 to taxation bills, see below under When requests are required: (c) proposed charge or burden.

A bill which validates tax unlawfully imposed by regulations is regarded as an amendable bill (Wheat Tax Regulations (Validation) Bill 1987, 17/12/1987, J.458).

On the contrary, bills which are stated to "close a loophole" or "correct an anomaly", but which in fact impose tax where none was imposed before, even if the tax has been collected, are bills imposing taxation (Radiocommunications (Transmitter Licence Tax) Amendment Bill 2002; Bankruptcy (Estate Charges) Amendment Bill 2002).

Measures which provide for the indexation of taxation are not bills imposing taxation (Road Transport Charges (Australian Capital Territory) Amendment Bill 2002).

The imposition of charges on Commonwealth entities only is not an imposition of taxation (Australian Radiation Protection and Nuclear Safety (Licence Charges) Bill 1998 and its amendment bill 2002).

A bill which empowers the making of regulations to impose a tax is regarded as amendable (Life Insurance Policy Holders' Protection Levies Bill 1991, 19/12/1991, J.1987-8; Overseas Students Tuition Assurance Levy Bill 1993, 17/12/1993, J.1080). A bill which imposes a tax but allows the regulations to set or vary the rate of the tax is treated as non-amendable (Forest Industries Research Levy Bill 1993, 23/11/1993, J.862-3).

A bill which amends regulations so as to impose taxation where none was imposed before would seem to be a bill imposing taxation, but, by including other matters in such a bill, the government drafters seem to have taken the view that it is not (Migration Legislation Amendment (Contributory Parents Migration Scheme) Bill 2002, 5/3/2003, J.1527-9).

On occasions the Senate has made requests for the insertion of appropriation provisions in bills originating in the House (4/10/1984, J.1153; 18/10/1995, J.3958-9). On these precedents, it could be argued that it would be open to the Senate to request the insertion in a bill originating in the House of a provision having the effect of imposing taxation. The better view, however, is that such amendments may not be moved in the Senate at all, in that, by turning a bill into a bill imposing taxation, they are contrary to the initiation provision of the first paragraph of section 53 of the Constitution (statement by President Calvert, SD, 16/9/2003, p. 15275).

When requests are required: (b) ordinary annual services

Section 53 of the Constitution provides that the Senate may not amend a bill which would appropriate money for the ordinary annual services of the government.

A bill would appropriate money if it contains a provision expressly stating that money is appropriated for the purposes of the bill. It is therefore readily determined whether a bill is an appropriation bill. The question which arises for interpretation is: what kind of appropriation is an appropriation for the ordinary annual services of the government?

This expression is used only in sections 53 and 54, and not in section 55. It is therefore not justiciable and its interpretation is a matter for the two Houses in their dealings with each other.

The framers of the Constitution had a fairly clear conception of the meaning of the phrase "the ordinary annual services of the government", and it was expounded by a number of speakers at the Constitutional Conventions. The expression referred to the annual appropriations which were necessary for the continuing expenses of government, as distinct from major projects not part of the continuing and settled operations of government. The expression had been taken from the so-called Compact of 1857 between the government and the Legislative Council of South Australia, and the operation of that agreement was familiar to the framers of the Constitution. The interpretation of the provision was also explored in a number of debates in the Senate. (For a comprehensive history of the exposition of the phrase see *ASP*, 6th ed., 1991, pp 569-80.)

The interpretation of the expression was substantially settled in 1965 by what amounted to an agreement between the Senate and the government, and by agreed applications of the terms of that agreement since that time.

This agreement, which is generally referred to as the Compact of 1965, arose from an attempt by the government to place in the non-amendable annual appropriation bills provision for some matters which were traditionally regarded as not forming part of the ordinary annual services. After debate in the Senate and the consideration of the matter by an informal committee of senators, a statement was made on behalf of the government indicating that appropriations for the following matters would not be regarded as part of the ordinary annual services of the government and would therefore be included in the amendable bill:

(a) the construction of public works and buildings;

(b) the acquisition of sites and buildings;

(c) items of plant and equipment which are clearly definable as capital expenditure;

(d) grants to the States under section 96 of the Constitution; and

(e) new policies not authorised by special legislation, subsequent appropriations for such items to be included in the appropriation bill not subject to amendment by the Senate.

This list reflected the principles set out in the report of the informal committee of senators. (A detailed account of the establishment of the Compact of 1965 is in *ASP*, 6th ed., 1991, pp 580-3.)

In 1974 two estimates committees drew attention to appropriations for new policies included in the non-amendable appropriation bill, and the Standing Committee on Constitutional and Legal Affairs was given a reference to consider the inclusion of new policies not authorised by legislation in the non-amendable bill. The committee's report indicated that appropriations for new policies not authorised by legislation should not be included in the non-amendable bill, and recommended that the Senate reaffirm the principles of the Compact of 1965 (report of the committee, PP 130/1976). The Senate therefore passed the following resolution:

> That the Senate resolves:
>
> (1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government.
>
> (2) That appropriations for expenditure on:
>
> (a) the construction of public works and buildings;
>
> (b) the acquisition of sites and buildings;
>
> (c) items of plant and equipment which are clearly definable as capital expenditure;
>
> (d) grants to the States under section 96 of the Constitution; and

> (e) new policies not previously authorised by special legislation,
>
> are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate Appropriation Bill subject to amendment by the Senate. (*17 February 1977 J.572*)

The ordinary annual services are therefore defined by what they do not include rather than what they include.

The application of the Compact of 1965 was the subject of correspondence between the Standing Committee on Appropriations and Staffing and the government, tabled in the Senate on 3 November 1988 and 4 April 1989. It was agreed that expenditure on computers, which, due to changes in technology, are no longer major items of capital equipment, and expenditure on the fitting out of buildings, should be regarded as part of the ordinary annual services subject to certain limits.

In 1999 the Senate adopted a recommendation in the 30th report of the Appropriations and Staffing Committee that some adjustments be made in the classification of appropriation items for the purpose of determining whether they fall within the category of ordinary annual services in the context of accrual budgeting (22/4/1999, J.777). The adjustments provided that:

(i) items regarded as equity injections and loans be regarded as not part of ordinary annual services

(ii) all appropriation items for continuing activities for which appropriations have been made in the past be regarded as part of ordinary annual services

(iii) all appropriations for existing asset replacement be regarded as provision for depreciation and part of ordinary annual services.

In 2004 the Senate determined a matter relating to the classification of payments to international organisations, on the recommendation of the Appropriations and Staffing Committee (41st report of the committee, PP 360/2004; 8/12/2004, J.273).

In March 2005 two appropriation bills were presented to replenish money spent by departments and agencies on relief for the victims of the 2004 tsunami. One of the bills purported to be for the ordinary annual services, but as the expenditure could not possibly be ordinary annual services expenditure, both bills were treated as amendable bills (15/3/2005, J.499-500). The Northern Territory Emergency Response package of bills repeated this anomaly (17/8/2007, J.4254), as did bills to cover expenditure on an equine influenza outbreak (14/2/2008, J.152). See also statement by the Chair of Committees in relation to the Appropriation (Regional Telecommunications Services) Bill 2005-2006, SD, 14/9/2005, p. 37.

These instances indicated that the Department of Finance and Administration appeared to be taking a position that ordinary annual services include anything it regarded as falling within vaguely-expressed outcomes of departments, including new policy proposals, a position quite contrary to the compact of 1965 and subsequent Senate determinations (see Report No. 25 of

2005-06 of the Auditor-General, pp 40-41; Appropriations and Staffing Committee, Annual Report 2005-06, PP 157/2006; Annual Report 2006-07, PP 138/2007; report of Finance and Public Administration Committee on annual reports, PP 206/2007; report on additional estimates 2007-08, PP 230/2008; Appropriations and Staffing Committee, 45th Report, PP 148/2008: this report called for a return to the position formerly agreed between the Senate and the government).

An amendment passed on 20 March 2008 to the motion for the second reading of the 2007-08 additional appropriation bills drew attention to the reports of the Senate committees on this issue, and called upon the government to resolve it (J.322). At the time of writing it remained unresolved. **(See Supplement)**

During the debate leading up to the Compact of 1965, it was pointed out that appropriations for the two Houses of the Parliament should not be regarded as ordinary annual services of the government, or, indeed, services of the government, and it was recommended that they be contained in a separate bill. This recommendation was not put into effect until 1982, when a separate parliamentary appropriations bill was introduced as a result of the recommendations of the Senate Select Committee on Parliament's Appropriations and Staffing (see under Parliamentary appropriations, below).

For amendments of an annual appropriation bill not for the ordinary annual services, see 30/11/1995, J.4320-1; 24/6/2004, J.3697-8.

When requests are required: (c) proposed charge or burden

Section 53 of the Constitution provides in the third paragraph that the Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. Any amendment to a bill which would have this effect must be moved in the Senate by way of a request to the House of Representatives for an amendment. This expression is used only in section 53, and its interpretation is therefore a matter for the two Houses in their dealings with each other.

The interpretation of this provision has been the subject of much discussion in the Senate in the past, and, in particular, was the subject of an extensive debate in the Senate in 1903 in relation to the Sugar Bounty Bill.

The Senate may not initiate bills imposing taxation or appropriating money. The Senate may not amend bills imposing taxation or appropriating money for the ordinary annual services. In the absence of the latter prescription, the Senate would be able to initiate by way of amendment that which it may not initiate by way of its own bill. By the Senate making requests to the House of Representatives for amendments to such bills, the initiative of the House in proposing the imposition of taxation and the appropriation of money is preserved. The further prescription in the third paragraph of section 53 similarly ensures, in relation to appropriation bills which the Senate may otherwise amend, that is, bills appropriating money other than for the ordinary annual services, that the Senate does not initiate by way of amendment that which it cannot initiate by way of its own bill, namely, a further appropriation of money.

The paragraph should therefore be regarded as applying only to that category of bills which the Senate may not initiate but which it may amend, that is, bills appropriating money other than for the ordinary annual services. To seek to apply the paragraph to any other category of bills immediately makes nonsense of it and defeats its purpose. If the paragraph is interpreted as prescribing against the Senate amending a bill which it may initiate, this means either that the Senate may not amend a bill which it has introduced, an obvious nonsense, or that the Senate may not amend a bill for the reason only that the bill has been introduced in the House of Representatives rather than the Senate, which is also a nonsense. It makes no sense to seek to prevent the Senate doing by way of amendment that which the Senate may do by initiating or amending its own bill; the Senate could circumvent such a prescription by refraining from consideration of a bill sent to it by the House, and sending to the House its own bill with a message indicating that its consent to the original bill is dependent upon the House's consent to the Senate bill. Not only would the supposed prescription thereby be avoided, but the implied extension of the exclusive right of the House to initiate the prescribed kinds of proposals would be undermined.

Therefore the paragraph applies only to bills which the Senate may not initiate but may amend, that is, appropriation bills other than those for the ordinary annual services of the government.

If this interpretation is not adopted, it is not possible to find any coherent purpose of the paragraph; any other interpretation immediately entails a view that the paragraph has no coherent purpose.

This was the interpretation of the third paragraph adopted at the later constitutional conventions, and in the early parliamentary discussion of the paragraph.

At the conventions, it was pointed out that the difference between an amendment and a request would be a matter of procedural form only and not a matter of substantive power, and this was given as a reason for opposing section 53 in the form to which agreement was eventually given. (Speech by George Reid, Melbourne Session, 1898, pp 1997-8.) The same view was repeatedly expressed in the first and only comprehensive debate in the Senate on the interpretation of the paragraph. (On the Sugar Bounty Bill 1903, SD, 2, 8, 22 and 23/7/1903, pp 1691-1703, 1821-63, 2365-415, 2469-503. Speeches by Senators Higgs, MacGregor, Clemons, Millen, Symon and Pulsford, pp 1836, 1843, 1852, 1854, 2404, 2384, 2482.) This observation has repeatedly been made since that time, including by the Leader of the Government in the Senate. (Senator Gareth Evans, SD, 1/9/1993, p. 740.) As will be seen, it was a major factor in the subsequent somewhat careless application of the paragraph.

The claim that there is no substantive difference between amendments and requests, and that it is a matter merely of procedural form, has never been refuted except in terms of the foregoing interpretation of the third paragraph, that it is designed to preserve the initiative of the House in respect of imposition of taxation and appropriations.

When challenged with the assertion that there would be no difference between amendments and requests, Edmund Barton, the leader of the convention, explained the provision in terms of preserving the initiative of the House of Representatives. An amendment, he said, would allow the Senate to put back on the House of Representatives the responsibility for determining

whether the measure would pass, whereas a request would ensure that the Senate could not avoid that responsibility. The bill would remain as the House of Representatives had initiated it, and if the House declined to change it at the request of the Senate, the Senate would have to decide whether to agree to the House's bill. (Adelaide Session, 1897, p. 557.)

The exposition of the third paragraph by Quick and Garran clearly states that it applies only to those bills which the Senate may not initiate but may otherwise amend, that is bills appropriating money other than for the ordinary annual services, and is designed to preserve the House's originating prerogative:

> The second paragraph of sec. 53 takes from the Senate absolutely the power to amend tax bills and annual appropriation bills, *whilst the third paragraph restricts its power to amend other appropriation bills*. [emphasis added]
>
> Seeing that the Senate cannot amend a bill imposing taxation, it may be naturally asked — how can the Senate possibly amend a proposed law so as to increase any proposed charge or burden on the people? The answer is that the Senate is only forbidden to amend tax bills and the annual appropriation bill; it may amend two kinds of expenditure bills, viz.: those for permanent and extraordinary appropriations. ..... The Senate may amend such money bills so as to reduce the total amount of expenditure or to change the method, object, and destination of the expenditure, but not to increase the total expenditure originated in the House of Representatives. (*Annotated Constitution of the Australian Commonwealth*, 1901, pp 668, 671.)

Garran apparently subsequently changed his mind in that regard (in an opinion of 13 April 1950, presented to the Senate on 22 March 1994), but his later view creates many difficulties.

The first and only comprehensive debate on the interpretation of the paragraph in the Senate was occasioned by an assertion by the House of Representatives that a Senate amendment to a bill should have been a request because it fell within the terms of the paragraph, in that it would increase expenditure under an appropriation in the bill. The message from the House supported this assertion on the ground that the amendment was said to be "an infraction of the provisions of section 53 of the Constitution, which prohibits the Senate from originating a proposed law appropriating revenue or moneys", as well as the ground of infringement of the third paragraph itself; that is, the third paragraph was seen as supporting the provisions concerning origination. (SD, 1903, p. 2365.) The minister leading for the government in the debate similarly supported the contention that a request was necessary on the basis that an amendment violated the right of the House to originate appropriations (Senator O'Connor, pp 2367, 2369). This theme was emphasised by others during the debate (exchange between Senators Keating and Clemons pp 1854-5; Senator MacGregor p. 1845, Senator Millen pp 2405, 2409). The minister was similarly insistent that a bill must propose an appropriation in order to fall within the prescription of the third paragraph:

> Of course, if the bill does not make an appropriation, we can do anything we like with it. (Senator O'Connor, pp 2369, 2406, 2489.)

It was clear then, from this early discussion, that the third paragraph was taken only to prevent the Senate doing by way of amendment that which it could not do by way of initiating a bill, to apply only to appropriation bills which the Senate could otherwise amend, and to prevent only an amendment which would increase expenditure under the appropriation.

This was a rational and coherent interpretation of the paragraph, and an answer, the only coherent answer, to the repeatedly-made observation that there is no difference, other than of procedural form, between an amendment and a request.

(i) appropriations

There has been general agreement that the expression charge or burden refers to appropriations of money (its supposed application to matters other than appropriations is dealt with below). An appropriation of money is a charge or burden on the people in the sense that it is a charge on the public funds. An amendment to a bill which would increase expenditure under a bill out of money proposed to be appropriated for that purpose is an amendment which would increase a proposed charge or burden on the people.

On the basis of this analysis, it would appear at first sight that the interpretation of the relevant provision is relatively easy: if a bill contains a proposed appropriation of money, and an amendment would have the effect of requiring increased expenditure under that appropriation, for example, by increasing the payments which are to be made under the appropriation, the amendment would need to be in the form of a request.

The question soon arose, however, of the application of the paragraph to an amendment to a bill which did not itself contain an appropriation but which amended an act which contained an appropriation in such a way as to affect expenditure under the appropriation. Should such an amendment which would increase expenditure under the standing appropriation be moved in the form of a request?

Strong arguments could be advanced, on the basis of the 1903 debate and previous authority, that the third paragraph did not apply to such an amendment. The bill would not of itself *propose* an appropriation. Moreover, such a bill could presumably be introduced in the Senate, and, as has already been noted, the application of the paragraph to a bill which may be introduced in the Senate undermines the only coherent purpose and rational application of the paragraph.

Unfortunately, when this question arose in the Senate in relation to the Surplus Revenue Bill 1910, it was not considered. A request was moved, and when the necessity for a request was questioned, the matter was brushed aside with the by then familiar remark: “What does it matter whether we proceed by way of request or amendment?” (Senator Pearce, SD, 25/8/1910, p. 2060). The request was then agreed to.

In this unsatisfactory way it was established that a request was required for an amendment to a bill which would increase expenditure under an appropriation in an act to be amended by the bill.

The situation could be rationalised by the thesis that such a bill contains an implied appropriation, but there is still the problem that such an amendment could be initiated by way of a Senate bill and could presumably be made by way of an amendment to a bill first introduced in the Senate. The case thereby extended the application of the third paragraph in a way which undermined its rationale as a safeguard of the initiative of the House of Representatives.

The interpretation of the provision has also been complicated in relatively recent years by certain unfortunate features of the framing of government legislation. These features are called unfortunate because, apart from complicating the interpretation of the relevant provision, they also amount to a removal of appropriation and expenditure from parliamentary control and supervision. These aspects of legislation are as follows.

Standing appropriations. The Parliament has agreed to many bills which contain standing appropriations, usually called special appropriations, that is, appropriations which, when they have been put onto the statute book, continue to authorise the expenditure of money for some years or until they are repealed, and do not have to be renewed by Parliament. Bills to amend those bills are then introduced, and the provisions of the amending bills affect the amount of expenditure to be made under the standing appropriations. It is then necessary to determine whether any particular amendment by the Senate of the amending bills will increase the expenditure under the appropriation. This determination is further complicated because these standing appropriations are often also appropriations of indefinite amount.

Indefinite appropriations. The Parliament has passed many bills which contain appropriations of indefinite quantity. The provisions in question usually state that the money required for the operation of the legislation is appropriated from the Consolidated Revenue Fund, without any specification of an amount. This drafting device is adopted because it is often not possible for the government to calculate with any degree of accuracy the amount of expenditure which will be required by the legislation concerned, because of uncertainty as to the impact of the legislation. This uncertainty also has the effect of making it difficult to determine whether any particular amendment of the legislation will require increased expenditure. If the government cannot determine how much expenditure will be involved in a piece of legislation, it is asking a great deal that the Senate should determine with certainty whether any particular amendment of the legislation will increase the expenditure. (The Financial Management and Accountability Amendment Bill 2000, which belied its title, and which was passed in connection with the government's new tax scheme, added an indefinite amount to every annual and standing appropriation in every statute, but it was explained that this was a "bookkeeping" device not actually increasing expenditure.)

Separation of appropriations. The use of standing and indefinite appropriations and bills which amend the legislation containing those appropriations means that appropriations are separated from the provisions that affect the expenditure which may be made under them. It may be argued, as indeed it was argued during the 1903 Senate debate, that, on a strict interpretation of the relevant provision in section 53, if a bill does not contain a specified appropriation there can be no question of any amendment to it increasing a proposed charge or burden. This interpretation, while probably strictly correct, has not been followed, and it has been accepted that a bill proposes a charge or burden if it amends other legislation which contains an appropriation. This is a very loose interpretation which could, if carried to its logical conclusion, lead, as was pointed out in the 1903 debate, to virtually every amendment becoming a request, because virtually every amendment has an impact on an appropriation which exists somewhere. Fortunately the interpretation has not been carried to that logical conclusion, but it does indicate the difficulty of drawing clear lines in the application of the relevant provision of section 53 if a direct connection between an amendment and increased expenditure is not required as a condition for a request.

Complex provisions. Many bills passed by the Parliament in recent years contain complex provisions which determine whether expenditure is to occur. Usually these provisions take the form of providing that expenditure may occur if certain factors apply, and the expenditure will occur only if the factors apply and relate in a certain way. Specific examples of these types of provisions are referred to in relation to the particular cases described below. These kinds of provisions often make it difficult to determine whether there is going to be any expenditure under a bill at all, and, if so, how much, and thereby make it doubly difficult to determine whether particular amendments will have the effect of increasing expenditure.

Discretion conferred on officials. Many bills passed by the Parliament confer discretions on ministers and other office-holders to determine whether payments are made and therefore to determine whether expenditure occurs. In many cases these discretions are not governed by any objective factors. Many appropriations authorise expenditure which is not statutorily required, as it is, for example, by provisions which create entitlements to payments. Expenditure under such appropriations depends on the decisions of officials in the sense that it may be decided to make savings by not spending up to the authorised level, or not spending at all. This is quite different, however, from provisions which explicitly empower ministers and other officials to determine whether payments are made, and if so in what amounts. As will be seen in the following analysis of past cases, these sorts of provisions provide a basis for an argument, which was advanced by the Senate in 1981, that an amendment which merely affects such a discretion need not be a request.

Appropriations of these kinds have been used (or abused) to such an extent in recent times that only about 20 percent of total government expenditure is now subject to annual parliamentary scrutiny and approval in the annual appropriation bills. The remaining 80 percent of government expenditure has escaped from parliamentary control through the use of these types of provisions. The following figures, extracted from the annual budget documents, show the growth of standing appropriations as a percentage of total government expenditure:

1909-10	10%
1929-30	38%
1949-50	49%
1969-70	56%
1992-93	74%
2002-03	80%

Had the Parliament not fallen into the habit of passing these kinds of provisions (and, it is submitted, it is a very bad habit from the standpoint of parliamentary control and supervision of expenditure), the interpretation of the relevant provision of section 53 would be relatively straightforward. It is because of these kinds of provisions that difficulties of interpretation have arisen.

Proper parliamentary supervision and control of expenditure, and the proper application of section 53 of the Constitution, require that all government expenditure be approved annually in specified amounts by Parliament, with additional and supplementary appropriations when required, and that expenditure of appropriated funds be governed by objective conditions rather

than discretions vested in officials. There is no reason for this situation not being achieved, except an executive desire to avoid unwelcome parliamentary attention. (A bill to abolish standing appropriations and to make all appropriations subject to annual renewal was introduced in the Senate in 1986 by Senator Vigor: 24/9/1986, J.1229.)

A report of the Auditor-General presented in 2004 (Report No. 15, 2004-05, PP 240/2004) found widespread illegalities, lack of information and absence of accountability and control in the administration of special appropriations. It was pointed out that the nature of special appropriations ("bottomless buckets of money") encourages these problems. (29/11/2004, J.122; SD, 29/11/2004, pp 74-8) The problems posed by special appropriations were subsequently taken up in debate on bills containing new provisions for such appropriations and by the Scrutiny of Bills Committee (SD, 10/10/2005, pp 16-17; Fourteenth Report of 2005, Accountability and Standing Appropriations, PP 461/2005). The committee adopted the practice of reporting on provisions for such appropriations.

Other reports by the Auditor-General disclosed lack of proper control and accountability in other areas of the public finance system where annual appropriations are by-passed (Reports Nos 24 of 2003-04, 28 of 2005-06, 31 of 2005-06).

The Finance and Public Administration Committee presented a report in March 2007 on the appropriations and funding system and its effect on parliamentary accountability. The committee recommended significant changes not only to the system of appropriations but to other features of public finance introduced during the previous ten years which maximised flexibility for government but reduced transparency and accountability and hampered parliamentary scrutiny (*Transparency and accountability of Commonwealth public funding and expenditure*, PP 47/2007; response by the Chairs' Committee, 21/6/2007, J.4028).

It is no answer that other countries have extensively used standing appropriations. This means only that other countries have made the same mistake. Generally speaking they have not made the same mistake to the same extent. In the United Kingdom standing appropriations account for only 25 percent of government expenditure.

The following are four cases in which there was significant disagreement between the two Houses (in reality between the Senate and the government's advisers) in relation to amendments and requests affecting appropriations, and they illustrate some of the issues of interpretation.

States Grants (Tertiary Education Assistance) Bill 1981. This bill contained a provision empowering a minister to make certain determinations which could have the effect of reducing the payments otherwise authorised to be made to the states under the bill. A Senate amendment removed the relevant provision. The Senate passed a resolution declaring that it was in accordance with section 53 of the Constitution to amend the bill in that way. The principle which may be drawn from that resolution is that a request is not required for an amendment which removes a ministerial power which may be exercised in such a way as to reduce expenditure under a bill (see also statements by Chair of Committees, SD 20/3/1997, p. 1820; 25/9/1997, p. 6961; 2/12/1997, pp 10130-31; the same principle applies to an amendment which would empower a minister to make determinations which could be exercised to increase expenditure otherwise to be made under the bill: statement by Chair of Committees, 21/6/2007, J.4043).

States Grants (Technical and Further Education Assistance) Bill 1988. Under this bill a minister was empowered to authorise payments to a state in respect of expenditure of certain institutions. The minister was not to authorise the payment of an amount that exceeded a prescribed maximum. That maximum was determined by multiplying a certain sum of money by the number of students receiving instruction in the relevant institutions. In calculating the number of students, certain categories of students were to be disregarded. A Senate amendment had the effect of removing the reference to one of the categories of students to be disregarded. The belief that the amendment did not require a request was based on an assessment that the effect of the amendment on the expenditure under the bill would not be sufficiently direct or certain to require a request. Whether the amendment increased expenditure would be determined by whether, because of students falling into the relevant category, the number of students would be thereby increased (this would depend on numbers of students in the other relevant categories), whether the maximum amount payable would thereby be increased and whether the minister would therefore authorise an increased payment. It appeared on the face of the provisions that the connection between the amendment and an ultimate increase in expenditure involved too many links in the chain of causation and would be simply too indirect and uncertain to warrant the amendment taking the form of a request.

Social Security Legislation Amendment Bill (No. 4) 1991. The *Social Security Act 1991* and its predecessor statute is a frequently-amended act which contains a standing and indefinite appropriation, and amendments to amending bills have given rise to difficult questions of interpretation. To this bill the government moved in the Senate a number of amendments, one of which created a category of potential recipients of benefits in respect of whom a certificate could be issued by state or territory authorities. The payment of funds therefore depended upon the exercise of a power conferred not on a Commonwealth official but on state and territory officials. It was not known whether any certificates would be issued by the relevant authorities or whether any benefits would be paid, and subsequent publicity surrounding the bill indicated that the matter was still in doubt for some time after its passage. The view was therefore taken that the effect of the amendment on total expenditure under the bill was uncertain. After the amendments had been passed by the Senate and agreed to by the House of Representatives, a statement was made by the Speaker indicating a belief that the amendment in question should have been a request.

Local Government (Financial Assistance) Amendment Bill 1992. A provision of this bill empowered the relevant minister to determine a figure which, multiplied by a separately determined factor, produced an amount of a payment to the state of Tasmania, and a ceiling was prescribed for the figure to be determined by the minister. A Senate amendment had the effect of altering that ceiling. The view was taken that the amount actually expended under the bill would not necessarily be affected by the alteration of the ceiling by the Senate's amendment. Moreover, it was made clear that, if the ministerial power under this bill were exercised in such a way as to increase the payment to Tasmania, payments to the State under other legislation, also determined by ministerial determination, would be reduced by a corresponding amount. It was clear, therefore, that in practice the amendment would not result in additional expenditure. In this case the effect of the amendment was influenced by two different statutory ministerial discretions. Although, as the Speaker suggested in a statement to the House of Representatives, it is somewhat anomalous to be interpreting the question with reference to a ministerial undertaking,

it is also highly anomalous to argue that a request is required when it is known that there will be no increase in expenditure.

(See Supplement) An issue which has arisen from time to time relates to Senate amendments which remove proposed restrictions on entitlements to payments. The principle has been followed that where a bill proposes to restrict eligibility for payments under an act which contains a standing appropriation, and the Senate's amendments remove or liberalise the restrictions, those amendments do not need to be requests, although their effect is to increase the total of expenditure which would otherwise have occurred had the bill been passed without amendment. This principle appears to have been accepted by the government. (See government amendments moved in the Senate to the Social Security Legislation Amendment Bill 1990, 18/12/1990, J.633-7; statements by the Chair of Committees, SD, 26/11/1996, p. 5968; 29/11/1996, p. 6379; 13/12/1996, p. 7490; 12/2/1997, p. 539; for acceptance by the government, see HRD, 2/12/1996, p. 7454.)

In relation to a Senate amendment to the Social Security Amendment Bill 1993, it was conceded by the government that it was not possible to determine the effect of the amendment on expenditure (HRD, 26/5/1993, pp 904-6).

In 1997 government amendments to a bill dealing with veterans' affairs were circulated as requests even though the explanatory memorandum accompanying the amendments stated that they did not have any financial impact. The Chairman of Committees stated that he was at a loss to understand why the amendments had been framed as requests (SD, 12/2/1997, p. 539). See also the statements by the Chair of Committees in relation to the Taxation Laws Amendment Bill (No. 1) 1997, SD, 27/6/1997, p. 5456; the Child Support Legislation Amendment Bill 1998, SD, 30/11/1998, p. 910, 7/12/1998, p. 1328; New Tax System Bills, SD, 30/4/1999, p. 4657; 24/6/1999, p. 6252; 25/6/1999, p. 6465; Telecommunications Bills, SD, 27/5/1999, p. 5549.

Amendments which may result in increases of expenditure from funds not yet appropriated or which authorise ministers to take action which may result in increased expenditure are not treated as requests (statements by Chair of Committees, SD, 20/3/1997, p. 1820; 25/9/1997, p. 6961; 2/12/1997, pp 10130-31).

Where amendments are purely consequential on amendments which are properly framed as requests, the consequential amendments may also be framed as requests (statement by Chair of Committees, A New Tax System (Family Assistance and Related Measures) Bill 2000, SD, 11/4/2000, p. 13807). On occasions government drafters have attempted to have groups of government amendments all treated as requests on the basis that some of them should be requests and they are related. The Senate has not accepted this distorted application of the constitutional provisions. (Statement by Chair of Committees, Further 1998 Budget Measures Legislation Amendment (Social Security) Bill 1999, SD, 20/9/1999, p. 8438).

In debate in the House of Representatives on the States Grants (Technical and Further Education Assistance) Bill 1988, the responsible minister quoted an opinion by a government adviser which indicated that the amendment to the bill was one which required a message under section 56 of the Constitution (HRD, 21/12/1988, pp 3777-8; the opinion was also quoted in the Senate p. 4809). In other cases in the past where there has been dispute about whether an amendment

moved in the Senate infringed the rule concerning a proposed charge or burden on the people, the government has sought to establish that the amendment should take the form of a request by advising that a Governor-General's message would be necessary if the amendment were passed by the House of Representatives.

In debate on the Trade Practices Revision Bill 1986, Senator Macklin pointed out that a message had been brought into the House of Representatives in connection with the bill. The bill did not contain any appropriation of money, and nor did the Trade Practices Act which it amended; the money necessary for expenditure under the Trade Practices Act is appropriated by the annual appropriation bills. There was a clause in the bill which enlarged the category of proceedings in respect of which, under the principal act, financial assistance might be granted by the Attorney-General. The funds necessary for this assistance were not appropriated by the bill or the Act, but were contained in annual Appropriation Bill (No. 1), and when the relevant section of the principal act was passed no message was produced. It was clear, therefore, that a Governor-General's message should not have been brought into the House of Representatives in respect of the bill. In response to Senator Macklin, Senator Evans, the Minister representing the Attorney-General, said that the introduction of the message represented an "abundance of caution" on the part of the Office of Parliamentary Counsel (the government drafting office). Senator Macklin asked why any caution at all was required, since the requirements of sections 53 and 56 of the Constitution are not justiciable. Senator Evans then conceded that the bill was not an appropriation bill and that the message should not have been produced (SD, 30/4/1986, p. 2072).

This incident demonstrated some of the issues of interpretation referred to, and also demonstrated that an opinion by government advisers that an amendment should have been a request cannot be taken as an infallible answer to the question.

In framing government amendments to be moved in the Senate the government drafters have occasionally suggested that such amendments should be made as requests if they make expenditure "legally possible"; in other words, section 53 of the Constitution should be read as if it referred to notional charges or burdens rather than real charges or burdens. This suggestion has not been accepted by the Senate. (Statement by Chair of Committees, Indirect Tax Legislation Amendment Bill 2000, SD, 26/6/2000, p. 15556; see also below under Procedure Committee's proposals.)

In the course of consideration of cases of disagreement, various papers were tabled in the Senate. In papers prepared by the Clerk of the Senate, it was suggested that an amendment to a bill relating to a standing or indefinite appropriation should not be regarded as increasing a proposed charge or burden unless the amendment would clearly, necessarily and directly cause an increase in expenditure under the appropriation. The contrary view appears to be that amendments have to be considered on a case-by-case basis without the application of any such general principle. (The various papers are collected in a volume entitled *Constitution, Section 53: Financial Legislation and the Houses of the Commonwealth Parliament*, Papers on Parliament No. 19, Department of the Senate, March 1993. These papers refer only to the question of the effect of the provision on appropriation bills; for the effect on taxation bills, see below. See also below under Procedure Committee's proposals.)

In relation to an appropriation bill which appropriates a definite sum and which is not for the ordinary annual services of the government, although the Senate may not amend the bill to increase the amount of the appropriation, it is clear that the Senate can alter such a bill to change the allocation of proposed expenditure and the purposes for which money is to be appropriated, provided that the total proposed expenditure of the bill is not increased (Appropriation (Works and Buildings) Bill 1910-11, 15/9/1910, J.98; see also J. Quick and R.R. Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, p. 671; cf ruling of President Gould, 3/10/1907, J.134, in relation to an amendment widening the scope of a bounty but subject to a limited total appropriation: this ruling was clearly in error). Thus the Higher Education Legislation Amendment (2005 Budget Measures) Bill 2005 was amended to reallocate appropriations within the same total (8/11/2005, J.1363; SD, 9/12/2005, p. 45). In the case of the States Grants (Primary and Secondary Education Assistance) Bill 2000, although the total effect of the Senate's amendments was probably to reallocate the funds to be appropriated, the effect of amendments which would have reduced grants for some private schools was not sufficiently clear to conclude that the reductions would have funded amendments to increase grants in respect of children with disabilities. The latter were therefore moved in the form of requests. (9/11/2000, J.3549-50; 10/11/2000, J.3555-68)

In its judgment in 1995 in the proceedings relating to the *Native Title Act 1993* (*Western Australia v Commonwealth* 1995 183 CLR 373), the High Court dealt with a submission that the Native Title Act was invalid because the amendments made to the Native Title Bill in the Senate were contrary to section 53 of the Constitution. The Court rejected the submission. In finding that the provisions of section 53 are not justiciable, the Court observed: "Section 53 is a *procedural provision* governing the intra-mural activities of the Parliament" (emphasis added). More significantly, the Court made the following observation: "In any event, the submission of want of conformity with s. 53 appears to be without merit. None of the Senate amendments appears to increase a 'charge or burden on the people' " (at 482). This confirmed the treatment of the amendments by both Houses at the time. They were moved in the form of amendments and not as requests because they did not directly increase expenditure under any appropriation contained in the bill or in any act amended by the bill. One of the Senate's amendments to the bill, however, established the Parliamentary Joint Committee on Native Title. This caused increased expenditure from a standing appropriation contained in the *Remuneration Tribunal Act 1973*, as modified by the *Remuneration and Allowances Act 1990*, in respect of remuneration of the chair of the committee and travelling allowances for members of the committee. The increased expenditure was automatic; no action by the Remuneration Tribunal was necessary. This suggests that the High Court took a view of the third paragraph of section 53 similar to that expounded here: only a very direct effect on an appropriation is regarded as an increase in a charge or burden.

(ii) taxation bills

A foundation of the 1903 debate in the Senate and the outcome of that debate was, as has been noted, the observation that the third paragraph of section 53 must apply to appropriation bills because it cannot apply to bills imposing taxation, which cannot be amended in any way. Therefore, notwithstanding that the expression "charge or burden" is suggestive of taxation, most senators on both sides of the debate rejected any notion of any such application. Much of the speech of Senator Symon, who supported the contention that the expression referred to

appropriations, was taken up by citations of persuasive authorities that the expression in fact historically referred to appropriations (pp 2391-8).

There is obviously a profound logical difficulty in any attempted application of the paragraph to taxation legislation. In order to fall within the prescription of the paragraph, an amendment must increase a *proposed* charge or burden contained in a bill. If a bill contains a *proposed* charge or burden, it must, on any reasonable construction of that expression if it is to have any application to taxation legislation, be a bill imposing taxation, which therefore cannot be amended at all. If an amendment is to increase a *proposed* charge or burden, there must be a proposed charge or burden to increase, that is, there must be an imposition of taxation.

This logical analysis provided an equally profound difficulty for those who wished to argue that the third paragraph has no application to appropriations. They were compelled to look for something else which may be referred to by the expression "charge or burden", and which is not an imposition of taxation or an appropriation. Perhaps, it was said, it refers to fines or fees, which are excluded from the definition of appropriations by the first paragraph of section 53. This argument has subsequently had appeal to some (opinion of Bailey, 21 April 1950, presented to the Senate on 23 March 1994 with that of Garran). Senator Baker came to the conclusion that the paragraph must refer to loan bills (SD, 1903, p. 1843). Both of these arguments involve the difficulty that the kinds of bills contemplated can be introduced in the Senate, a difficulty which Garran swept aside by declaring that the paragraph refers only to bills first introduced into the House, without considering the further difficulty arising from such a view. These arguments were not convincing at the time, and have become less convincing with the passage of time.

One senator in 1903 suggested that the paragraph could apply to bills which do not impose taxation but which provide for "machinery", an amendment to which might widen the scope of the taxation. This suggestion, however, was made in the context of a somewhat strange argument that the paragraph operated to prevent both amendments and requests, and was immediately dismissed and not taken up by any other speaker. It was thought, quite reasonably, and consistently with the arguments advanced in the debate, that an amendment which would have the effect of increasing tax would have to affect the imposition of the tax and not merely the "machinery" provisions, and in any other case such an amendment would be in effect a proposed law imposing taxation under the first paragraph of section 53 (Senators Millen and Dobson, pp 2403-8; Senator McGregor, p. 1845).

Thus the conclusion drawn in the 1903 debate is that the paragraph applies to appropriation bills otherwise amendable by the Senate and could have no application to taxation bills.

At first sight it may be thought that there is one obvious exception to this rule. A bill which reduces or abolishes a tax may be regarded as a bill which does not impose taxation. It may appear to be contrary to the third paragraph for the Senate to amend such a bill to substitute a higher rate of tax than that proposed. This apparent exception, however, conforms with the interpretation of the third paragraph here expounded. While the Senate could introduce its own bill to abolish a tax, when the question is posed: could the Senate introduce its own bill to raise the level of a tax?, the answer is clear: it could not, because such a bill would in that context clearly be a bill imposing taxation. The Senate may not do by way of amendment that which it may not do by initiating its own bill. Therefore an amendment may not be moved in the Senate to

raise the level of a tax. This is not an application of the third paragraph of section 53 but an application of the first paragraph: such an amendment to such a bill would indeed be a proposed law for imposing taxation.

On occasions the Senate has made requests for the insertion of appropriation provisions in bills originating in the House (4/10/1984, J.1153; 18/10/1995, J.3958-9). On these precedents, it could be argued that it would be open to the Senate to request the insertion in a bill originating in the House of a provision having the effect of imposing taxation. The better view, however, is that such amendments may not be moved in the Senate at all, in that, by turning a bill into a bill imposing taxation, they are contrary to the initiation provision of the first paragraph of section 53 of the Constitution (statement by President Calvert, SD, 16/9/2003, p. 15275).

An argument has been mounted from time to time that in the third paragraph the word "charge" refers to taxation while the word "burden" refers to appropriations, an argument which may appeal on linguistic ground alone, but there is no historical basis for such a contention. It was well said in the 1903 debate that "charge or burden" is a "drag-net" phrase (Senator Higgs, p. 1829), and the historical analysis and argument then presented sufficiently establish that "charge" historically referred to appropriations and that both words refer to appropriations.

Prior to the Taxation Laws Amendment Bill (No. 4) 1993, there were no precedents of the Senate making requests for amendments to bills which did not impose taxation for the reason only that the amendments would increase liability to pay a tax imposed under another bill or act. The Senate declared in relation to that bill that its action in making requests did not commit it to a view as to the application of the third paragraph of section 53 to that bill or in similar cases.

In debate on the Taxation Laws Amendment Bill (No. 4) 1993 on 22, 23 and 24 March 1994, it was pointed out that the bill was classified as a bill not imposing taxation, but government amendments which were moved to the bill were framed in the form of requests apparently because it was thought that the amendments would increase the taxation liability of taxpayers. It was suggested that this highlighted again the difficulties arising from the government's classification of taxation legislation, and the claim that a bill can increase taxation without being a bill imposing taxation within the meaning of section 53 of the Constitution, and that Senate amendments can increase taxation without imposing taxation and should then take the form of requests. This view was the basis of the dispute concerning the taxation legislation arising from the 1993 budget, which resulted in the government withdrawing and reframing its taxation bills (see above).

In this case the Senate agreed to the requests for amendments but passed a declaratory resolution, similar to resolutions used for the 1993 taxation legislation (see above), declaring that in agreeing to the requests the Senate did not necessarily accept that requests were appropriate and had not arrived at any concluded view as to the application of sections 53 and 55 of the Constitution to the bill. See also the statements by the Chair of Committees in relation to the Taxation Laws Amendment Bill (No. 4) 1994, SD, 8/12/1994, pp 4267-8; and the Tax Law Improvement Bill 1997, SD, 26/6/1997, p. 5317.

The problems with the interpretation advanced by the government's advisers were also well illustrated by a bill introduced by the government in the Senate and passed on 4 May 1994. The

Customs Tariff Amendment Bill 1994 increased rates of customs duties, but was classified as a bill which did not impose taxation and was introduced in the Senate. According to the view of the government's advisers, the Senate could have amended the bill to increase further the rates of duty. Thus the House of Representatives would not only receive from the Senate a bill which increased taxation but which had been amended by the Senate to increase the taxation beyond the level proposed by the government. This would completely undermine the main purpose of section 53, which is to give the House of Representatives the exclusive right to introduce taxation imposition and appropriation measures.

The Chair of Committees has directed that government requests to bills dealing with taxation be moved in the form of amendments where the amendments have been proposed as requests apparently because of a view on the part of government advisers that they might result in higher taxation by comparison with the bill, as distinct from the status quo in the absence of the bill. The chair has pointed out that the Senate has not accepted such a strained interpretation of the charge or burden provision (SD, 22/11/1995, p. 3722; 1/12/1995, pp 4570-1; 20/11/1996, p. 5711; 10/2/1997, p. 277; SD, 25/5/1998, p. 3022; SD, 10/5/2000, p. 14265; SD, 7/12/2000, p. 21146).

In relation to amendments which might increase tax payable, the constitutional provision refers to an amendment which would increase any proposed charge or burden, and the view taken in the Senate since 1903 is that a bill dealing with taxation does not contain a proposed charge or burden unless it is a bill imposing taxation. Amendments of this kind are therefore directed by the chair to be moved as amendments (New Business Tax System (Thin Capitalisation) Bill 2001, SD, 27/9/2001, p. 28123). The claim that any amendment which might be regarded as in any way disadvantageous to taxpayers should be a request was also not accepted (statement by Chair of Committees, SD, 27/6/1996, pp 2367-8).

On the other hand, the government drafters have taken the view that amendments which *reduce* the taxation payable should be requests on the basis that appropriations may increase to compensate for the lost revenue! In one case a Governor-General's message was prepared (but not used) to recommend the appropriation supposedly arising from the amendments (A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999: statements by Chair of Committees, SD, 9/12/1999, pp 11654, 11691). Where it has been indicated that an amendment will give rise to tax refunds payable out of a standing appropriation, the Senate has accepted that the amendments should be requests (statement by Chair of Committees, New Business Tax System (Miscellaneous) Bill 1999, SD, 8/6/2000, p. 14923, 26/6/2000, p. 15633; this case gave rise to a resolution of the Senate requiring explanations of government amendments framed as requests: 26/6/2000, J.2899; Indirect Tax Legislation Amendment Bill 2000, SD, 26/6/2000, p. 15556).

On occasions government amendments have been initially presented as requests despite the explanatory memoranda indicating that they would have no financial impact (Taxation Laws Amendment Bill (No. 1) 1997, SD, 27/6/1997, p. 5456; Superannuation Contributions Tax Bills, SD, 24/11/1997, p. 9289; Ballast Water Research and Development Funding Levy Collection Bill, SD, 26/3/1998, p. 1392; Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997, SD, 23/3/1998, p. 1087. For other cases involving tax bills see New Tax System Bills, SD, 30/4/1999, p. 4657; 24/6/1999, p. 6252; 25/6/1999, p. 6465; Telecommunications Bills, SD, 27/5/1999, p. 5549).

Procedure Committee's proposals

The Procedure Committee, in its first report of 1996 (PP 194/1996), recommended a scheme for the interpretation and application of section 53 of the Constitution, based on the foregoing analysis. Essentially, the scheme would require bills which appropriate money, either directly or indirectly, to contain an appropriation clause and to be first introduced into the House of Representatives, and bills which increase taxation to be treated as bills imposing taxation, and would provide for certifications by the government as to whether particular amendments moved in the Senate would increase expenditure from an indefinite appropriation, with statements of reasons for such certification. This proposal has not yet been adopted by the Senate.

Decision as to amendments or requests

The Chair of Committees may decide in the first instance whether an amendment should take the form of a request (ruling of President Baker, SD, 3/10/1906, pp 5966-8), but ultimately it is for the Senate to decide whether to proceed by way of amendment or request.

In June 2000 the Senate adopted a resolution requiring all amendments circulated in the Senate chamber in the form of requests to be accompanied by a statement of reasons for the amendments being framed as requests together with a statement by the Clerk on whether the amendments would be regarded as requests under the precedents of the Senate (26/6/2000, J.2899). This resolution followed a series of cases of government drafters presenting amendments as requests inappropriately and failing to respond to requests for explanations for so doing.

For the assistance of senators, the Senate Department classifies and marks bills as follows:

A — contains a provision appropriating money
AA — amends an act which contains a standing appropriation of money*
T — affects taxation but does not appear to impose a new tax or to increase an existing tax*
IT — appears to impose a new tax or to increase an existing tax*
N — does not attract any of these classifications*

* if more than one act is amended by the bill, the amendments to the acts are classified in accordance with these marks.

For cases of bills stated by government not to be bills imposing taxation, but treated by the Senate as bills imposing taxation, see above, under When requests are required: (a) bills imposing taxation.

Until late 1994 it was the practice of the Office of Parliamentary Counsel (the government drafters) to place marks on the bottom right hand corner of the first page of bills to indicate a view of their category. The marks were as follows:

MM — indicating a bill requiring a message from the Governor-General recommending an appropriation of loan moneys

MR — indicating a bill requiring a message from the Governor-General recommending an appropriation of revenue
MRM — indicating a bill requiring a message from the Governor-General recommending an appropriation of revenue and loan moneys
T — indicating a bill dealing with taxation, but not imposing tax
T* — indicating a bill imposing taxation
O — none of the above.

Where a bill required a message from the Governor-General recommending an appropriation and was also a bill with respect to taxation, the mark placed on the first page was a mark composed of the marks relevant to each aspect of the bill.

These classifications were not necessarily accepted by the Senate. Bills marked T* were not always regarded as imposing taxation, as often they merely amended statutes which imposed taxation without affecting the tax. Bills which clearly proposed fees for services were often marked T* (Overseas Students Charge Bill 1985, 29/11/1985, J.661).

During the controversy over the 1993 taxation bills (see above), it was pointed out that the drafters' classification of taxation bills often did not conform with the views then expounded by the Attorney-General's Department. In late 1994 the Office of Parliamentary Counsel abandoned the practice of placing marks on bills.

Cases of government amendments wrongly circulated as requests have been considered above in relation to the various categories of bills. Usually this arises because of inconsistent interpretations by government advisers of the constitutional provisions. Occasionally, however, even after the resolution of the Senate of 26 June 2000, government amendments which should be requests are mistakenly circulated as amendments (Taxation Laws Amendment (Research and Development) Bill 2000, SD, 27/9/2001, p. 28271).

Retrospectivity of tax legislation

The *Customs Act 1901* (ss 226 and 273EA) and the *Excise Act 1901* (ss 114 and 160B) contain provisions which allow the collection of customs duties and excise duties from the time of the announcement of proposals by the government, within a period of 12 months before the passage of legislation to validate the duties. The purpose of these provisions is to ensure that windfall profits may not be made between the time of announcement of duties and the enactment of legislation to levy the duties.

The Senate has not declined to pass a bill validating increases in duties, and there has long been speculation about the remedial action which might be taken in such a case. In June 2000 the Senate passed a resolution expressing opposition to rates of excise contained in an excise tariff proposal tabled in the House of Representatives (29/6/2000, J.2980). A compromise by the government avoided rejection by the Senate of the measure.

On 12 August 2003 the Senate deferred consideration of two customs and excise tariff bills to give effect to an ethanol subsidy scheme until the government produced documents required by various Senate orders relating to the scheme. The documents were not initially produced and the bills were not passed until documents were subsequently tabled. (12/8/2003, J.2089-90; 1/4/2004, J.3324-5)

On 17 June 2008 the Senate passed a resolution declaring its opposition to excise increases on certain alcoholic beverages in the absence of a more comprehensive plan to deal with alcohol abuse, foreshadowing a possible rejection of excise increases already being collected (17/6/2008, J.498). **(See Supplement)**

An amendment made by the Senate to the Taxation Laws Amendment (Budget Measures) Bill 1995 required public notification of any intention of the government to introduce changes to the sales tax law then in effect (29/6/1995, J.3591-3).

In relation to other taxes, the Senate in 1988 passed a declaratory resolution, as part of an amendment to the motion for the second reading of a bill, to the effect that if more that six months elapses between a government announcement of a taxation proposal and the introduction or publication of a bill, the Senate will amend the bill to reduce the period of retrospectivity to the time since the introduction or publication of the bill (8/11/1988, J.1104; precedents for removal of retrospective provisions: 22/5/1990, J.121; 31/5/1990, J.195).

The Scrutiny of Bills Committee draws the attention of the Senate to retrospective legislation, particularly tax legislation, and has been critical of the practice of backdating tax legislation to the date of a ministerial announcement (see Report on the Operations of the Committee 1990-1993, October 1993, PP 208/1993, pp 16-20).

Procedure on financial legislation

Except as described in this section, financial bills are proceeded with by the Senate in the same way as other bills.

The motion for the first reading of bills which the Senate may not amend, unlike the equivalent stage of amendable bills, is debatable (SO 112(2)). This variation in respect of non-amendable bills is necessary because, in compliance with the provision of section 53 of the Constitution that a request for an amendment may be made at any stage, requests may be moved on the motion for the first reading of such a bill (see below).

In debate on the motion for the first reading, matters not relevant to the subject matter of the bill may also be discussed (SO 112(2)). The purpose of this provision is to provide the Senate with a further opportunity to debate matters of general interest, and, on each piece of financial legislation, to discuss the general financial policy of the government.

In proceedings on bills which the Senate may not amend, requests for amendments may be made at any of the following stages of a bill:

(a) On the motion for the first reading of the bill.

(b) In committee after the second reading has been agreed to.

(c) On consideration of any message from the House of Representatives referring to the bill.

(d) On the third reading of the bill (SO 140(1)).

This standing order puts into effect the provision of section 53 of the Constitution that the Senate may make a request for an amendment at any stage of the consideration of a bill.

The motion for the second reading of a bill, however, is not included in the list of stages at which requests may be made. This provision was adopted on the basis that the second reading debate should be confined to the principles of a bill and the question of whether it should be passed subject to any subsequent requests. The Senate is not excluded, however, from making requests on the second reading, and may do so if this is appropriate (statement by President Gould, SD, 9/9/1909, p. 3225. For an early precedent of a request at the second reading, see Supply Bill (No. 1) 1901, 14/6/1901, J.35-6). Requests to be moved to the second reading of the Customs Tariff Amendment Bill (No. 2) 2001 and the Excise Tariff Amendment Bill (No. 1) 2001 were circulated in April 2001, but were not moved when the government agreed to amend the bills by way of requests moved in committee of the whole (the requests at second reading would have sought the division of the bills).

Under the expedited method for the introduction of bills, the motion for the first reading is dealt with together with other procedural motions and is now treated purely as a formal step. The second reading has therefore replaced the first reading as the first stage at which a request may effectively be moved.

For a precedent of a request moved on the motion for the first reading, see Customs Tariff Bill 1933, 31/5/1933, J.220. The request, motion for which was negatived, sought the return of the bill to the House of Representatives for the purpose of its amendment along certain lines which were indicated in the motion in a general way. For further precedents for requests moved on the motion for the first reading, see Appropriation Bill 1954-55, 28/9/1954, J.39; Appropriation Bill 1956-57, 16/10/1956, J.171. For a further precedent of a request in general terms, see Social Security (Home Child Care and Partner Allowances) Legislation Amendment Bill 1994, 24/3/1994, J.1504-6, 1523-6.

In practice, requests for amendments of non-amendable bills are now usually made during the committee of the whole stage.

If a request for an amendment is made at any stage, the bill is then returned to the House of Representatives with the request for amendment, and the bill is not further proceeded with by the Senate until the request has been dealt with (SO 140(4)). When requests for amendments are agreed to in committee of the whole, the report of the committee is adopted by the Senate, the bill is returned to the House of Representatives with the requests, and the third reading of the bill is not moved until the requests have been dealt with (SO 129(1)).

Bills which the Senate may amend but which are subject to requests for amendments are dealt with in the same way. If the Senate makes both requests and amendments in relation to a bill, the bill is returned after the committee stage to the House of Representatives with the requests, and when the requests are dealt with the bill is again returned with a message asking for concurrence of the House with the amendments (SO 129). The message forwarding the requests, however, also sets out the amendments which the Senate has made to the bill. The rationale of this

procedure is that the House should know of all the amendments required by the Senate before it deals with the Senate's requests. The House cannot actually deal with the Senate's amendments, however, until the requests have been disposed of and the Senate has passed the bill.

When the House makes amendments requested by the Senate and makes further amendments to the bill, the bill is not read a third time until the Senate has agreed to the House amendments (23/8/1999, J.1512, 1533; 18/10/1999, J.1922).

The Senate has dealt with requests suggested by the House of Representatives in substitution for Senate requests: 15/4/1986, J.898-9; 16/4/1986, J.904-12; 17/4/1986, J.917-8.

It is open to the Senate to request an amendment to a bill which is otherwise amendable as an alternative to amendments to the bill to which the House of Representatives has disagreed (see Chapter 12, Legislation, under Disagreement of House with Senate amendments). For example, in respect of an appropriation bill not for the ordinary annual services, the Senate may make amendments to the bill, and when the House of Representatives disagrees with the amendments the Senate may request an amendment to increase the amount of the appropriation as an alternative to the original Senate amendments disagreed to by the House. In that circumstance the Senate's non-insistence on its amendments is conditional upon the House making the requested amendment; it is not open to the House to decline to make the requested amendment and forward the bill for assent on the basis that the Senate had not insisted on its amendments. When the House has dealt with the Senate's requests the bill is returned for the Senate's final agreement (27/6/1996, J.431-3; 28/6/1996, J.442).

If the Senate amends a bill and the House of Representatives returns the bill with a suggestion that any amendments should have been made in the form of requests, the Senate, if it agrees with this suggestion, may then return the bill with requests, and after such requests have been dealt with any Senate amendments not resolved may be dealt with in accordance with procedures for amendments (SO 130). (For precedents of amendments changed to requests, see Sugar Bounty Bill 1903, 15, 22, 23, 24/7/1903; J.67, 80, 83, 87; Local Government (Financial Assistance) Amendment Bill 1992, 25/6/1992, J.2621, 2632, 2641.) In this circumstance also the Senate should make its non-insistence on its amendments conditional upon the requested amendments being made. In 1997 the government in the House of Representatives adopted the device of rejecting requests which its advisers claimed should have been amendments, but making identical amendments to the bill and then asking the Senate to agree to the amendments. This appears to have been resorted to as a means of saving time at the end of a period of sittings (Social Security and Veterans' Affairs Legislation Amendment (Family and Other Measures) Bill 1997; see statement by Chair of Committees, SD, 2/12/1997, pp 10130-31.)

In committee of the whole on a bill which the Senate may not amend, the following procedures are followed:

(a) The Chair calls on each clause or item, and puts the question — That the clause or item be now passed without requests.

(b) If motions for requests are moved and passed, the Chair puts a further question —That the clause or item be now passed, subject to the requests being complied with.

(c) If either of those questions is negatived, it is again proposed by the Chair, and consideration of the clause or item may continue until either question is agreed to. (SO 140(3))

The reason for the questions in relation to clauses or items being put in this form, rather than the question for an amendable bill, that the clause stand as printed, is that the Senate cannot amend the bill by negativing a clause as it can with an amendable bill.

If the committee, by majority vote, continues to negative the question that the clause or item be now passed without requests, or be now passed subject to requests being complied with, this means that the committee wishes to continue to consider the clause or item in question.

In 1993, in relation to the Customs Tariff (Deficit Reduction) Bill 1993 and the Excise Tariff (Deficit Reduction) Bill 1993, the question arose of the effect of the negativing of either of those questions by an equally divided vote, which would raise the possibility of the committee being unable to proceed to a subsequent clause of a bill. Although a formal ruling was not given on this question by the chair, it was suggested in an advice provided to the President and to senators by the Clerk of the Senate that, in this situation, the Chair of Committees should indicate to the committee that if there are no further requests to be moved the clause is passed without requests and the committee proceeds to the next clause.(For text of advice, see SD, 21/10/1993, p. 2448.) The rationale of this ruling would be that making a request is the only action the committee can take on the clause of a non-amendable bill, although, of course, at the third reading stage the Senate can reject the whole bill.

At the request of any senator a clause or item under consideration is divided (SO 140(3)(d)).

Consideration of a clause or item may be postponed, as with an amendable bill. (For postponement of items until documents tabled, see 28/5/1992, J.2349-50; for deferral of bills until information provided, see 20/5/1975, J.655-7; 12/8/2003, J.2089-90; 1/4/2004, J.3324-5; separate consideration in committee of the whole of answers to questions raised during committee of the whole debate: 28/5/1990, J.151.)

Any senator may move a request for an amendment. In that respect, a senator has a greater power in relation to financial legislation than a member of the House of Representatives, other than a minister. Under the procedures of that House, a private member cannot move an amendment involving the imposition of taxation or an increase in an appropriation in a bill (the latter kind of amendment requiring a message from the Governor-General).

A proposed request may be amended, just as a proposed amendment may be amended.

As with amendments made by the Senate, it is not normal for reasons for requests to be sent to the House of Representatives, although it would be open to the Senate to do so if it chose (ruling of President Baker, SD, 16/10/1903, p. 6243).

If the House of Representatives returns a bill with the Senate's requested amendments made, the bill is proceeded with by the Senate. If the requests were made in committee of the whole, as is

normal, a motion is then moved that the bill be read a third time. Further requests may be made at that stage, if necessary by a recommittal of the bill (28/6/1996, J.443).

If the House of Representatives returns a bill to which the Senate has requested amendments with the requested amendments not made or made with modifications, the bill is considered in committee of the whole, and any of the following motions may be moved:

(a) That the request be pressed.

(b) That the request be not pressed.

(c) That the modifications be agreed to.

(d) That the modifications be not agreed to.

(e) That another modification of the original request be made.

(f) That the request be not pressed, or agreed to as modified, subject to a request relating to another clause or item, which the committee orders to be reconsidered, being complied with. (SO 141(2)).

These procedures provide flexibility in any situation in which the House does not completely comply with the requests of the Senate. Any of the motions may be amended to alter the proposed course of action (11/6/1970, J.181; 21/12/1988, J.1366; 21/6/1991, J.1284; 24/3/1994, J.1504; for the substitution of amendments for requests, see the Health Legislation Amendment Bill (No. 2) 1999, 30/3/1999, J.664-5; Dairy Produce Legislation Amendment (Supplementary Assistance) Bill 2001, 28/6/2001, J.4512-4). The primary question to be determined is whether or not the Senate should insist on its requests as originally made.

There is no rule, as there is in relation to further amendments moved after disagreement by the House of Representatives with the Senate's initial action, that further requests must be relevant to the matters in issue: section 53 of the Constitution allows new requests to be made at any stage, and this is reflected in standing order 140(1), which provides that a request may be made on consideration of any message from the House (see Youth Allowance Consolidation Bill 1999, 22/6/2000, J.2859-71).

If the motion that a request be not pressed is negatived by a majority, the committee has resolved to press the request accordingly (ruling of President Young, SD, 20/10/1981, p. 1412). Similarly, if a motion that a request be pressed is negatived by a majority, the committee has resolved not to press the request.

In 1993, in relation to the Customs Tariff (Deficit Reduction) Bill 1993 and the Excise Tariff (Deficit Reduction) Bill 1993, the question arose of the effect of the negativing of either of the first two questions by an equally divided vote. It was ruled that, in that circumstance, the request is disposed of and the bill proceeds without the request. The rationale of this ruling is that a request requires the support of a majority to be made in the first instance, and an equally divided vote on either of the questions indicates that there is no longer a majority in favour of proceeding

with the request (ruling of President Sibraa, 21/10/1993, J.690-2; see also Procedure Committee, Second Report of 1994, 10/11/1994, PP 223/1994, pp 4-28; statements by Deputy President, 10/2/1997, J.1400-1; 24/6/1997, J.2192-3). If a request is disposed of in this way, the third reading of the bill could be negatived by an equally divided vote; in other words, a majority is required to pass the bill, and senators who unsuccessfully voted to insist on a request in that circumstance could vote to reject the bill as a consequence of the rejection of the Senate's request. **(See Supplement)**

The application of the principle underlying this ruling may be complicated if the House of Representatives makes amendments to a bill in substitution for requested amendments not agreed to by the House. In that circumstance, normally a motion is moved that the Senate does not press its request, but agrees to the amendment made by the House of Representatives in place thereof. If this motion were to be negatived on an equally divided vote, this would mean that the Senate would not press its request but would also disagree with the amendment made by the House of Representatives in substitution; in other words the bill would go forward in its original form (it is clear that a motion to agree to a substitute amendment made by the House of Representatives must be carried by a majority). This could well be an unintended outcome.

The solution to this problem is that a senator could ask for the question to be divided under standing orders 84(3) and 144(2) and (7); such a request is always granted, unless the question is incapable of division. The question would then be put that the committee not press its request. If that question is negatived by a majority, the request is pressed and the second part of the question is redundant. If the question is negatived on an equally divided vote and the request is thereby lost, senators can then consider their vote on the question that the substitute amendment made by the House of Representatives be agreed to. Senators who unsuccessfully voted to press the request could then vote for the amendment suggested by the House of Representatives as a second-best choice. If that second question is also negatived the Senate would have rejected the amendment proposed by the House of Representatives in substitution for its own request. Senators would then have the option of voting against the third reading of the bill.

If a request is not pressed because of an equally divided vote, a similar vote could also prevent the final passage of the bill by negativing either of the questions for the resolution of the committee to be reported or the report of the committee to be adopted. The bill would then remain in the Senate and would not pass.

There is also the potential complication of substitute amendments or requests being proposed in the Senate on the return of the bills, which is permitted by standing order 141. That procedure, however, does not raise any similar difficulties of interpretation. Any such amendments or requests would require a majority to be carried, subject to what is said in Chapter 12, under Disagreement of House with Senate amendments, in relation to amendments for the omission of clauses or items.

In unusual proceedings on the Wool Tax (Nos 1-5) Amendment Bills 1991, the Senate at first resolved to further press certain requests, but subsequently the message of the House of Representatives was reconsidered in committee of the whole, by leave, this resolution was reversed and an amendment made to each bill by the House of Representatives in substitution for the requests was agreed to, after the government had given certain undertakings in relation to the

bills. This action was possible only because a message informing the House of Representatives of the Senate's resolution to press its requests had not been sent before the matter was further considered (21/6/1991, J.1284).

Although it is open to the Senate to negative the third reading of a bill in which the House of Representatives has made amendments at the request of the Senate, there is at least an implied understanding that, if the Senate suggests amendments and the House of Representatives makes the amendments, the bill as amended will be passed by the Senate (see ruling of President Baker, SD, 11/10/1906, p. 6449).

Pressing of requests

In spite of the procedures of the Senate expressly providing for the pressing of requests, and the fact that the House of Representatives has dealt with and acceded to pressed requests, the right of the Senate to press requests has been questioned. Governments in the House of Representatives have not expressly conceded the Senate's right to press requests, and when dealing with pressed requests have usually passed a resolution to the effect that the House refrains from determining its constitutional rights in relation to the question.

The essence of the argument that the Senate may not press a request is that there must be some difference between an amendment and a request, and that is the difference. This argument disappears if it is concluded, as has been suggested in this chapter, that the difference between an amendment and a request is procedural only. The Constitution prescribes a number of matters of procedure, and to say that the difference is one of procedure is not to deny its importance. The distinction between an amendment and a request, according to this view, is closely related to another matter of procedure prescribed by section 53 of the Constitution, the exclusive right of the House of Representatives to initiate bills for appropriating money or imposing taxation. The provision relating to requests preserves that initiative without affecting the substantive powers of the Senate.

The following considerations support this thesis, and the right of the Senate to press its requests for amendments.

(1) There is nothing to prevent the Senate pressing its requests. If the constitution-makers had intended that the Senate be prohibited from pressing a request they would have provided some mechanism for enforcing the prohibition. To the contrary, section 53 of the Constitution provides that the two Houses have equal powers except as provided in the section.

(2) Not only was such a prohibition on the Senate not adopted, it was explicitly rejected. At the Constitutional Convention of 1898 an amendment to insert the word "once" in the relevant paragraph of section 53, to prevent the Senate repeating a request, was defeated. (Debates of the Convention, pp 1996-9.)

(3) Delegates to the Constitutional Conventions, including Edmund Barton, indicated that the difference between an amendment and a request would be one of procedure only, the rationale of the difference being to preserve the right of the House of Representatives

actually to alter the text of a bill by amendments involving additional appropriations or taxation. (Adelaide Convention, 1897, Debates p. 557.)

(4) The relevant paragraph of section 53 provides that the Senate may "at any stage" return a bill to the House of Representatives with requests. Even if "at any stage" is interpreted as meaning at any stage in the Senate's initial consideration of the bill, as has been suggested as an argument against the pressing of requests, the Senate could press a request many times by reiterating it at each stage of the consideration of a bill, and could provide in its own procedures that non-amendable bills pass through 100 stages.

(5) Even if the Senate could not press the same request, it could easily circumvent such a restriction, for example, by slightly modifying a request on each occasion on which it was repeated. It cannot be supposed that the constitution-makers intended to impose a prohibition which could so easily be circumvented.

(6) The Senate has successfully pressed requests on many occasions since 1901.

A practical argument in support of the right to press requests is that it provides a means of allowing further consideration of a matter in dispute between the Houses before the matter reaches the stage of final disagreement, for example, by the rejection by the Senate of the bill, which can then be settled only by the provisions of section 57 of the Constitution.

On the basis of these considerations the right of the Senate to press requests has been supported by many eminent and learned authorities, including Senator Josiah Symon, Senator, later Mr Justice, R.E. O'Connor, and Mr W.M. Hughes, MP. (Senator Josiah Symon: SD, 9/9/1902, pp 15813-28; Senator O'Connor: *ibid*., p. 15829; W.M. Hughes: HRD, 3/9/1902, pp 15705-6. See also remarks by Senator Gareth Evans, SD, 20/10/1981, pp 1395-8.)

As has been expounded in this chapter, the provisions of section 53, because they refer to the internal proceedings of the two Houses on proposed laws, as distinct from enactments of the Parliament, are not justiciable, and depend for observation and compliance upon agreement being reached between the two Houses. Thus if the Senate were to pass a bill imposing taxation or an amendment directly increasing expenditure, the only remedy would be for the House of Representatives to decline to consider the bill or the amendment. Similarly, the Senate may decline to pass a bill until its amendments or requests are agreed to by the House. To say that the provisions of section 53 are not justiciable and rely for enforcement upon the dealings of each House with the other is another way of saying that those provisions are procedural only. A real limitation on legislative power requires a means of legal enforcement. In that respect, section 53 is to be contrasted with section 55, as has been indicated earlier in this chapter.

Section 53 being thus a procedural section, prescribing procedural rules for the Houses to observe, it is for the Houses, in their transactions with each other, to interpret those rules by application. It is suggested that, in their dealings with Senate requests over the years, the Houses have supplied the required interpretation so far as the pressing of requests is concerned, and that interpretation is that requests may be pressed.

A list of occasions on which the Senate has made requests, showing the outcome of the requests, is contained in appendix 6.

Requests and section 57

Section 57 of the Constitution, which authorises the simultaneous dissolution of both Houses of the Parliament by the Governor-General in prescribed circumstances of disagreement between the Houses (see Chapter 21), refers to the Senate rejecting, failing to pass or passing a bill with amendments to which the House of Representatives will not agree. It is a significant question, which has not been considered, whether the Senate in making or pressing requests for amendments to a bill could be said to have failed to pass it within the meaning of the section. In that circumstance the Senate has not passed the bill with amendments. Certainly if the Senate makes or presses requests it cannot be said to have failed to pass the bill until the House of Representatives has definitely rejected the requests and the Senate has then had an opportunity to reconsider them. In that respect the government appears to have been in error in declining to consider the Senate's pressed requests in relation to the Sales Tax Amendment Bills (Nos 1A to 9A) 1981 (see SD, 22/10/1981, pp 1547-8, particularly the statement by Senator Harradine that the action taken by the government in the House of Representatives "was not only unconstitutional but also ... ensured that the time clock for action to be taken under the dissolution provisions of section 57 of the Constitution could not run").

Scrutiny of expenditure proposals by standing committees

The Senate has a system which allows intensive scrutiny of government expenditure proposals, or estimates, before the appropriation bills reflecting those proposals are received by the Senate.

The basis of this system is the scrutiny of estimates, from 1970 to 1994 by estimates committees and from 1994 by the legislative and general purpose standing committees. Schedules of the proposed expenditure contained in the main annual and additional appropriation bills are tabled in the Senate when the bills are introduced into the House of Representatives, and are referred to the committees for examination.

These committees provide the principal opportunity for senators to scrutinise, not only the expenditure proposals of the government, but the operations and activities of government departments and agencies. In effect, they have become twice-yearly general inquisitions into government operations. As such, they are regarded by senators as among the most valuable of the Senate's activities.

The committees, for each group of annual and additional appropriation bills, hold a main round of hearings at which all items of expenditure are open to examination, and in relation to the annual appropriation bills a supplementary round of hearings, after answers to questions taken on notice are received, which are confined to matters senators have notified for further questioning.

The committees report after their main hearings, and draw attention to any matters for further consideration by the Senate. They do not necessarily make any further reports after the supplementary hearings unless they have specific recommendation to make, for example, a recommendation that a matter be referred to a standing committee for further inquiry.

Strictly speaking, the committees have before them only the estimates of expenditure reflected in the annual appropriation bills, and, as has been noted, these account for less than 20 percent of government expenditure. In practice, however, the whole range of government expenditure is examined by the committees, particularly at the time of the main appropriation bills.

The introduction first of program budgeting and subsequently of output-based accrual accounting by government departments reinforced the practice. The requirements of estimates committees for more detailed explanations of expenditure proposals led to the development by departments of voluminous explanatory notes on the estimates and the tabling of those notes in the Senate. With program budgeting these notes were replaced by program performance statements, and then by output-based portfolio budget statements. These statements are tabled in the Senate and used by the committees as the basis of their scrutiny. (For a resolution of the Senate requiring further explanations of items in program performance statements, see 2/6/1992, J.2391-2.)

For directions to committees to hold further hearings on estimates, see 7/2/1995, J.2895-6, 2897; 4/11/1996, J.836; 10/4/2000, J.2582-3, 2585; 28/6/2000, J.2958; 28/11/2000, J.3594-5; 12/3/2002, J.154-6; 25/11/2003, J.2709-10; 16/6/2004, J.3473. **(See Supplement)**

It is considered that normally the appropriation bills should not be passed until the committees have concluded their hearings. The rationale for this is that the hearings may lead to senators wishing to move amendments or requests to the bills. The second reading debate on the bills may take place before the committees conclude their hearings. There is no fixed rule relating to this matter, and it has always been open to the Senate to pass the appropriation bills before the committees have concluded their deliberations. (For a postponement of the appropriation bills until the conclusion of estimates hearings, and debate on the matter, see SD, 20/6/1995, pp 1464-6.)

The Senate has on several occasions resolved, following reports of estimates committees, that there are no areas of expenditure of public funds by statutory authorities which are not open to scrutiny (9/12/1971, J.846; 23/10/1974, J.283; 18/9/1980, J.1563; 4/6/1984, J.902-3; 19/11/1986, J.1424).

The committees must hear evidence on the estimates in public session (SO 26(2)), and all documents received by the committees are published (see proceedings on report of Standing Orders Committee, 28/9/1972, J.1146, SD, p. 1331-2).

Normally only the main annual and additional appropriation bills are referred to the committees (precedent for referral of special appropriation bills: 1/12/1992, J.3169).

Further details on estimates hearings are in Chapter 16, Committees.

When proposed expenditure contained in an appropriation bill has been considered by a committee under these procedures, the bill is not considered in committee of the whole unless a senator has circulated in the Senate a proposed amendment or request for amendment to the bill. In that circumstance debate in committee is confined strictly to the purpose of the amendment

(SO 115(4); for precedents see 29/3/1995, J.3185-6; 6/4/2000, J.2567; 13/4/2000, J.2637-9; 24/6/2004, J.3697-8).

The adoption of any recommendations of the committees may be proposed by way of an amendment to the motion for the passage of any other stage of a bill (18/11/1993, J.821; 31/10/1996, J.813).

History of expenditure scrutiny

The history of these procedures is of interest. Prior to 1961, the only opportunities for the Senate to consider the estimates were the debate on the budget papers, the second reading debate and the committee of the whole stage on the appropriation bills. This system was unsatisfactory because the appropriation bills were often received late in the period of sittings and insufficient time remained for their consideration. This led to the adoption of a new procedure in 1961.

From 1961 the practice was adopted of considering the estimates (that is, the figures contained in the appropriation bills, as distinct from the bills themselves) in committee of the whole prior to the receipt of the appropriation bills. This system had the advantage of allowing more time for the consideration of the estimates earlier in the period of sittings. The unsatisfactory features of this procedure were that the consideration of the estimates engaged the whole Senate for a considerable period of time, and questions could be put only to ministers in the Senate, who mostly repeated answers provided to them by departmental advisers. These disadvantages were partly the cause of the Senate moving to the consideration of estimates in estimates committees in 1970.

In 1970, as part of the establishment of a comprehensive committee system which had been recommended by the Standing Orders Committee, estimates committees were established to examine the estimates in detail (see also Chapter 16, Committees). The estimates committees were intended to achieve the advantage of more expeditious consideration of the estimates, in that three estimates committees could meet simultaneously. An additional advantage was that questions could be put directly to departmental officers, subject to the right of ministers to answer questions themselves. The committees were also established with the intention that largely they would replace the committee of the whole proceedings. An explanatory note circulated in June 1970 with the motion to establish the committees stated:

> The reasonable expectation would be that, the Estimates having been examined by the Estimates Committees, the Senate would generally only consider any matters in respect of which further consideration had been recommended by the Committees.

The next major change in procedures was the adoption in December 1989 of a recommendation of the Select Committee on Legislation Procedures, which considered the estimates procedures in conjunction with its consideration of procedures for referring bills to committees (see also Chapter 12, Legislation, under Procedures for regular referral to committees). The select committee recommended that debate in committee of the whole on appropriation bills be confined to matters in respect of which estimates committee reports or reservations attached to the reports had made recommendations that the Senate further consider those matters.

The reason for this recommendation was that the committee of the whole stage on appropriation bills, which was intended to be largely replaced by estimates committee examination of the estimates, had in fact expanded into a full-scale reconsideration of the detail of the bills. As was pointed out by the then Deputy President, Senator David Hamer, in debate on the select committee report (SD, 4/12/1989, p. 3814), after the estimates committees were established in 1970 there was a large reduction in the time spent in committee of the whole on the appropriation bills, but that time had increased over the years until, in 1989, 33 hours were spent in committee of the whole on the bills. The recommendation of the select committee was intended to achieve the original purpose of the estimates committees of largely replacing the committee of the whole consideration of the bills, and focussing any debate in committee of the whole on matters which were raised in estimates committees and which were considered to require some further examination.

By the end of 1992, however, it was already clear that the adoption of the new procedures in December 1989 had not achieved its purpose. In 1990 nearly 20 hours were spent on the additional appropriation bills and over 37 hours on the annual appropriation bills in committee of the whole. In 1991 over 24 hours were spent in committee of the whole on the additional appropriation bills and 30 hours on the annual appropriation bills. There had not been a return to the original purpose of estimates committees of replacing committee of the whole consideration of the estimates. This was because a great many matters were recommended for further consideration by estimates committee reports or reservations attached to the reports. The 1989 procedures did not place any limitation on the number of matters which could be recommended for further consideration, and, as was pointed out by the Chair of Committees in relation to the annual estimates in 1990, many of the matters were very broad and did not relate to specific programs or items of expenditure (SD, 12 and 13/11/1990, pp 3893-7, 4036). In the 1991 reports and reservations, matters recommended for further consideration were more specific, but a great many matters were specified.

The fundamental difficulty with the various changes of procedures which had occurred over the years was that they provided more opportunities for the consideration of the estimates and the appropriation bills, and the consideration of the estimates and the bills had expanded to take up all of the available opportunities.

Originally there were only the second reading and committee of the whole stages of the appropriation bills in addition to debate on the budget papers. Thus there were three opportunities to consider the estimates, one of which was in committee. There were by 1992 four opportunities to consider the estimates, two of which allowed detailed consideration in committee:

(a) the debate on the budget papers (this debate is usually not extensive and is often not completed);

(b) consideration of the estimates in estimates committees;

(c) the second reading debate on the appropriation bills; and

(d) the committee of the whole stage of the appropriation bills.

The stages listed in (b), (c) and (d) had expanded into full-scale considerations of the estimates and the appropriation bills. The original intention of the establishment of the estimates committees, that they would largely replace the committee of the whole stage on the bills, had still not been realised. In effect, there were two opportunities to consider the estimates in committee, with each senator able to speak any number of times, when it was originally intended that there be only one such detailed consideration.

In 1992 the Procedure Committee considered ways of returning to the original purpose of estimates committees, and preventing the continuing expansion of consideration of the estimates so that it took up more and more of the time available for the consideration of legislation.

The Procedure Committee proposed that, as a substitute for the committee of the whole, supplementary hearings of estimates committees be held. (Procedure Committee, Discussion Paper, Estimates Committees and Appropriation Bills, December 1991; First Report of 1992, PP 527/1992, March 1992.)

This proposal was adopted by special orders agreed to on 6 May 1993 (J.99) and incorporated into standing order 26 in February 1997. The procedures required that, after the initial round of hearings of committees, written answers to questions and further information provided by departments were to be lodged with the committees in accordance with a deadline fixed by the committees. Senators were to lodge with the committees notice of specific matters which they wished to be further examined in the committees, and of matters arising from the written answers and the additional information which they wished to raise (these notices replaced the matters recommended for further consideration in committee of the whole in the estimates committee reports and the reservations attached to the reports under the 1989 procedures). The committees then met after the written answers and additional information had been provided, and held supplementary hearings on the matters notified by Senators for further examination. The responsible ministers were notified in advance of the particular matters to be raised at the hearings, and asked to provide the officers with responsibility for those matters. The hearings were to be held outside the Senate's sitting times, but the sittings of the Senate could be suspended to allow the hearings to take place if the Senate's program of business allowed. The committees decided the times of the hearings and how long they would last. The committees were to coordinate their supplementary meetings, just as their main meetings were coordinated.

Apart from avoiding long committee of the whole proceedings, and achieving the original purpose of the establishment of the estimates committees, these procedures had a number of advantages:

- a more satisfactory and systematic means is provided of dealing with matters arising from the initial hearings of the committees

- in particular, questions arising from written answers and additional information are put directly to officers

- answers to questions on notice and additional information are supplied more expeditiously and perhaps are more carefully composed

- officers do not need to attend on the committee of the whole stage, the progress of which is much more uncertain than that of the committees

- there is less pressure on the committees to conclude their main meetings by a deadline.

In 1994, as part of a restructuring of the committee system recommended by the Procedure Committee (see Chapter 16, Committees), the function of scrutinising estimates was transferred to the legislative and general purpose standing committees. These committees examine the estimates in the same way as the estimates committees.

In 2001, on the recommendation of the Procedure Committee, supplementary hearings were confined to the annual appropriation bills, and abolished in respect of the additional appropriation bills. The rationale of this change was that, as the budget cycle had developed, the supplementary hearings for the additional appropriation bills were occurring very near to the main round of the annual appropriation hearings, when unlimited questioning of departments and agencies is possible.

Parliamentary appropriations

The annual and additional appropriations for the Senate department and the other parliamentary departments are contained in bills which are separate from the appropriations for executive departments and agencies, and entitled Appropriation (Parliamentary Departments) Bills.

Until 1982 appropriations for the services of the two Houses of the Parliament were contained in the appropriation bills for the services of the government, and were divided between the bill not amendable by the Senate, containing appropriations for the ordinary annual services of the government, and the amendable bill, containing other appropriations. At various times during discussions in the Senate about the concept of ordinary annual services, it was pointed out that the services of the Houses were not ordinary annual services of the government nor services of the government as such, and it was therefore highly anomalous to have parliamentary appropriations contained in the two appropriation bills in this way.

This point was taken up in the report of the Senate Select Committee on Parliament's Appropriations and Staffing, which was appointed to consider issues relating to the control by the Houses of their own appropriations and staffing, and which reported in 1981 (report of the committee, PP 151/1981). One of the recommendations of the committee was that there be a separate parliamentary appropriations bill. This recommendation was adopted in 1982, and since that time a third annual appropriation bill has been introduced, the Appropriation (Parliamentary Departments) Bill. As this bill is not for the ordinary annual services of the government it is amendable by the Senate.

The select committee also examined the issue of the control by the Houses of their own appropriations, and recommended the establishment of a standing committee with the responsibility of determining the appropriations for the Department of the Senate for inclusion in the parliamentary appropriations bill. This recommendation was adopted by the Senate, and the Standing Committee on Appropriations and Staffing is now established by standing order 19.

The committee is given the task of determining the amounts for inclusion in the parliamentary appropriation bill for the Department of the Senate. The committee accordingly considers draft estimates submitted to the President by the Department of the Senate and determines the amounts which should be appropriated by the Appropriation (Parliamentary Departments) Bill for the Department.

The select committee also suggested amendment of sections 53 and 56 of the Constitution so that the parliamentary appropriation bill could be initiated in either House of the Parliament and passed without a recommendation of the Governor-General. Amendment of the Constitution being a significant and expensive step, this suggestion has not been followed, and the Appropriation (Parliamentary Departments) Bill is initiated in the House of Representatives and passed on a Governor-General's recommendation as with other appropriation bills. This constitutional situation, in effect, gives the executive government control over the contents of the bill as introduced.

Following the establishment of the Appropriations and Staffing Committee, there were some difficulties caused by governments making changes to the figures determined by the Appropriations and Staffing Committee for inclusion in the bill. It was envisaged by the 1981 select committee that the government, through its representation on the Appropriations and Staffing Committee, would submit to that committee any alterations the government considered desirable to the draft estimates. Instead, the government occasionally adopted the practice of examining the estimates as determined by the standing committee and making changes, albeit marginal changes, without further consultation with the committee. This situation was considered by Estimates Committee A in 1985, and, on the recommendation of that committee, the Senate passed a resolution setting down procedures to be followed for the determination of the appropriations for the Senate Department. The relevant parts of the resolution are as follows:

> (b) the estimates of expenditure for the Senate to be included in the Appropriation (Parliamentary Departments) Bill shall continue to be those determined by the Standing Committee on Appropriations and Staffing;
>
> (c) if before the introduction of the Bill the Minister for Finance should, for any reason, wish to vary the details of the estimates determined by the Committee the Minister should consult with the President of the Senate with a view to obtaining the agreement of the Committee to any variation;
>
> (d) in the event of agreement not being reached between the President and the Minister, then the Leader of the Government in the Senate, as a member of the Appropriations and Staffing Committee, be consulted;
>
> (e) the Senate acknowledges that in considering any request from the Minister for Finance the Committee and the Senate would take into consideration the relevant expenditure and staffing policies of the Government of the day; and
>
> (f) in turn the Senate expects the Government of the day to take into consideration the role and responsibilities of the Senate which are not of the Executive Government and which may at times involve conflict with the Executive Government. (*2 December 1985, J.676*)

Following the adoption of that resolution the Appropriations and Staffing Committee had occasion to complain of non-observance by the government of the procedures laid down in the

resolution, and the Senate twice reaffirmed the resolution (30/11/1988, J.1214; 29/11/1989, J.2273). In 1993 it was reported to the Senate and to Estimates Committee F that the Appropriations and Staffing Committee was pursuing with the government the question of compliance with the resolution (19th report of the Standing Committee on Appropriations and Staffing, August 1993, PP 115/1993; Estimates Committee F, Hansard, 26/8/1993, pp F2-F5; also 20th report of the committee, May 1994, PP 473/1994, 1993-94 annual report, PP 473/1994, 22nd report, May 1995, PP 490/1995, annual report 1995-96, August 1996, PP 427/1996). Agreement between the committee and the Minister for Finance on a method for calculating funding for select committees, and changes in government budgeting methods generally, have avoided disagreements in recent years. (See also Chapter 5, Officers of the Senate: Parliamentary Administration, under Senate's Appropriations and Staffing, and Chapter 16, Committees, under Appropriations and Staffing Committee.)

The system recommended by the 1981 select committee was not followed in respect of the determination of appropriations for other parliamentary departments. It was envisaged that an appropriations and staffing committee would also be established in the House of Representatives and would determine appropriations for that House, and that the two committees would meet as a joint committee to determine appropriations for the joint parliamentary departments, the departments (now one department) which provide services for both Houses. The government, however, has not permitted the establishment of such a committee in the House of Representatives, and the appropriations for the other parliamentary department are determined by the President and Speaker subject to veto by the government.

Chapter 14

COMMITTEE OF THE WHOLE PROCEEDINGS

WHEN THE SENATE wishes to consider a matter, or a set of related matters, in detail, with unlimited opportunities for senators to speak and move amendments, it resolves itself into a committee of the whole, that is, a committee of which all senators are members, and which meets in the Senate chamber.

Committee of the whole proceedings are used to consider bills, and other matters may also be considered in committee of the whole if they require or lend themselves to committee of the whole treatment. The consideration of bills in committee of the whole is dealt with in Chapter 12, Legislation, and Chapter 13, Financial Legislation. This chapter relates to committee of the whole proceedings generally and their application to matters other than bills.

Appointment of committee

Except in relation to bills, for which the Senate automatically resolves itself into committee at the appropriate stage, a committee of the whole must be appointed by motion to consider a matter (SO 143(1)). Normally this is done by a motion, moved when a document is laid before the Senate, that the document be considered in committee of the whole on a future day. The standing orders allow such a motion to be moved whenever a document is laid before the Senate (SO 169). This may be done, for example, with reports of the Procedure Committee recommending changes to Senate procedures. If such a motion is passed, the consideration of the document in committee of the whole becomes an order of the day for a future day, and when the order of the day is called on the Senate automatically goes into committee of the whole to consider the document (SO 143(2)). It is also open to a senator to move by motion on notice that a matter be considered in committee of the whole at a specified time.

Chair of Committees

The Deputy President and Chair of Committees is the chair of all committees of the whole of the Senate, and, when the Senate goes into committee, takes the committee chair, which is at the Senate table.

The location of the chair in committee at the table facilitates receipt of advice from the clerks on matters which may be complex, also facilitates communication with senators, and provides a readily visual signal that the Senate is in committee and that different rules apply to the proceedings.

If the Chair of Committees is absent during a committee of the whole, any one of the Temporary Chairs of Committees may take the chair (for the appointment of Temporary Chairs see Chapter 5, Officers of the Senate: Parliamentary Administration).

Proceedings in committee

A committee of the whole may consider only the matters referred to it by the Senate (SO 144(1)). A committee appointed to consider a bill or a particular document cannot move to a consideration of any other matter; if another matter is to be considered the Senate has to appoint another committee of the whole.

Except to the extent that the standing orders provide different rules for proceedings in committee of the whole, the same rules apply as in the Senate, and the Chair of Committees has the same authority to uphold the rules in committee (SO 144(7)). Questions in committee are decided in the same manner as in the Senate (SO 144(2)), and a committee of the whole has the same majority as the Senate.

The Chair of Committees and a committee of the whole, however, have no authority to deal with disorder. Any disorder must be reported to the Senate, with the President taking the chair (SO 144(7), 203(2); see Chapter 10, Debate, under Disorder). The President may resume the chair in cases of sudden disorder in committee (SO 146(1)).

The Chair of Committees may make rulings in committee to interpret and apply the rules of the Senate, but if any objection is taken to a ruling of the Chair the Senate resumes, and the matter is laid before the President for decision (SO 145, 198).

The most significant difference between proceedings in the Senate and in committee is that in committee senators may speak more than once and move any number of amendments to the same question (SO 144(5)). This is the essence of committee proceedings: they provide an opportunity for thorough consideration of a matter, and that consideration does not conclude until senators do not wish to speak any further or move any further amendments.

There are certain minor restrictions on proceedings in committee. A committee cannot consider any motion which is contrary to its decisions; only the Senate can reverse a decision of a committee (SO 144(3)). The motion for the previous question cannot be moved (SO 144(4); see Chapter 9, Motions and Amendments, under Previous question). If a motion for the closure of debate or that the committee report progress (the equivalent of adjourning debate, see below) is moved, neither of those motions may be moved again within 15 minutes (SO 144(6)).

For the suspension of standing orders in committee, see Chapter 8, Conduct of Proceedings, under Suspension of standing orders.

Quorum

The quorum of a committee of the whole is the same as for the Senate, that is, a quarter of the whole number of senators, 19 senators (SO 147(1); see Chapter 8, Conduct of Proceedings, under Quorum).

If a senator draws attention to the lack of a quorum in committee of the whole, the bells are rung for four minutes as in the Senate, but if a quorum is then not present, the committee reports to the Senate, the President resumes the chair and there is then a further opportunity to form a quorum in the Senate. If a quorum is then present, proceedings in the committee resume (SO 147(2), 52(2)). If the absence of a quorum is revealed by a division in a committee, no decision is reached by the division, and the lack of a quorum is similarly reported to the Senate (SO 147(2)). If proceedings in committee are interrupted by the absence of a quorum those proceedings are automatically made an order of the day for the next day of sitting and are called on accordingly (SO 147(3)).

Debate in committee

As has already been indicated, in committee of the whole senators may speak more than once to questions before the chair.

A special time limit applies to debate in committee of the whole. A senator may not speak for more than 15 minutes at a time, but when a senator has spoken for 15 minutes and no other senator rises to speak, the senator speaking may continue to speak for a further 15 minutes. If there is then no other senator who wishes to speak, the senator speaking may not continue on the same question (SO 189(3)).

This means that if only one senator wishes to speak on a question before a chair, that senator is limited to 30 minutes' speaking time. The rule also means that at least two senators, speaking in turn, are required to keep debate going on a question in committee of the whole; a senator who speaks twice without any other senator rising cannot continue on the same question (see SD, 26/8/1999, p.7805-6, Temporary Chair Hogg and Senator Brown). When a senator is interrupted by the time limit, but has obviously not finished the speech, another senator may seek the call to speak and speak briefly solely for the purpose of allowing the senator whose time has expired to continue. The senator seeking the call may merely say: "I rise only to allow the senator to continue the senator's speech", and then sit down, allowing the senator whose time has expired to seek the call again and to continue speaking with what is technically a new speaking opportunity. This procedure also facilitates full debate in committee of the whole.

If a committee reports progress (see below), which means, in effect, that the consideration of the matter before it is adjourned, every senator, including a senator who has spoken for 30 minutes continuously, has renewed speaking opportunities when the committee resumes consideration of that matter. If the sitting of a committee is suspended, a senator speaking at the time of the suspension has the right to continue when the sitting is resumed for the balance of the time available to the senator.

Report of committee

When a committee of the whole has considered and made decisions on matters referred to it, the committee reports to the Senate, that is, the President resumes the chair, the Senate resumes, and the Chair of Committees reports what the committee has done (SO 148(1)).

The report of a committee is, in effect, a recommendation to the Senate as to the action the Senate should take in relation to a matter. The Senate may endorse the report of a committee, by a resolution that the report of the committee be adopted, and decisions of the committee then become the decisions of the Senate. The Senate may disagree with the decisions of a committee, or may agree to such decisions with amendments. It may refer the matters under consideration back to the committee of the whole for further consideration, or it may avoid coming to a decision on the report of a committee by postponing consideration of it (SO 148(3)). (For the recommittal of bills see Chapter 12, Legislation, under Recommittal on report and Third reading.)

Reporting progress

The equivalent of adjourning consideration of a matter in committee of the whole is to report progress. The committee reports to the Senate that the committee has considered the matter referred to it, has made progress, and seeks leave to sit again at some future time for further consideration. The Senate then normally, by motion, gives the committee leave to sit again at a later time, and consideration of the matter in committee of the whole then becomes an order of the day for that later time.

A motion to report progress and seek leave to sit again may be moved at any time in committee by any senator, but subject to the 15 minute rule concerning the repetition of such motions. The motion to report progress is not debatable (SO 148(2), 144(6)).

Words may be added to the motion to report progress to indicate that deferral of consideration of the matter before the committee is sought for a particular purpose. For example, consideration of a bill may be deferred until a minister provides answers to questions or relevant documents. By adopting the committee's report the Senate endorses the committee's decision that the matter be deferred for the specified purpose (20/5/1975, J.655-7).

Interruption of committee

Committee of the whole proceedings may also be interrupted if the Senate has ordered that another matter is to be considered at a specified time, either by the standing orders or any other order of the Senate. At the specified time the committee reports to the Senate, and the resumption of the deliberations of the committee of the whole automatically becomes an order of the day for a future time (SO 146(2), 68).

For the limitation of debate on bills in committee, see Chapter 12, Legislation, under Limitation of debate: urgent bills.

Instructions to committees

By motion on notice, moved in the Senate, a committee of the whole may be given an instruction. Such an instruction may empower a committee already appointed to consider matters not otherwise referred to it or extend or restrict its order of reference, or may direct the committee to deal with the matters referred to it in a particular way (SO 149, 151). As explained

in Chapter 12, Legislation, under Instructions to committees of the whole, instructions to committees are of limited utility and are therefore seldom moved.

Matters of privilege

Standing orders 81 and 197 contemplate that a matter of privilege arising suddenly in relation to proceedings before the Senate may be raised and dealt with at once, rather than by the more deliberate process provided by standing order 81 (see Chapter 2, Parliamentary Privilege, under Raising of matters of privilege). A matter of privilege raised in committee, however, would have to be reported to the Senate before it could be determined.

Chapter 15

DELEGATED LEGISLATION AND DISALLOWANCE

THE POWER TO ENACT LAWS is a primary power of Parliament. Parliament, however, frequently enacts legislation containing provisions which empower the executive government, or specified bodies or office-holders, or the judiciary, to make regulations or other forms of instruments which, provided that they are properly made, have the effect of law. This form of law is referred to as "delegated legislation", "subordinate legislation" or "legislative instruments". The last is the statutorily-established term. This is law made by the executive government, by ministers and other executive office-holders, without parliamentary enactment. This situation has the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government. The principle has been largely preserved, however, by a system for the parliamentary control of executive law-making. This system, which has been built up over many years, principally by the efforts of the Senate, is founded on the ability of either House of the Parliament to disallow, that is, to veto, such laws made by executive office-holders.

Executive law-making

The Constitution does not explicitly authorise the Commonwealth Parliament to delegate power to make laws. However, the High Court's decision in *Baxter v Ah Way* 1910 8 CLR 626 has been held to support the Parliament's power to do so. In this case O'Connor J. of the High Court rationalised the power to make regulations in the following terms:

> Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied. (*Baxter v Ah Way* 1910 8 CLR 626 at 637-8)

The essential theory of delegated legislation is that while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail. As the theory was expressed in 1930 by Professor K.H. Bailey: "It is for the executive in making regulations to declare what Parliament itself would have laid down had its mind been directed to the precise circumstances." (Evidence to the Senate Select Committee on the Standing Committee System, PP S1/1929-31, p. 20.)

Other justifications for the use of delegated legislation include reducing pressure on parliamentary time, and allowing legislation to be made so as to accommodate rapidly changing or uncertain situations, or cases of emergency.

Regulations are the primary form of delegated legislation. Many Acts of Parliament contain a provision allowing the Governor-General (who exercises this power on the advice of the ministry) to make regulations "required or permitted" by the statute to be made or "necessary or convenient to be prescribed for carrying out or giving effect" to the statute. Many statutes also refer to specific matters to be prescribed by regulation. Other instruments are made by a variety of executive and administrative authorities, including ministers, heads of departments and agencies, and their delegates.

The making of instruments is governed by statutory provisions contained in the *Legislative Instruments Act 2003* (LIA). The main provisions are that legislative instruments must be registered in the Federal Register of Legislative Instruments (FRLI) and laid before each House of the Parliament within 6 sitting days, and are then subject to disallowance by either House.

Some instruments are subject to special provisions which vary from those of the LIA, for example, as to the period for tabling or disallowance. Some are subject to affirmation by both Houses. Special control provisions of this kind have occasionally been included in statutes by amendments moved in the Senate. There are also some instruments which are not subject to tabling and disallowance, either because they are not legislative in character (that is, not in the nature of laws) or because they are statutorily exempted from the tabling and disallowance process, by the LIA or another statute.

The LIA largely replicates the provisions for parliamentary control of delegated legislation formerly contained in the *Acts Interpretation Act 1901*.

Types and volume of delegated legislation

The types of legislative instruments are extremely diverse. In 1970 there were only three different kinds; by the 1990s this had increased to over 100. They include:

- regulations
- determinations
- ordinances of territories
- plans of management, for example, for fisheries
- declarations, approvals, principles and notices
- by-laws of statutory authorities
- navigation and aviation orders
- notices, such as broadcasting service notices
- standards, such as accounting standards
- declarations, such as health legislation declarations
- directives, such as airworthiness directives
- guidelines, such as aged care and child care guidelines.

The volume of instruments is considerable and increasing in the long term. The table below sets down details of the numbers in recent years:

Year	Disallowable Instruments
1985-1986	855
1986-1987	832
1987-1988	1035
1988-1989	1352
1989-1990	1258
1990-1991	1645
1991-1992	1562
1992-1993	1652
1993-1994	1803
1994-1995	2087
1995-1996	1900
1996-1997	1791
1997-1998	1888
1998-1999	1672
1999-2000	1655
2000-2001	1859
2001-2002	1546
2002-2003	1661
2003-2004	1561
2004-2005	2432
2005-2006	2449
2006-2007	2349
2007-2008	2982

Generally speaking, about half of the law of the Commonwealth by volume consists of delegated legislation rather than acts of Parliament.

Parliamentary control: historical background

As has been noted, a system has been built up, principally through the efforts of the Senate, whereby delegated legislation is subject to parliamentary control, mainly through the power of either House of the Parliament to disallow any delegated legislation. This gives the Senate basically the same power it has in relation to other proposed laws: the power of veto. It was through recognition by the Senate of the need to preserve the principle of parliamentary control of law-making that this system was established.

At an early stage in its history the Parliament recognised the need for direct parliamentary control over subordinate legislation. In enacting customs and excise legislation, for example, provision was made, in the face of ministerial resistance, for tabling of regulations and their disallowance by either House within a prescribed period. The *Acts Interpretation Act 1904* included the basic framework for handling subordinate legislation, namely notification in the

Gazette and laying before each House within 30 sitting days (reduced to 15 in 1930 and 6 in 2003). A vital component of that framework, inserted by amendment in the Senate but based on provisions in other legislation, was the capacity to move, within 15 sitting days of tabling, that regulations be disallowed. This was further amended in the House of Representatives so that only notice of motion was required within 15 sitting days.

At this stage, however, there was no provision in either House (or any other parliament) for active scrutiny. It was in the 1920s and 30s that public and parliamentary concern led to the establishment of parliamentary procedures to ensure that exercise of regulation-making power became an active subject of scrutiny and liable to a measure of control.

Credit for rousing public opinion is often accorded to Lord Hewart, Lord Chief Justice of England, in his book, *The New Despotism*, published in 1929. The book represents "the outstanding landmark in the development of the theory and practice of delegated legislation" (G.S. Reid, 'Parliament and delegated legislation', *Parliament and Bureaucracy*, 1982, p. 151).

By coincidence Hewart's book was published at the time when the Senate had established a select committee to consider, report and make recommendations about establishing standing committees of the Senate on "statutory rules and ordinances". When the select committee reported, it proposed a committee to review "Regulations and Ordinances".

Simultaneously, the Senate, in which senators supporting the government were in a minority, was challenging regulations made by the Scullin Government under the *Transport Workers Act 1928*, using powers contained in the Acts Interpretation Act. When the initial regulations were disallowed, the regulations were promptly remade. This led the Senate unsuccessfully to petition the Governor-General to refuse to approve further regulations which were the same in substance as regulations already disallowed by the Senate. There was also litigation in the High Court challenging the validity of the regulations (*Dignan v Australian Steamships Pty Ltd* 1931 45 CLR 188).

With this controversy in the background, the Senate, following the general election of 1931, resolved to incorporate in the standing orders a requirement that a Standing Committee on Regulations and Ordinances be appointed at the commencement of each session of Parliament (4/3/1932, J.27-8). Only the House of Lords, when it created a committee in 1925 to examine regulations requiring an affirmative resolution to become law, had previously acted in this field. Eventually many houses of parliaments followed a similar course of establishing a committee to oversee statutory instruments, but one which has not done so is the Australian House of Representatives. Thus responsibility in the Commonwealth for active and systematic scrutiny of this extensive field of legislation falls upon the Senate. Maurice Blackburn, later a Labor member of the House of Representatives, had explicitly contended in 1930 that:

> the House of Representatives is not likely to do that work well, or, in fact, to do it at all. Upon its vote turns the fate of the ministry. The regulation is made by the ministry, and a proposal for its disallowance would certainly be treated as a vote of want of confidence, and would be tested on party lines. No ministry depends on the vote of the Senate and it is quite likely that in that chamber a regulation would be considered on its merits.... (Evidence to the 1929 Select Committee, PP S1/1929-30, p. 23.)

Parliamentary scrutiny of subordinate legislation was further strengthened in 1932 by amendment of the Acts Interpretation Act designed to address the issues which had arisen during dispute over the Transport Workers regulations. The amendment prohibited remaking of disallowed regulations within six months of disallowance, or the making of new regulations "substantially similar", unless their introduction was preceded by a motion rescinding the earlier disallowance.

Five years later the Act was consolidated. An important addition, included following observations by Maurice Blackburn in the House of Representatives about the ease with which a motion to disallow could be by-passed, was a provision compelling action on a motion for disallowance: if a motion to disallow was not resolved, the regulations would be deemed to have been disallowed.

In 2005 the *Legislative Instruments Act 2003* came into effect. This legislation, which had been introduced, scrutinised by the Regulations and Ordinances Committee and amended by the Senate in various forms on a number of occasions between 1994 and 1998, consolidated and reformed the law relating to delegated legislation in accordance with recommendations made by the Administrative Review Council in 1992. It retained and enhanced the provisions for parliamentary control.

Making of delegated legislation

The procedures for making delegated legislation are markedly different from those used in enactment of a statute. There are no stages for legislative passage or opportunity for amendment, and there are no procedural restraints upon rushed legislation.

The LIA:

- defines a legislative instrument as an instrument that is of legislative character, and that is made in the exercise of a power delegated by the Parliament (s. 5)
- establishes the Federal Register of Legislative Instruments, an authoritative source for all delegated legislation accessible in, and maintained in, electronic form (ss 20-22)
- requires that (unless specifically exempted) all legislative instruments be registered (s. 24), and provides that no legislative instrument will be enforceable unless it is registered (s. 31)
- requires the provision of an explanatory statement to accompany each instrument (s. 26)
- encourages rule-makers to undertake appropriate consultation, and to report on that consultation in the explanatory statement (ss 17-19).

There is a prohibition on retrospectivity of delegated legislation where the rights of a person are affected to the disadvantage of that person, or where liabilities are imposed on a person. These limits do not, however, apply to the rights of the Commonwealth or a Commonwealth authority (LIA, s. 12(2)).

Tabling

Section 38 of the LIA provides that copies of all legislative instruments be laid before each House of the Parliament within 6 sitting days of that House after registration. Instruments not laid before each House within the prescribed period after registration cease to have effect (LIA, s. 38(3)).

This system to enforce tabling, which was similar under the earlier legislation, may not be totally fool-proof. In 1990 it was discovered that disallowable rules under the Aboriginal and Torres Strait Islander Commission Act for election of regional councils and special rules for election and composition of the Torres Strait Islands regional council had not been tabled as required. The Act required that elections be held under rules in force at the time when elections were called. As it happened, when the elections were called the time for tabling had not expired. Thus, as the Federal Court found, the elections themselves were valid (*Thorpe v Minister for Aboriginal Affairs* 1990 97 ALR 543).

Normally instruments required to be tabled are forwarded by the responsible department to the Clerk of the Senate, and are tabled by the Clerk at a convenient time in the proceedings.

On occasions failure by departments to forward instruments for tabling has caused considerable legal difficulties. Such a situation was revealed by a statement by the Minister for Industry, Science and Technology, SD, 26/6/1995, pp 1737-9; the instruments in question had to be validated retrospectively by amendments to the Export Market Development Grants Amendment Bill 1994 and by the Industry Research and Development Amendment Bill 1995, and in each case the Senate made amendments to preserve the rights of persons affected by adverse decisions under the invalid instruments to seek redress by litigation. There have been other significant failures by government departments to forward delegated legislation for tabling within the statutory time limit, resulting in that legislation ceasing to have effect, with serious consequences (see statements by the Regulations and Ordinances Committee, SD, 10/10/1996, pp 3854-6; 3/12/1996, pp 6566-8).

It is not essential, however, that regulations be provided for tabling by a minister, or any other member of the government. Once an instrument has come into effect, it is open to any senator to seek to table it. On 26 March 1931 (J.253-5), Transport Workers (Waterside) Regulations were tabled by the Leader of the Opposition in the Senate, Senator Pearce, in conformity with an order of the Senate. Senator Pearce had quoted the gazetted regulations earlier in the day during a speech on a motion for adjournment to debate a matter of urgency; in tabling the regulations he was responding to a motion under then standing order 364 (now 168(2)) that they be laid on the table. The regulations were subsequently disallowed.

(See Supplement) Private senators have tabled regulations on other occasions. On 14 December 1989 (J.2380), Senator Patterson tabled regulations made under the National Health (Pharmaceutical Benefits) Act; these were disallowed on 22 December 1989 (J.2463). On 2 June 1994 (J.1743) Senator Bell tabled regulations under the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act.

Remaking instruments subject to tabling and disallowance

Once a legislative instrument has been made, no instrument the same in substance may be made within a defined period unless approved by both Houses by resolution. The defined period ends seven days after the original instrument has been laid before both Houses, or the later of the two days when the instrument is tabled on different days in the Houses; or after the last day on which the instrument could have been so tabled (LIA s. 46).

Similarly, where notice of a motion to disallow a legislative instrument has been given in either House within 15 sitting days of the instrument being laid before that House, another instrument the same in substance may not be made unless the notice has been withdrawn; the instrument is deemed to have been disallowed under section 42(2); the motion has been withdrawn or otherwise disposed of; or section 42(3) has applied in relation to the instrument (see below). Similar restrictions also apply to instruments if they are deemed to have been tabled again following a dissolution, expiration or prorogation of the House of Representatives (s. 42(2)).

These provisions were inserted in the statute in 1988 after the Regulations and Ordinances Committee pointed out that the disallowance provisions could be defeated by a succession of instruments repealing and remaking their predecessors (82nd report of the committee, PP 311/1987).

The expression "the same in substance" has been judicially construed to refer to "any regulation which is substantially the same …. in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect" (*Victorian Chamber of Manufactures v the Commonwealth* 1943 67 CLR 347 at 364).

See also Remaking of instruments following disallowance, below.

Disallowance

Section 42(1) of the LIA provides:

> If:
>
> (a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and
>
> (b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;
>
> the instrument or provision so disallowed then ceases to have effect.

Where a session of the Parliament ends because the House of Representatives is dissolved or expires, or the Parliament is prorogued, and a notice of motion to disallow has not been withdrawn or otherwise disposed of, the instrument in question is deemed to have been laid before the relevant House on the first sitting day of the new session (s. 42(3)). The opportunity to move disallowance is then renewed.

If, at the expiration of 15 sitting days after notice of a motion to disallow any instrument, given within 15 sitting days after the instrument has been tabled, the motion has not been resolved, the instrument specified in the motion is deemed to have been disallowed (s. 42(2)).

This provision ensures that, once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved. The provision greatly strengthens the Senate in its oversight of delegated legislation.

For precedents of instruments disallowed by effluxion of the prescribed time after giving notice, see 28/11/1985, J.637; 17/4/1986, J.925; 26/5/1992, J.2316-7.

On 5 March 1992 (J.2073-4) Senator Parer gave notice of motion to disallow all regulations made under the *Political Broadcasts and Political Disclosures Act 1991*. The notice was set down for the day on which the Government tabled the legal advice it had received on the validity of the regulations. The legal advice was not tabled and with the effluxion of time the regulations were deemed to be disallowed.

The disallowance provisions allow for the disallowance of an instrument or a "provision" of an instrument. A provision is regarded as any reasonably self-contained provision which can stand or fall alone.

Under the previous legislation, a regulation had to be disallowed in its entirety and could not be disallowed in part. While on its face more restricted than the current provisions, this gave rise to issues still relevant under the current legislation. A regulation, in a set of regulations, is one of the numbered series of provisions into which such a set is divided. The way in which the disallowance provisions applied to other kinds of delegated legislation depended on their form, but generally speaking a numbered item in a piece of legislation could be disallowed. This feature of disallowance procedure was the source of concern as a limitation on the Senate's control over delegated legislation (for the views of the Standing Committee on Regulations and Ordinances, see 80th report, PP 241/1986). On 9 October 1990 (J.307-8) Senator Harradine withdrew a motion to disallow certain regulations relating to the Human Rights and Equal Opportunity Commission on the ground that he was unable to disentangle those he wished to disallow from the remainder. A notice was withdrawn by Senator Bartlett in similar circumstances in 2000, but only after a government undertaking to amend the regulations in question (11/10/2000, J.3375; see also SD 11/9/2003, pp 14926-30; 9/10/2003, pp 16008-11).

On 1 May 1986 the Senate disallowed export control orders which were self-contained and separately numbered, but which were contained in a single amending order. The Attorney-General's Department and the Solicitor-General argued that the orders had not been validly disallowed and were still in force, on the basis that the Senate could disallow only the complete amending order. When the matter was litigated, however, the Federal Court found that the regulations had been disallowed (*Borthwick v Kerin* 1989 87 ALR 527). The Court suggested, without deciding, that "a regulation" means "each of the serially numbered collocations of words" in a set (at 537). (For this matter see SD, 15/6/1989, pp 4123-6.)

In light of this history, the interpretation of "provision" suggested here is likely to be adopted in future cases.

The question has also arisen of the interpretation of the expression "sitting day" in section 42 of the LIA. This question has not been adjudicated. Where two sittings of the House occur on one day, it is considered that this should be regarded as one sitting day; there would be two sittings, but it is not thought that there would be two sitting days. Where a sitting commences on one day and extends for a period beyond midnight (possibly a very short period) and a new sitting does not commence on the next day, the view taken is that the fact of continuation beyond midnight would not constitute an additional "sitting day". Where one sitting extends over two or more full days, without the intervention of an adjournment, but by the process of suspension of the sitting, the view taken is that, while it may be argued that there has been only one sitting day, it should for safety be assumed that each of those days is a sitting day.

In June 2000 the Senate disallowed some regulations under the Customs Act which had already been deemed to be disallowed in the House of Representatives because of the expiration of the statutory time limit for resolving a notice of a disallowance motion given in the House (20/6/2000, J.2813). The purpose of this seemingly unnecessary action was to ensure that the regulations could not be remade without the consent of the Senate (see below, under Remaking of instruments following disallowance).

Another question which has arisen is whether it is possible for the Senate to pass a motion disallowing instruments which have already been held to be invalid by a court. On 25 August 1983 the Attorney-General's Department submitted an opinion to the President that it was not possible for the Senate to do so. The Attorney-General subsequently took a point of order to this effect in the Senate, but no ruling was made in response to the point of order, and the notice of motion to disallow the regulations in question was withdrawn. A contrary opinion presented by Senate officers was that, just as invalid instruments may be repealed, they may also be disallowed by a House of the Parliament, either of those actions, repeal or disallowance, having the effect of terminating the existence of the invalid instruments. For text of opinions, see SD, 15/12/1983, pp 3858-9.

There are some forms of subordinate legislation with different approval or disallowance procedures. Some instruments require affirmative resolutions of both Houses to bring them into effect, while others do not take effect until the period for disallowance has passed. The Senate has amended bills to insert such provisions where it was thought that particular instruments merited special control procedures (see 12/12/1989, J.2355-61; 15/10/1992, J.2919-20; 25/11/1992, J.3115; 30/8/1995, J.3735-6; 23/8/2001, J.4732; 26/6/2002, J.477-8; 4/12/2003, J.2871; 4/3/2004, J.3085-6). One such amendment provided that a statute was not to operate until the regulations made under it were approved (12/12/1989, J.2358).

Disallowance motions in the Senate may be based on recommendations of the Regulations and Ordinances Committee, which have been, without exception, adopted by the Senate.

Disallowance motions may be moved other than at the initiation of the committee, and are often motivated by opposition to the policy manifested by the delegated legislation. Disallowance may

also be on the basis that the matter should be addressed by legislation (for example, Artificial Conception Ordinance 1986, 9/4/1986, J.875).

On 3 February 1994 (J.1190), pursuant to notice, a senator moved a motion to disallow an instrument of delegated legislation (guidelines for eligible child care centres), identical in terms to a motion to disallow the same instrument which was negatived on 8 December 1993 (J.940). No point of order was taken to the effect that this was contrary to the same question rule. (See also 29/5/1997, J.2030.) A motion may not be moved it if is the same in substance as a motion which has been determined during the same session, unless the latter was determined more than six months previously (SO 86). As explained in Chapter 9, the same question rule is seldom applied, because it seldom occurs that a motion is exactly the same as a motion moved previously. Even if the terms of a motion are the same as one previously determined, the motion almost invariably has a different effect because of changed circumstances and therefore is not the same motion. There may also be different grounds for moving the same motion again.

This consideration arises particularly in relation to delegated legislation. A senator may move to disallow an instrument of delegated legislation on policy grounds, and the Regulations and Ordinances Committee may give notice of a motion to disallow the same instrument on grounds related to the committee's criteria of scrutiny; the two motions are regarded as entirely separate, and the determination of one does not affect the other. Moreover, it could be argued that the same question rule could not prevent the operation of the relevant statutory provisions, which provide for disallowance subject only to the statutory time limit for giving notice. Therefore any disallowance motion may operate (and operate automatically if not withdrawn or determined) provided only that notice of it is given within the statutory time.

Having given a notice for a disallowance motion, a senator cannot be compelled to move the motion before the day for which the notice is given (see Chapter 9, Motions and Amendments, under Notice of motion).

The following are precedents for unusual proceedings involving disallowance: disallowance motion brought on early 9/10/1986, J.1273; disallowance notice given or deferred while instruments referred to committee 23,24,25/8/1988, J.850, 856, 885; 17/10/1988, J.1013; 11/10/1994, J.2252; regulations requiring approval to bring legislation into operation disallowed 16/5/1990, J.92; instruments subject to approval and amendment considered together with bill 17/12/1990, J.584, 589; disallowance motions ordered to be taken together 13/5/1991, J.1011; 29/8/2000, J.3139-40; 27/11/2000, J.3573; disallowance motion moved pursuant to contingent notice 17/11/1993, J.788; two disallowance motions moved together 29/5/1997, J.2030; 1/11/2000, J.3466.

Disallowance motion without notice

While the statutory provisions refer to notice being given of a motion for disallowance, the Senate may disallow tabled regulations without notice if standing orders are suspended to do so. When the matter came before the High Court in the case concerning the Transport Workers Regulations, Rich J. held that the statutory provisions as to notice are directory, not imperative (*Dignan v Australian Steamships Pty Ltd* 1931 45 CLR 188 at 198).

The Senate may also suspend standing orders to enable a notice of motion of disallowance, having effect for that day, to be given and the motion then moved. This occurred on 20 June 1967 (J.153) when a special meeting of the Senate was held, at the request of an absolute majority of senators, in order to have the opportunity to move for disallowance of certain postal and telephone regulations. After some formal business, the Leader of the Opposition, Senator L.K. Murphy, moved:

> That so much of the Standing Orders be suspended as would prevent a Notice of Motion from being now given by Senator Murphy, and having effect for this day, for the disallowance of the Regulations contained in Statutory Rules 1967, Nos. 74, 75, 76 and 77, and made under the Post and Telegraph Act 1901-1966.

The motion being agreed to, Senator Murphy then gave notice of motion for the disallowance of the regulations. Then he moved, pursuant to that notice, that the regulations be disallowed, which motion was agreed to (20/6/1967, J.153).

Given that notice is not necessary, this elaborate procedure need not be followed. For a motion moved by leave after notice was given of it on the same day, see 1/11/2000, J.3466.

For disallowance motions moved by leave immediately after the tabling of the regulations by a minister, see 19/12/1991, J.1990; 19/6/2002, J.402-3; pursuant to a contingent notice immediately after tabling, 24/11/2003, J.2692-3.

Precedence of disallowance motion

A motion to disallow or disapprove any regulation or other instrument subject to disallowance or disapproval by either House is placed on the Notice Paper as Business of the Senate. As such, it takes precedence over Government and General Business for the day on which it is set down for consideration (SO 58).

This procedure further strengthens the Senate in exercising the power of disallowance, and ensures that disallowance motions are given appropriate attention.

The Notice Paper indicates the number of sitting days remaining within which a motion for disallowance must be disposed of before the instrument will be deemed to have been disallowed.

Tabling as a condition of disallowance

A legislative instrument not laid before each House within 6 sitting days after registration ceases to have effect (LIA s. 38(3)). The question arises whether it is necessary for a regulation to be tabled before disallowance is initiated.

In *Dignan v Australian Steamships Pty Ltd* 1931 45 CLR 188, the High Court by a majority (Rich, Starke and Dixon JJ. — Gavan Duffy, C.J. and Evatt J. dissenting) held that the disallowance by the Senate of certain Transport Workers (Waterside) Regulations on 26 March 1931 (J.254-5), after they had been tabled (as noted earlier) by the Leader of the Opposition in the Senate (Senator Pearce) rather than a minister, was an effective disallowance.

In 1942, Senator Spicer, the then Chairman of the Senate Regulations and Ordinances Committee, prepared a memorandum on the subject with the aim of determining the practice which should be followed by the Senate. His memorandum concluded:

> An analysis of the judgments in this case (ie. *Dignan's* case) discloses, therefore, that only two of the five Judges committed themselves to the view that the regulations need not be laid before the House before disallowance, but a majority of the Court, including the two Judges referred to, held that the regulations had been effectively laid before the House, by reason of the motion under S.O. 364.
>
> In these circumstances the question whether disallowance will be effective in a case in which a regulation has not been laid before the House at all is still an open one as far as the High Court is concerned. Any doubt on the matter can be avoided if motions for disallowance are not moved before regulations are laid before the House either by a member of the Executive or by order of the Senate, and this would seem to be ample justification for continuing to follow that procedure.
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> Although *Dignan's* case was decided under section 10 of the *Acts Interpretation Act* 1904-1930, which has since been repealed by the Act of 1937 (No. 10), the new section, 48, which has been inserted in its stead is for this purpose not materially different from the section with which the High Court had to deal. It seems to me that the views I have expressed above are as applicable to the new section as to the section which was under consideration in *Dignan's* case.

In support of his contention that notice of disallowance should be given subsequent to the tabling of the regulations and within fifteen sitting days of such tabling, Senator Spicer instanced the speeches of ministers, the submissions of counsel for the government, and the judgment of at least one High Court Judge (Dr H.V. Evatt). "With this backing", he submitted, "there is learned and authoritative justification for the view that to require notice of disallowance to be delayed until after the regulations are tabled is giving effect to the proper intention of the provision in the Acts Interpretation Act."

This analysis applies equally to the provisions of the LIA.

In 1988 (23/8/1988, J.850) Senator Puplick gave notice of a motion to disallow regulations before they were tabled. The notice was withdrawn on 25 August 1988 (J.878) but revived four days later when the regulations were eventually tabled. (See also Workplace Relations Regulations, 15-16/2/1999, J.436, 450-1.)

In 2002 a disallowance motion was moved by leave immediately after a minister, in response to a resolution of the Senate, tabled the regulations in question. Notice of a motion to disallow the same regulations, given before the regulations were tabled, was withdrawn (18/6/2002, J.381; 19/6/2002, J.402-3, 408).

Amendment of disallowance motion

The following principles apply to amendment of notices of motion for disallowance and amendment of disallowance motions after they are moved:

- an amendment to reduce the scope of a motion (for example, by confining it to particular regulations or a lesser number of regulations) may be made regardless of

whether the time for giving notice has expired, because the original notice is effective for the statutory purpose of giving notice within the statutory time limit

- an amendment to expand the scope of a motion (for example, by extending it to other regulations not covered by the original motion) may not be made unless the time for giving notice has not expired, because the original notice is not effective for that purpose.

On 14 November 1935 (J.125) a motion of disallowance was amended by leave to confine it to a lesser number of regulations. A point of order was taken that the amendment was not in order in that the law required that disallowance motions be submitted after notice had been given within a specified time, and no notice had been given of the motion as amended. President Lynch, for the reasons submitted, ruled the amendment not in order. This ruling was not correct and has not since been followed. Notice had been given of a motion for the disallowance of the whole of the regulations, and the notice extended to any of the regulations. A court would probably have held the proposed motion for disallowance, as amended, to be lawful, given the view of *Dignan v Australian Steamships Pty Ltd* 1931 45 CLR 188, that the provision as to notice is directory and not imperative.

Thus on 26 May 1972 (J.1016-7) a motion was moved for disallowance of the Legal Practitioners Ordinance of the Australian Capital Territory and an amendment proposed to limit the disallowance to sections 10 and 11. No objection was taken to the propriety of the amendment. For further precedent, see 4/5/1987, J.1801 (amended on Notice Paper 4/5/1987). For motions amended by leave, see 8/11/2000, J.3523; 30/11/1995, J.4310; 28/11/1996, J.1143.

For a case of a disallowance motion amended by leave to restrict its scope, and an amendment moved to expand its scope within the original notice, see Parliamentary Entitlements Amendment Regulations, 20/8/2003, J.2249-50.

Although there is at least one precedent, in 1987, for an amendment to a notice of motion for disallowance to reduce its scope by means of a letter under standing order 77, this practice is not followed because a senator who wishes to support the disallowance of certain regulations, for example, may find that a notice has been amended so that it no longer covers those regulations without the senator being aware of the amendment. This problem potentially arises regardless of whether the time for giving notice has expired. Therefore, when a senator wishes to amend a notice of motion to reduce its scope, this is done by way of giving notice of intention to amend the notice, similar to the notice of intention under standing order 78. If the time for giving notice has not expired, another senator can then give a fresh notice to cover the particular items the senator wishes to disallow. If the time for giving notice has expired, another senator can take over the notice in so far as it relates to such items (23/6/1997, J.2165). For a notice narrowed in scope by a standing order 77 notice (after notice of intention), and an amendment moved to further narrow it, see Notice Paper 24/3/2004 and 24/3/2004, J.3223.

An example of a notice of motion to disallow extended in scope when the time limit for giving notice had not expired occurred on 28 April 1992 when Senator Harradine, pursuant to standing

order 77, amended an original notice to extend its scope (Notice Papers, 28/4/1992, p. 1; 29/4/1992, p. 22).

Words may be added to a disallowance motion to give reasons for disallowance; for precedents, see 30/4/1969, J.452; 9/11/1978, J.455.

For amendments to substitute words not having the effect of disallowance, see 13/5/1991, J.1013; 26/10/1995, J.4057-8.

Consideration in committee of the whole

There is a precedent (26/5/1904, J.49) for the consideration of the disallowance of regulations in committee of the whole. The circumstances were that a motion was moved for the disallowance of a series of regulations under the Defence Act, and it was considered that the advantages of the committee procedure of debate, where senators can speak more than once to a question, were more suited to the nature of the motion. In addition, each regulation could be considered seriatim. To be effective, any resolution of the committee of the whole would have to be adopted by the Senate, on report.

Withdrawal of notice of motion

If a senator, having given notice of a motion for disallowance, seeks to withdraw the notice, provision is made for another senator to take over the motion, thus averting the possibility that the Senate could be denied an opportunity of considering disallowance where the time for giving notice has passed. Standing order 78 provides:

> (1) A senator who wishes to withdraw a notice of motion standing in the senator's name to disallow, disapprove, or declare void and of no effect any instrument made under the authority of any Act which provides for the instrument to be subject to disallowance or disapproval by either House of the Parliament, or subject to a resolution of either House of the Parliament declaring the instrument to be void and of no effect, shall give notice to the Senate of the intention to withdraw the notice of motion.
>
> (2) Such notice of intention shall be given in the same manner as a notice of motion, shall indicate the stage in the routine of business of the Senate at which it is intended to withdraw the notice of motion, and shall not have effect for the day on which it is given; except that, if given on a day on which by force of the statute the instrument shall be deemed to be disallowed if the motion has not been withdrawn or otherwise resolved, or on a day on which by force of the statute the motion must be passed in order to be effective, such notice of intention may have effect for a later hour of that day.
>
> (3) If another senator, at any time after the giving of such notice of intention and before the withdrawal of the notice of motion, indicates to the Senate an objection to the withdrawal of the notice of motion, that senator's name shall be put on the notice of motion, the name of the senator who wishes to withdraw the notice of motion shall be removed from it, and it shall not be withdrawn; but if no senator so objects to the withdrawal of the notice of motion, it may be withdrawn in accordance with such notice of intention.

These provisions ensure that the right of any senator to move disallowance is not lost by the withdrawal of a notice.

For instances of senators taking over disallowance motions, see 14/11/1986, J.1398; 18/12/1989, J.2389; 24/3/1992, J.2093; 10/9/1996, J.546. In each instance, a senator was taking over the motion to disallow from the Regulations and Ordinances Committee chair.

Where a senator wishes to withdraw a notice of motion for disallowance on the last day for resolving the notice and there is not time for notice of intention to withdraw to be given, the notice may be withdrawn by leave, but only after senators present have an opportunity to take over the notice (11/10/2000, J.3375).
(See Supplement)
A notice of intention to withdraw a disallowance motion has the effect of postponing a notice which would otherwise be called on earlier to the time of intended withdrawal, unless another senator takes over the notice before that time, in which case it is called on at its due time.

For the withdrawal without notice or leave of a notice of motion for disallowance which was not regarded as effective because it was given before the regulations concerned were tabled, see 19/6/2002, J.402-3, 408. For the withdrawal of a notice after the regulations concerned were disallowed, see 24/11/2003, J.2693.

An unusual resolution was passed on 30 June 1994 (J.2002) on the motion of the chair of the Regulations and Ordinances Committee to allow the committee to withdraw from the Notice Paper a notice of motion for the disallowance of certain Industrial Relations Court Rules during the winter long adjournment of the Senate. It was explained that, if the committee received a satisfactory undertaking from the Industrial Relations Court concerning the making of substitute rules, the withdrawal of the notice of motion would allow the Court to make substitute rules without waiting for the next meeting of the Senate and without running the risk of the new rules being held to be invalid under the predecessor of section 47 of the LIA. As explained above, this provision prohibits the making of delegated legislation the same in substance as legislation which is the subject of an unresolved disallowance motion. The High Court has taken a broad view of the meaning of "the same in substance" (*Victorian Chamber of Manufactures v Commonwealth* 1943 67 CLR 347), and new rules, while overcoming the objections of the Regulations and Ordinances Committee, might be legally the same in substance as the previous rules. The resolution preserved the right of any senator to prevent the withdrawal of the notice of motion until the Senate next met, thus keeping the spirit of standing order 78.

Standing order 83(2) provides that a motion not moved when the notice is called on is withdrawn. If, however, a senator declines to move a disallowance motion when the notice is called on (in the circumstance, for example, of the Senate rejecting a motion by the senator to postpone it), it is not withdrawn under standing order 83(2) until other senators have an opportunity to take it over and move it in accordance with standing order 78. On the senator declining to move the motion when the notice is called on, the chair designates either a time on the next day of sitting or a time later in the sitting (depending on whether it is the last day for resolving the matter) by which the notice will be withdrawn if no other senator takes it over. A senator taking over a disallowance notice in these circumstances is entitled to specify a future day for moving the motion, provided that that day is within the statutory time limit for resolving the notice. (17/10/2002, J.914)

Standing order 78 is regarded as applying to any disallowance-type provision even if it does not strictly fall within the language of the standing order. Thus leave was required to withdraw a notice of motion to amend disability standards under the *Disability Discrimination Act 1992*, the standards being subject to amendment and approval provisions inserted into the statute by amendment by the Senate (23/10/2002, J.967-8).

Effect of end of a Parliament or session

As has been noted above, the LIA, s. 42(3) contains an important safeguard to ensure that the opportunity to disallow a legislative instrument is not lost when a Parliament or a session ends. As explained in Chapter 7, either of those occurrences terminates the business before the Senate, including notices of motion. An unresolved disallowance notice, however, results in the instrument in question being deemed to be tabled again on the first sitting day of the next session, so that disallowance action may start afresh.

Ministerial undertakings

The Standing Committee on Regulations and Ordinances follows a practice of giving notices of motions to disallow regulations or other subordinate legislation within the prescribed period, and then withdrawing the notices after correspondence with the responsible minister satisfies the committee's concerns.

Giving notices of motions to disallow indicates concern about the delegated legislation in question, and these are known colloquially as protective notices of motion, in that they protect the right of the committee, and of any senator, to move disallowance if it is subsequently decided that this is appropriate. Such concern is often allayed by further explanatory material from the minister or an undertaking to amend the legislation. Where the committee's concerns are met, the notice of motion to disallow is withdrawn (although it may be taken over by another senator). There are some occasions where the responsible minister does not satisfy the committee and the motion to disallow proceeds.

Frequently a protective notice of motion is withdrawn on the basis of undertakings from a minister to take action addressing the matters causing concern, usually by amending the legislation in question.

The practice of ministerial undertakings has the benefit of securing an outcome agreeable to the committee without necessarily interrupting administration and implementation of policy by disallowance of the instruments in question.

Undertakings, however, must be carried out promptly for this system to work. This is a source of serious, continuing and active concern to the committee. During a period when there was a particularly notable failure to fulfil undertakings promptly, the committee observed:

> A highly unsatisfactory situation arises when undertakings by Ministers are not carried out promptly and expeditiously, in that provisions recognised to be defective are allowed to stand and the public effectively lack the protection which the disallowance procedure and the Committee are designed to give. (62nd report, PP 203/1978)

In its annual report for 1986-87 the committee again recorded its apprehensions about delays in giving effect to ministerial undertakings:

> The Committee is concerned that it could undermine the whole basis of parliamentary honour on which the undertaking convention is based, if the implementation of undertakings is not expedited as quickly as possible after a Minister has given his or her word to act. To countenance excessive delay is not only a discourtesy to the Senate but it is also a continuing affront to principles of freedom, justice, fairness and propriety if objectionable provisions are left on the delegated statute book in spite of parliamentary requests for amendments and in contravention of ministerial commitments to make amendments. (83rd report, PP 377/1988)

See also a statement by the chair of the committee, SD, 6/2/1995, pp 515-9.

It is customary for the committee, in its general reports, to record all undertakings which have been given and discharged, and those which have been given and are still to be implemented.

Senators other than the chair of the committee also occasionally withdraw disallowance motions on the basis of ministerial undertakings (30/11/1994, J.2627, SD, pp 3585-9; 28/6/1995, J.3551-2, SD, pp 1932-3). Undertakings may also be accepted by the Senate in determining whether to disallow instruments (19/10/1995, J.3972; SD, 30/11/1995, pp 4393-400).

For a precedent of ministerial undertakings given following report of a committee on regulations, see the report of the Legal and Constitutional Affairs Committee on the Australian Nuclear Science and Technology Organisation Regulations, presented on 8 November 1994 (PP 222/1994), and Senate Debates of the same date, pp 2585-91.

Remaking of instruments following disallowance

Section 48 of the LIA provides:

> (1) If, under section 42, a legislative instrument or a provision of a legislative instrument is disallowed, or is taken to have been disallowed, a legislative instrument, or a provision of a legislative instrument, that is the same in substance as the first-mentioned instrument or provision, must not be made within 6 months after the day on which the first-mentioned instrument or provision was disallowed or was taken to have been disallowed, unless:
>
> (a) if the first-mentioned instrument or provision was disallowed by resolution—the resolution has been rescinded by the House of the Parliament by which it was passed; or
>
> (b) if the first-mentioned instrument or provision was taken to have been disallowed—the House of the Parliament in which notice of the motion to disallow the instrument or provision was given by resolution approves the making of a legislative instrument or provision the same in substance as the first-mentioned instrument or provision.
>
> (2) Any legislative instrument or provision made in contravention of this section has no effect.

For the meaning of "the same in substance" see above, under Remaking instruments subject to tabling and disallowance.

The statute was amended in 1932 to include this provision that a disallowed regulation was not to be remade unless the resolution of disallowance was rescinded. Introducing the amending legislation to the Senate, the Acting Attorney-General (Senator McLachlan) recalled the events of the previous year relating to the disallowance of regulations and the re-enactment of others which were substantially the same. Those circumstances were the subject of an address to Governor-General Isaacs requesting that he refuse to sanction further regulations, during the then session, being the same in substance as those already disallowed (28/5/1931, J.292). Although the Governor-General, in his reply (10/6/1931, J.294-5), could not comply with the Senate's request, the subsequent amending legislation met the wishes of the Senate.

The standing orders were also amended in 1932 to ensure that the general rule that the same question is not to be again proposed during the same session should not operate to prevent the proposal of a motion for the disallowance of an instrument substantially the same as one previously disallowed during the same session (SO 86). But in view of the statutory restrictions on the remaking of disallowed instruments, this provision in the standing orders can, in practice, relate only to instruments remade more than six months after the date of disallowance.

Motions to allow the remaking of delegated legislation disallowed by the Senate usually arise from the complex character of that legislation: the Senate is often not able to disallow provisions regarded as objectionable without also striking down some acceptable provisions. For precedents see 25/6/1992, J.2633-5; 17/10/1994, J.2298; 9/10/1996, J.668; 4/12/1996, J.1192. As explained in Chapter 9, these motions are not technically rescission motions and are now not treated as such (13/5/2004, J.3415). **(See Supplement)**

See under Disallowance, above, for disallowance of instruments already disallowed or invalidated and repetition of the same disallowance motion.

For an analysis of the same question rule, see Chapter 9, Motions and Amendments, under that heading. See also that chapter for an analysis of the meaning of rescission, and the point that motions to permit the remaking of delegated legislation are not technically rescission motions.

Disallowance of a repealing instrument

The disallowance of an instrument which repeals, in whole or in part, an earlier instrument revives the repealed provision from and including the date of disallowance of the repealing instrument. (LIA, s. 45(2))

In its 66th report in 1979, the Regulations and Ordinances Committee considered the question of whether the disallowance of an instrument which repeals another instrument has the effect of reviving the repealed instrument. There appeared then to be obscurity in the law on this matter and the committee considered that the obvious solution was for the legislation to be amended so as to provide explicitly for the effect of the disallowance of a repealing instrument. The committee was strongly in favour of the common law rule of revival being applied to the disallowance of regulations and other instruments. The common law rule of revival is that repeal of a statute which has repealed an earlier statute has the effect of reviving the earlier repealed statute. (PP 116/1979; SD, 8/6/1979, pp 2932-3) (In relation to statutes, however, the common law rule has been reversed.) On 26 May 1981 (SD, pp 2084-6) the Attorney-General informed

the Senate that the Government had decided to introduce amendments to the legislation to implement the committee's recommendation, that is, that the common law rule of revival should, by statute, be applied to the parliamentary disallowance of all instruments. This was done in 1982.

In 1996 a new government adopted the tactic of disallowing the regulations of its predecessor in the House of Representatives, thereby avoiding the making of repealing regulations which could be disallowed by the Senate. The Senate passed a motion condemning this practice (27/6/1996, J.422-3).

"Sunsetting" of instruments

Part 6 of the LIA contains provisions for "sunsetting" of legislative instruments, that is, ceasing their operation, generally after ten years. Sections 52 and 53 provide for the tabling of lists of instruments to be "sunsetted", and for either House to resolve, within 6 months after tabling, that particular instruments or provisions continue in effect. In effect, each House is empowered to veto a "sunsetting".

Consultation

Part 3 of the LIA provides for rule-makers to consult with interested parties before making instruments. Section 19, however, provides that failure to consult does not affect the validity of an instrument. It likewise does not affect parliamentary control, although it may be an issue in parliamentary scrutiny.

National uniform legislation

National schemes of legislation, also known as uniform legislation, have always presented difficulties for Senate scrutiny of legislation because they are framed by agreement between the Commonwealth and state and territory executive governments and then presented to the respective parliaments as unchangeable because the parliaments cannot change the intergovernmental agreements. The two legislative scrutiny committees, the Regulations and Ordinances Committee and the Scrutiny of Bills Committee, combined to present on 16 October 1996 a position paper on this subject. The position paper suggested two possible solutions: a national committee for the scrutiny of such legislation and the adoption of parliamentary procedures so that legislation commented on by a scrutiny committee would not proceed until the government reported on the matters raised. No action has yet been taken on these suggestions. (See also statement by the committee, SD, 12/3/1998, p. 892-4.)

Regulations and Ordinances Committee

All disallowable legislative instruments stand referred to the Standing Committee on Regulations and Ordinances for scrutiny and recommendation as to any further parliamentary action including disallowance.

The Standing Committee on Regulations and Ordinances is appointed at the commencement of each Parliament under standing order 23(1). It is composed of six senators, three from the

government party; and three from other parties, including usually at least two from the Opposition parties. The committee chair is elected from the government members. The committee has a quorum of four. The chair, or the deputy chair when acting as chair, has a casting vote in the event of equality of voting.

Standing order 23(2) provides:

> All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the Committee for consideration and, if necessary, report.

The committee scrutinises each instrument to ensure:

> (a) that it is in accordance with the statute;
>
> (b) that it does not trespass unduly on personal rights and liberties;
>
> (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
>
> (d) that it does not contain matter more appropriate for parliamentary enactment. (SO 23(3))

These terms of reference have governed the committee's proceedings throughout its history with only minor amendment in 1979 largely occasioned by creation of the Administrative Appeals Tribunal. The four principles are interpreted broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights.

In its fourth report in 1938 the committee recorded that it had determined in 1933 that "questions involving government policy in regulations and ordinances fell outside its scope" (PP S1/1937-8, p. 4). The committee does not consider policy issues arising in delegated legislation, but does not refrain from finding provisions contrary to its principles and recommending their disallowance simply on the basis that they reflect government policy.

The committee interprets its terms of reference as requiring it to scrutinise instruments to ascertain whether they:

- are in accordance with the spirit of the statute even though legally authorised by the statute
- contain reversals of the onus of proof in criminal matters
- abridge traditional civil liberties; for example by providing for searches of premises without warrant
- allow for administrative decisions affecting rights and liberties without objective criteria to govern such decisions and without a right of appeal to a judicial or other independent body by an aggrieved person

- allow retrospective imposts, particularly involving payment of moneys with long periods of retrospectivity.

The committee reports regularly to the Senate and makes general reports on its scrutiny of delegated legislation. In respect of many instruments these reports record that the instruments have been changed when the committee has pointed out defects in them. The chair of the committee also frequently makes statements on its behalf in the Senate recording action taken by the committee in relation to particular instruments. These statements are often accompanied by tabling of the committee's correspondence with ministers and other rule-making authorities. As noted above, the committee frequently gives notices of motions for disallowance and withdraws the notices when satisfactory explanations or undertakings are given by ministers or other rule-making authorities.

In its 101st report, in June 1995 (PP 97/1995), the committee asserted its right, and that of the Senate, to scrutinise rules of court and other instruments made by judicial bodies. These instruments, like other forms of delegated legislation, are subject to disallowance by the Senate (see also statements by the committee, SD 23/6/1997, pp 4868-70).

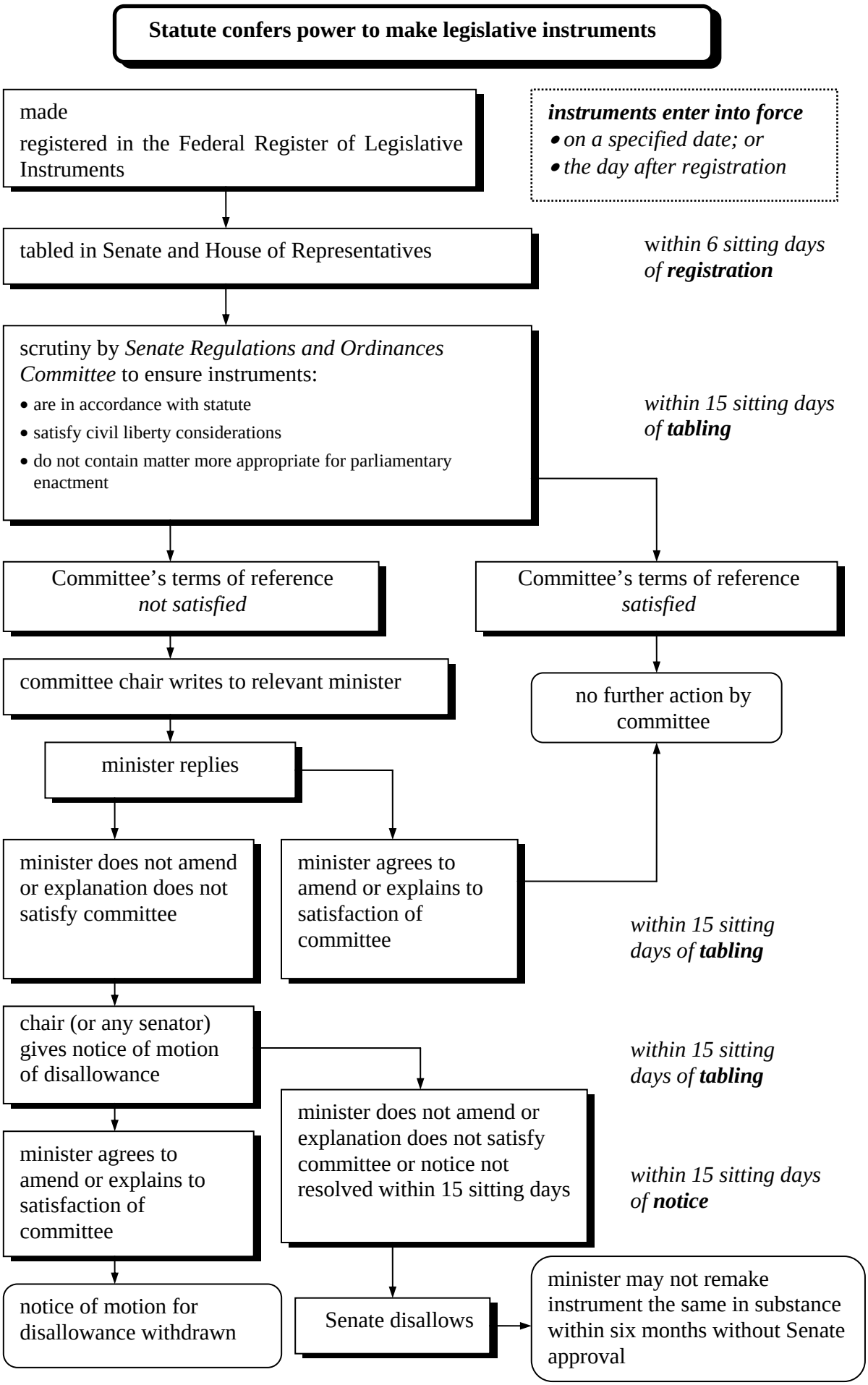
Occasionally the Senate refers to the committee for special report particular matters relating to delegated legislation. Thus in 1994 and subsequently the committee considered and reported in detail on the Legislative Instruments Bill, which significantly affected the system for the making of delegated legislation (PP 176/1994; 264/2003; see also Chapter 16, Committees, under Legislative Scrutiny Committees).

In its scrutiny of delegated legislation the committee is supported not only by its staff but by advisers who have been drawn from both the practising and academic sides of the law profession. The legal adviser reports to the committee on every instrument it considers. In framing advice the legal adviser also peruses supporting documentation, including explanatory memoranda issued by the rule-making authority. The committee usually meets in private. It has the power to sit during recess, but it does not have the power to move from place to place.

The committee, supported by the statutory provisions for disallowance, has established an effective system for the parliamentary scrutiny and control of delegated legislation. This system has since been widely copied in other jurisdictions in Australia and around the world (see the 71st report of the committee, PP 47/1982; 85th report, PP 464/1989; and subsequent annual reports).

In assessing the committee's achievements over half a century, Professor Gordon Reid observed that it had "established itself as bipartisan in all of its work" and had "maintained its working momentum, whichever political party has been in power". Reid further observed that the committee's record demonstrated that so far as ministerial responsibility is concerned, ministers have been "held primarily responsible to the Senate and only incidentally to the House of Representatives in their use of delegated legislation" (Reid, *op. cit.*, pp 157, 159).

SCRUTINY OF DELEGATED LEGISLATION



Chapter 16

COMMITTEES

LIKE MOST REPRESENTATIVE legislative assemblies in free countries, the Senate delegates some of its tasks, and the powers to carry out those tasks, to committees of its members.

Role of committees

The task most often given to committees is that of conducting inquiries: of inquiring into specified matters, particularly by taking submissions and hearing evidence, and reporting findings on those matters to the Senate. Although the Senate may conduct inquiries directly, committees are a more convenient vehicle for this activity (see also Chapter 17, Witnesses).

Apart from conducting inquiries, committees may be required to perform any of the functions of the Senate, including its primary legislative function of considering proposed laws, the scrutiny of the conduct of public administration and the consideration of policy issues.

The Constitution recognises committees as essential instruments of the Houses of the Parliament by referring in section 49 to: "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House ...".

The Senate makes extensive use of committees which specialise in a range of subject areas. The expertise built up by those committees enables them to be multi-purpose bodies, capable of undertaking policy-related inquiries, examining the performance of government agencies and programs or considering the detail of proposed legislation in the light of evidence given by interested organisations and individuals. The scrutiny of policy, legislative and financial measures is a principal role of committees.

Most significantly, committees provide a means of access for citizens to participate in law making and policy review. Anyone may make a submission to a committee inquiry and committees will normally take oral evidence from a selection of witnesses who have made written submissions. Committees frequently meet outside Canberra, thereby taking the Senate to the people and gaining first hand knowledge of and exposure to issues of concern to the public.

Inquiries by committees allow citizens to air grievances about government and bring to light mistreatment of citizens by government (for an investigation of oppression of persons by a government agency, see the report of a standing committee on the Casualties of Telstra, 11/3/1999, J.555-6).

Specialist committees support the Senate's ability to monitor delegated legislation made by the executive government and to ensure that all proposals for legislation do not trespass against fundamental personal rights and liberties. In the Australian Parliament, only Senate committees perform this role.

An important outcome of committee work is the opportunity senators gain to pursue special interests and build up expertise in aspects of public policy, enhancing the quality of debate and providing a solid grounding for backbenchers who may go on to be committee chairs, shadow ministers, party spokespeople or ministers.

The characteristic multi-partisan composition and approach of committees also provides opportunity for proponents of divergent views to find common ground. The orderly gathering of evidence by committees and the provision of a forum for all views can often result in the dissipation of political heat, consideration of issues on their merits and the development of recommendations that are acceptable to all sides:

> It is in the conference [i.e., committee] room that careful, calm consideration can be brought to bear upon a subject, and [senators] can work harmoniously in spite of party differences. It is there that the qualities and experience of the individual can be applied to matters under discussion. It is there that opportunity is provided for vision, judgment and experience to be applied and, later, brought before the Senate for open discussion and action. (Chairman of the Select Committee on the Standing Committee System, Senator R D Elliott, SD, 14/5/1931, pp 1912-3)

Types of committees

Committees are of two main types: standing committees, which remain in existence and inquire into matters within their areas of responsibility referred to them by the Senate; and select committees, which are appointed to inquire into particular matters and which cease to exist when they have finally reported on those matters.

Standing committees may be subclassified according to their functions. Joint committees, committees of both Houses, are best treated as a separate category. This produces the following classification, which is employed in this chapter:

(a) standing domestic committees;
(b) standing legislative scrutiny committees;
(c) legislative and general purpose standing committees;
(d) estimates committees;
(e) select committees; and
(f) joint committees.

Evolution of the committee system

The Senate's first standing orders provided for the establishment of both standing and select committees. The standing or domestic committees were concerned with the Senate's own affairs and support services and included a Standing Orders Committee, Library Committee, House Committee, Printing Committee and Elections and Qualifications Committee. The first committee reports in 1901 were made by the Elections and Qualifications Committee and the

Standing Orders Committee. Select committees were used to inquire into particular matters the Senate considered worthy of inquiry. Such committees were given powers to summon witnesses and require the production of documents, and procedures for examining witnesses were set out in the standing orders. The first select committee report presented to the Senate examined steamship communication between Tasmania and the mainland. Other select committees were appointed as required.

In 1932, the Regulations and Ordinances Committee was established following a report of the select committee appointed in 1929 to consider, report and make recommendations upon the advisability or otherwise of establishing standing committees of the Senate upon:

(a) statutory rules and ordinances
(b) international relations
(c) finance
(d) private members bills

and such other subjects as were deemed advisable (PP S1/1929-31).

The select committee was of the view that a standing committee system, to be successful and bearing in mind the small number of senators available (then 36), would need to grow from modest beginnings (SD, 1/5/1930, p. 1311). Although the select committee originally recommended the establishment of regulations and ordinances and external affairs committees, and the modification of the standing orders to facilitate the reference of bills to committees, the matter was recommitted and the committee's second report (PP S2/1929-31) recommended that only a regulations and ordinances committee be established. There had been government fears that an external affairs committee might use its powers to obtain access to sensitive documents on Australia's external affairs and the proposal for a committee in this area was not pursued at that time. The significant volume of delegated legislation made without parliamentary scrutiny was of concern to all sides of politics, however, and the establishment of a regulations and ordinances committee was therefore seen as a priority. In 1982 that committee was joined by the second of the standing legislative scrutiny committees, the Scrutiny of Bills Committee, charged with ensuring that all bills and Acts observed similar fundamental principles as those applying to delegated legislation.

The modern committee system dates from 1970, when the Senate agreed to the appointment of seven legislative and general purpose standing committees, standing ready to inquire into any matters referred by the Senate in a range of subject areas, and five estimates committees to examine the annual estimates of departments in a more orderly and effective manner.

With this development, the evolution of the main types of committees on which senators have served was complete.

A major refinement occurred with the adoption of resolutions by the Senate on 5 December 1989 providing for the systematic referral of bills to legislative and general purpose standing committees. These orders came into effect in the latter half of 1990 and facilitated the realisation of a long-held ideal, that Senate committees should have a greater role in the consideration of legislation.

In 1994, as a result of a Procedure Committee report on the committee system (First Report of 1994, PP 146/1994), the estimates and legislative and general purpose committees were amalgamated. A scheme of paired committees, incorporating the functions of estimates and legislative and general purpose standing committees in each subject area, a references committee and a legislation committee, was adopted. The chairs of other committees were reorganised so that the distribution of chairs approximated the representation of parties in the Senate. In 2006 the pairs of committees in each subject area were amalgamated, returning to pre-1994 arrangement for the legislative and general purpose standing committees.

Standing domestic committees

There are eight standing domestic committees established by standing order. They are:

Procedure
Privileges
Appropriations and Staffing
Library
House
Publications
Senators' Interests
Selection of Bills

Procedure Committee

A descendant of the 1901 Standing Orders Committee, the Procedure Committee is established under standing order 17 and has been in operation under its present name since 1987.

The committee has four ex officio members, the President, Deputy President, Leader of the Government in the Senate and Leader of the Opposition in the Senate. It is chaired by the Deputy President, a provision adopted in 1994. Its remaining six members are appointed from the Senate without any prescribed allocation of places to government or non-government senators. This formula allows as wide a representation of senators as is considered appropriate at any time. The Leaders of the Government and of the Opposition in the Senate are authorised to appoint substitute members when they are unable to attend meetings (SO 17(2)).

The committee's terms of reference are "any matter relating to the procedures of the Senate referred to it by the Senate or by the President" (SO 17(3)). The standing orders do not confer formal inquiry powers upon the committee as they are not considered necessary. Most of the matters considered by the Procedure Committee are referred by the Senate. Although it does not formally gather evidence, the committee sometimes invites submissions from senators. A 1993 reference to the committee on the hours of sitting and routine of business included an instruction that the committee invite submissions from all parties in the Senate and independent senators and consult with the Procedure Committee of the House of Representatives, which was undertaking a similar inquiry (18/8/1993, J.357). In most cases reports are developed following discussions and consideration of issues papers. The committee cannot meet other than in Parliament House without authorisation by the Senate (22/6/2006, J.2345).

Reports of the committee may be considered in committee of the whole to facilitate free discussion of detailed matters, but may also be considered by the Senate. Consideration of the reports may be listed under Government Business orders of the day because, following the presentation of a report, a minister moves the motion to provide for its consideration, or may be listed as an order of the day under Business of the Senate, either by order contained in the reference to the Procedure Committee (9/3/1989, J.1459) or following a motion moved on presentation of the report (15/6/1989, J.1891; 21/12/1990, J.686; 12/9/1991, J.1512; 24/3/1992, J.2097). The designation of Procedure Committee reports as Business of the Senate orders of the day gives priority to their consideration, as befits significant matters of relevance to the conduct of the business of the Senate (see Standing Orders Committee, 1st Report, 62nd Session, PP 504/1985 pp 1-3).

Committee of Privileges

The Committee of Privileges is established by standing order 18, which provides:

> (1) A Committee of Privileges, consisting of 7 senators, shall be appointed at the commencement of each Parliament to inquire into and report upon matters of privilege referred to it by the Senate.
>
> (2) The Committee shall have power to send for persons and documents, to move from place to place and to sit during recess.
>
> (3) The Committee shall consist of 7 senators, 4 nominated by the Leader of the Government in the Senate and 3 nominated by the Leader of the Opposition in the Senate.
>
> (4) The Committee shall elect as its chair a member nominated by the Leader of the Opposition in the Senate.

As well as inquiring into privilege matters referred by the Senate, which mainly relate to cases of alleged interference with senators or committees, the committee also reports on matters raised with the President of the Senate under Resolution 5 of the Privilege Resolutions, that is, responses by persons to statements made about them in the Senate. (See Chapter 2, Parliamentary Privilege, for a detailed analysis of these resolutions and the work of the committee.)

Apart from Resolution 5 matters, inquiries referred have chiefly been of three types: possible unauthorised disclosure of evidence or draft reports; possible misleading evidence given to a committee; or possible interference with, or adverse treatment of, witnesses as a result of their having given evidence. A list of the committee's reports since its establishment in 1966 and consequent action by the Senate is in appendix 3.

In addition to Resolution 5 matters and individual privilege cases referred by the Senate, the committee has also participated in the legislative function of the Senate. In 1994, the committee examined and reported on a private senator's bill, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994. The bill provided a mechanism for resolving conflicts between the Senate and the executive by providing for questions relating to the failure

of ministers and public servants to comply with lawful orders of the Senate, and related issues of public interest immunity, to be resolved by the Federal Court. In its 49th report (PP 171/1994), the committee concluded that such a bill was not necessary and that the Senate already possessed the powers required to resolve such conflicts.

The committee acts as an essential safeguard of the rights of senators and the Senate, and the rights and obligations of witnesses appearing before the Senate and its committees.

Appropriations and Staffing Committee

Standing order 19 provides for the appointment of a Standing Committee on Appropriations and Staffing whose role is to inquire into:

(a) proposals for the annual estimates and the additional estimates for the Senate;

(b) proposals to vary the staff structure of the Senate, and staffing and recruitment policies; and

(c) such other matters as are referred to it by the Senate.

The committee is responsible for determining the amounts for inclusion in the parliamentary appropriation bills for the annual and additional appropriations for the Senate and for reporting to the Senate on its determinations prior to the Senate's consideration of the relevant parliamentary appropriation bill. In relation to staffing, the committee is responsible for making recommendations to the President and reporting to the Senate on any matter. It is required to make an annual report to the Senate on the operations of the Senate's appropriations and staffing and related matters. The committee also oversees the funding and administration of security measures affecting the Senate.

The President, the Leader of the Government in the Senate and the Leader of the Opposition in the Senate are *ex officio* members of the committee. The Leader of the Government in the Senate may nominate another Senate minister as a representative, thereby ensuring that the government retains a presence on the committee to represent its views. The Leader of the Opposition in the Senate may also nominate a representative. There are six other members, three nominated by the Leader of the Government in the Senate and three nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators. Originally, the committee had seven members but the number was increased to nine when the committee was re-established in May 1983 (11/5/1983, J.80).

The President is the committee's chair and has the power to appoint a deputy chair from time to time. The chair, and deputy chair when acting as chair, has a casting vote when the votes are equally divided (SO 19(7)). Senators who are not members of the committee may attend and participate in its deliberations and question witnesses but may not vote (SO 19(8)).

Unlike the other domestic standing committees, the Appropriations and Staffing Committee has power to appoint subcommittees (SO 19(5)). Like the Committee of Privileges, it also has power to summon witnesses and to require the production of documents.

See also Chapter 5, Officers of the Senate: Parliamentary Administration, under Senate's appropriations and staffing, and Chapter 13, Financial Legislation, under Parliamentary appropriations.

Library Committee

The Library Committee is established by standing order 20 as follows:

> (1) A Library Committee, consisting of the President and 6 senators, shall be appointed at the commencement of each Parliament, with power to act during recess, and to confer and sit as a joint committee with a similar committee of the House of Representatives.
>
> (2) The Committee may consider any matter relating to the provision of library services to senators.

The President is the chair of the committee.

The committee invariably sits as a joint committee. Having no powers of inquiry or report, the committee generally functions as a forum in which to raise and consider matters of relevance to the operations and administration of the Parliamentary Library. It is an advisory committee and the Presiding Officers, with joint responsibility for the Library, are not bound to follow the advice of the committee.

In 2008 a joint resolution of the two Houses specified the joint committee's advisory role and detailed provisions for its composition and proceedings (13/2/2008, J.121-2, 14/2/2008, J.156).

House Committee

Like the Library Committee, the House Committee, established under standing order 21, usually sits as a joint committee with the House of Representatives House Committee. The committee's terms of reference are "any matter relating to the provision of facilities in Parliament House referred to it by the Senate or the President". Its membership and powers are comparable to those of the Library Committee and similar arrangements exist for the rotation of the chair between the President and the Speaker. The committee does not possess inquiry powers.

In 1981 the Senate House Committee conducted an inquiry into the organisation, operation, functions and financial administration of the Joint House Department. A resolution conferred powers to summon witnesses and require the production of documents for the purposes of the inquiry. After presentation of the committee's report (PP 163/1982) on 26 August 1982 (J.1030), a follow-up inquiry was referred to the committee which was again given inquiry powers for the purpose (22/9/1982, J.1093). The reference having been renewed, the committee presented an interim report in May 1983 (17/5/1983, J.93).

In 1994, the committee received a reference from the Senate to inquire into the future treatment and use of old Parliament House (19/10/1994, J.2323). A subsequent resolution authorised the committee to summon witnesses and require the production of documents (19/10/1994, J.2328).

Publications Committee

The Publications Committee, established by standing order 22, also normally sits as a joint committee with its House of Representatives counterpart. The committee has seven members but there are no formal conditions attaching to the representation of government and non-government senators.

The committee makes recommendations to the Senate on the printing of documents presented to the Senate and which have not already been ordered to be printed. An order to print a document ensures its inclusion in the series of parliamentary papers; all documents presented to the Senate are ordered to be published (SO 167). It is usual upon the presentation of committee reports to the Senate for a motion to be moved that the report be printed. The motion is not commonly moved when other documents such as petitions, government documents, delegation reports or reports of the Auditor-General are presented, and it is these which are considered by the Publications Committee at regular meetings in accordance with guidelines determined by the committee. When the Publications Committee reports to the Senate, recommending the printing of certain documents, a motion is moved, by leave, that the report be adopted (leave is required for a motion that would otherwise require notice to be given). The motion may be amended; for example, to provide for the printing of a document not recommended for printing by the committee.

When sitting as a joint committee with the Publications Committee of the House of Representatives, the committee has the following additional powers:

> (a) to inquire into and report on the printing, publication and distribution of parliamentary and government publications and on such related matters as are referred to it by the relevant Minister; and
>
> (b) to send for persons and documents. (SO 22(3))

This additional role of the joint committee arose from recommendations of the Joint Select Committee on Parliamentary and Government Publications (PP 32/1964-6) which were adopted in 1970. The investigatory function is invoked when the committee considers matters relating to Commonwealth publishing. The committee has undertaken inquiries under this function and presented several reports.

In 1993 the committee criticised the presentation of large numbers of annual reports of departments and agencies in the last sitting week before the end of the year. The basis for this criticism was that:

> [t]he Committee believes that this situation diminishes Parliament's role in ensuring the accountability of these organisations through their annual reports to Parliament by reducing the opportunity for Members and Senators to critically review and debate matters contained in the reports. (27th report, 4/5/1993, J.36)

Requirements for annual reports stipulate 31 October as the deadline for tabling. The requirements were part of the revision of accountability documentation stemming from the altered Budget timetable introduced in 1994 and provided under the *Public Service Act 1999* (see below, Conduct of inquiries, Referral of matters to committees, Estimates).

Senators' Interests Committee

Under standing order 22A(1), the functions of this committee are:

(a) to inquire into and report upon the arrangements made for the compilation, maintenance and accessibility of a Register of Senators' Interests;

(b) to consider any proposals made by senators and others as to the form and content of the Register;

(c) to consider any submissions made in relation to the registering or declaring of interests;

(d) to consider what classes of person, if any, other than senators ought to be required to register and declare their interests; and

(e) to make recommendations upon these and any other matters which are relevant.

Its membership is required to reflect as closely as possible the composition of the Senate. The committee has a specified membership, which may be varied, of eight senators, three nominated by the Leader of the Government in the Senate, four nominated by the Leader of the Opposition in the Senate and one nominated by any minority groups or independent senators. The chair of the committee is a member of the committee nominated by the Leader of the Opposition in the Senate. Provision is made for the appointment of a deputy chair and for the chair (or deputy when acting as chair) to have a casting vote when the votes are equally divided.

The committee has power to send for persons and documents and to confer with a similar committee of the House of Representatives. It does not have power to move from place to place. Its inquiry power is qualified by a requirement that any exercise of the power to send for persons and documents, or any investigation of the private interests of any person, must be agreed to by not fewer than three members other than the chair. This is intended to be a safeguard against use of the committee's powers for partisan political purposes.

The committee is required to present an annual report and may also report from time to time.

The committee was first established on 17 March 1994 following a commitment given by the government as part of a package of "accountability measures" to be pursued in the wake of the forced resignation of the Minister for Environment, Sport and Territories over the administration of the Community Cultural, Recreation and Sporting Facilities Program. The package was announced by the Leader of the Government in the Senate, Senator Gareth Evans, on 3 March 1994 (SD, pp 1453-4). Notices of motion to establish such a committee had languished on the Notice Paper for years through the 1980s and early 1990s. (See also Chapter 6, Senators, under Pecuniary interests.)

Selection of Bills Committee

The Selection of Bills Committee, which is established by standing order 24A, makes recommendations to the Senate for the referral of bills to committees. The committee considers bills introduced into the Senate or received from the House of Representatives and reports to the

Senate on whether any bills should be referred to legislative and general purpose standing or select committees.

Membership of the committee is based on an informal committee of party whips which meets each sitting day to confer on the day's program. The committee consists of the Government Whip and two other senators nominated by the Leader of the Government, the Opposition Whip and two other senators nominated by the Leader of the Opposition, together with the whips of any minority groups. The chair of the committee is the Government Whip who may from time to time appoint a deputy chair to act as chair when the chair is not present at a meeting. The chair, or deputy chair when acting as chair, has a casting vote when the votes are equally divided.

The standing order establishing the committee does not contain any criteria which the committee is required to follow in making recommendations in relation to bills. This allows the committee to take into account any grounds advanced by senators for the submission of bills to committee scrutiny.

Although few of the committee's reports have indicated the basis on which the committee has made its recommendations, the committee has commented on particular referrals and given reasons why a decision has been made or changed. In its 4th report of 1990, for example, the committee indicated that there was a difference of views about which standing committee a package of social welfare bills should be referred to. Although the committee recommended that the bills be referred to the Community Affairs Committee, an amendment was moved to the motion that the report be adopted, which would have had the effect of referring parts of one of the bills to two different committees. The President ruled on a point of order that a bill could be referred to more than one committee because, although the order of the Senate referred to bills being referred to "a committee", as a matter of interpretation the singular number is taken to include the plural. The amendment was then agreed to (11/10/1990, J.322). In its 6th report of 1990, the committee indicated that its decisions not to refer two bills to committees as proposed by the Opposition and Australian Democrats, respectively, had been taken by a majority. One of these recommendations was subsequently overturned by an amendment to the motion that the report be adopted (17/10/1990, J.351). The committee reviewed an earlier recommendation not to refer a bill in light of comments on the bill by the Scrutiny of Bills Committee (7th report of 1990, 8/11/1990, J.397). The committee now reserves disagreements for resolution by the Senate (2nd report of 2002, 20/3/2002, J.240). The committee has also reviewed recommendations not to refer bills on other grounds, including the circulation of a large number of government amendments to a bill (1st report of 1991, 14/2/1991, J.747) and representations by individual senators (3rd report of 1992, 26/3/1992, J.2124; 9th report of 2004, 23/6/2004, J.3651). The committee has also reviewed its recommendations on the timing of referrals in view of the demands of a heavy legislative program (9th report of 1990, 28/11/1990, J.487).

In practice the committee recommends the referral of a bill if a significant group in the Senate ask for the bill to be referred. Amendments to motions to adopt the committee's reports, however, are still relatively common.

The committee is required to examine all bills received from the House of Representatives or introduced into the Senate, except for bills containing no provisions other than provisions appropriating money, and, in respect of each bill, recommend whether it should be referred to a

legislative and general purpose standing committee. The committee may also refer bills to appropriate select committees. When the committee decides that a bill should be referred to a committee, it is required to recommend which committee should receive the bill, the stage at which it should be referred and the date on which that committee should report.
(See Supplement)
The committee's reports are presented after the giving of notices of motion, or at other times by leave. Amendments may be moved to the motion that the report of the committee be adopted and these may include amendments to refer additional bills to committees. Debate on the reports is limited to 30 minutes with a 5 minute limit on individual contributions.

The committee recommends the referral to committees of approximately 35 percent of all bills considered by the Senate.

Legislative Scrutiny Committees

Regulations and Ordinances Committee

The oldest standing committee, apart from the domestic or internal committees, the Regulations and Ordinances Committee undertakes the important function on behalf of the Senate of scrutinising delegated legislation to ensure that it complies with principles of personal freedom and parliamentary propriety. Established under standing order 23, the committee is charged with considering and, if necessary, reporting on, all regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character (SO 23(2)). For the nature of delegated legislation and the statutory provisions for its disallowance by the Senate, see Chapter 15, Delegated Legislation.

The committee is required to scrutinise each piece of delegated legislation to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

The membership of the committee is set at six, with three members nominated by the Leader of the Government in the Senate and three nominated by the Leader of the Opposition in the Senate or by minority groups or independent senators. The chair of the committee is elected from the members nominated by the Leader of the Government. The chair is empowered by standing order 23(7) to appoint a deputy chair to act as chair when there is no chair or the chair is not present at a meeting. By convention, the deputy chair is a non-government senator, reinforcing the high degree of non-partisanship under which the committee operates. The chair, or deputy chair when acting as chair, has a casting vote but this has been a matter of little significance in the history of the committee.

The committee has power to send for persons and documents and to sit during recess (SO 23(5)).

The committee may recommend the disallowance by the Senate of any delegated legislation not in accordance with the committee's principles. The Senate has never rejected a committee recommendation that an offending instrument should be disallowed. Because its scrutiny is confined to its criteria, the committee avoids debates on the merits of policy. This, together with its endurance, ensures that it maintains a high reputation in supporting the Senate's legislative review function.

In carrying out its role, the committee is assisted by a legal adviser appointed, with the approval of the President, pursuant to standing order 23(9). The legal adviser assists the committee to identify instruments which may offend against the committee's principles. When such an instrument is identified, the usual practice is for the chair to give notice of a motion to disallow the instrument. In accordance with the Legislative Instruments Act, notices of motion for disallowance must be given within 15 sitting days after the instrument has been tabled and the Senate has a further 15 sitting days in which to deal with the notice; if the motion is not by then disposed of, the instrument is automatically disallowed. Many notices to disallow instruments are protective notices in that they are given pending the receipt of a satisfactory explanation or undertaking from the relevant minister. Once such an explanation or undertaking is received, the chair withdraws the notice of motion, having previously notified an intention to do so. At this point, it is open to any senator to take over the notice, in accordance with standing order 78, and therefore to pursue any other issues involved in the instrument. For a more detailed exposition of this process, see Chapter 15, Delegated Legislation.

As well as scrutinising many thousands of instruments and contributing to the evolution and refinement of executive law-making, the committee has had an important role in strengthening the procedures governing the making and scrutiny of delegated legislation. In its 80th report to the Senate, for example, it gave detailed guidelines on how the committee applies its four principles (PP 241/1986; Chapter 3). These guidelines were further developed in the 83rd report (PP 377/1988), which also contained a strong recommendation that all delegated legislation subject to tabling and disallowance in the Senate be accompanied by adequate explanatory statements (not then statutorily required), a theme continued in the 85th report (PP 464/1989). The 82nd report (PP 311/1987) considered proposed amendments to the disallowance scheme contained in the legislation which were referred to the committee. The report recommended that the legislation be amended to eliminate the possibility that the statutory disallowance scheme could be by-passed by a sequence of instruments, each one repealing and remaking its predecessor. Provisions to prevent this were enacted in 1988. In 1994 and subsequently, under the Senate's procedures for referring bills to committees, the Legislative Instruments Bill 1994 was referred to the committee for inquiry and report. This bill proposed, among other things, to reform the law relating to delegated legislative instruments and to establish an electronic register of existing and future delegated legislation. The committee endorsed the objectives of the bill and generally supported its main principles, but several concerns were enumerated and the committee recommended amendments (99th report, PP 176/1994; 111th report, PP 264/2003).

A comprehensive account of the committee's first 56 years of operation and the development of its approach to issues of personal rights and liberties may be found in a statement by the then chair, Senator Collins, reproduced as appendix 2 to the committee's 85th report, referred to

above. Further information on the committee's work may be found in its subsequent general reports and in Chapter 15, Delegated Legislation under Regulations and Ordinances Committee.

Scrutiny of Bills Committee

The Senate Standing Committee for the Scrutiny of Bills is established pursuant to standing order 24, which provides (in part):

> At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
>
> (i) trespass unduly on personal rights and liberties;
> (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
> (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
> (iv) inappropriately delegate legislative powers; or
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The committee has six members, three nominated by the Leader of the Government in the Senate and three nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators. A senator nominated by the Leader of the Opposition in the Senate is the chair. In the event of an equality of votes the chair has a casting vote. The committee's history, however, shows that the question of which party has a majority has been of no significance to the operation of the committee.

Standing order 24 provides for the appointment of subcommittees and the committee's power to send for persons and documents. The committee also has power to move from place to place and to meet in private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives. The committee is authorised to appoint a legal adviser to assist the committee. Since its inception, the committee has always taken up the opportunity to engage such assistance.

When a bill is introduced in either House of the Parliament, copies are provided to the committee and to the committee's legal adviser for examination and report. The legal adviser examines each bill and provides a written report to the committee in respect of each of the bills, advising whether or not they offend (or may offend) against the committee's principles and, if so, in what way.

On the basis of the legal adviser's report, the committee's Alert Digest is drafted. That document, which is generally tabled on Wednesday of each sitting week, deals with all bills introduced in the preceding week and sets out the committee's comments on each bill. Adverse comments are set out by reference to the relevant principle. When the Alert Digest is tabled in the Senate, any comments on a bill are also formally drawn to the attention of the minister responsible for the bill, who is invited to make a response to the committee's comments. Given the time constraints which the legislative process generates, these comments are requested by the following Tuesday, in order that the committee can consider them on the following day, at its regular weekly meeting.

If the committee receives a response from a minister, that response is reproduced in a subsequent report. In its reports, which are also tabled on a weekly basis during sitting periods, the committee re-states its concerns about a bill, refers to the relevant ministerial response and then makes any comments it considers appropriate, including any differences between the committee's view and that of the minister. In reporting to the Senate, the committee expresses no concluded view on whether any provisions offend against its principles or should be amended. These are regarded as matters for the Senate to decide. The committee may report that ministers have given undertakings to initiate amendments of legislation to conform with the committee's principles.

The committee may act on requests by senators to examine particular aspects of bills before the Senate, but does not consider amendments moved to bills unless they are made (statement by the chair of the committee, SD, 19/11/2002, pp 6744-5).

Amendments are often made to bills in the Senate as a result of the committee's comments.

Particular inquiries relating to the content of legislation may be referred to the committee by the Senate (3/9/1997, J.2419; 10/12/1998, J.374; 28/6/2001, J.4439; 25/3/2004, J.3230-1; 29/11/2004, J.123). For the purposes of such inquiries the Senate may authorise the committee to hold public hearings (29/9/1997, J.2537; 1/9/1999, J.1626; 21/3/2002, J.269; 22/6/2004, J.3611). The committee may also make special reports on aspects of legislation (24/3/2004, J.3220; 4/12/2006, J.3226).

For further information on the history and operation of the committee, see *Ten Years of Scrutiny*, the proceedings of a seminar to mark the committee's tenth anniversary, 14/10/1992, J.2907.

For the difficulty presented by national uniform legislation, see Chapter 15, Delegated Legislation, under that heading.

Legislative and general purpose standing committees

(See Supplement) The legislative and general purpose standing committees, appointed under standing order 25, are the engines of the Senate's committee system. First established in 1970, together with a system of estimates committees, these committees, specialised by subject, inquire into and report on matters referred to them by the Senate.

The committees cover between them all areas of government responsibility and subjects of inquiry. Specific matters, within their subject areas, are referred to them by the Senate. Some "watching briefs" are also referred to them, for oversight of areas of government activity. They have the task of scrutinising annual reports of government departments and agencies and bills referred to them.

The main features of the committees are:

- eight committees are established under standing order 25 with each subject area similar to the responsibilities of related government departments and agencies

- the committees inquire into matters referred to them by the Senate, bills, estimates, annual reports and performance of agencies
- each committee is allocated a group of government departments and agencies by resolution
- each committee has eight members, with equal numbers from government and non-government parties, the government party having the chairs and non-government parties having the deputy chairs
- chairs have a casting vote when the votes are equally divided, as do deputy chairs when acting as chairs
- the chair, or the deputy chair when acting as chair, may appoint another member of a committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting
- senators may also be appointed as substitute members, replacing other senators on committees for specific purposes, or as participating members, who have all the rights of members except the right to vote
- provisions authorising other senators who are not members of committees to attend and participate in public hearings apply only to estimates hearings
- committees may appoint subcommittees with a minimum of three members
- subcommittees have the same powers as the full committees, including the power to send for persons and documents, travel from place to place and meet in public or in private and notwithstanding any prorogation of Parliament or dissolution of the House of Representatives
- the chairs and deputy chairs of the committees and any select committees form the Chairs' Committee, which meets with the Deputy President in the chair, to consider and report to the Senate on any matter affecting the operations of the committees
- each committee is supported by a single secretariat unit.

The committees therefore have the capacity to perform any of the Senate's roles on its behalf.

The operations of the committees are considered below under Appointment and membership of committees, Powers of committees and Conduct of inquiries.

Events leading to the establishment of legislative and general purpose standing committees and estimates committees on 11 June 1970 and their subsequent history are covered in *ASP*, 6th ed., pp 728-41; see also *Senate Committees and Responsible Government*, the proceedings of a conference held to mark the twentieth anniversary of the Senate committee system in 1990 (*Papers on Parliament*, No. 12, Department of the Senate, September 1991).

For further detail on the reference of annual reports and legislation to committees, see below under Conduct of inquiries, Referral of matters to committees. Reports of the legislative and general purpose standing committees are listed in the Department of the Senate's *Consolidated Register of Senate Committee Reports*. A supplement to the *Register* is produced annually and a consolidated version prepared at the end of each Parliament. Other information about committees may be found in the following publications:

> *Senate Legislative and General Purpose Standing Committees: The First 20 Years 1970-1990*, Senate Committee Office (tabled 20/8/1991, J.1392).
>
> Senate Standing Committee on Legal and Constitutional Affairs, *The Twentieth Anniversary of the Committee*, December 1991 (PP 298/1991).
>
> Department of the Senate, *Annual Report*, various (see particularly *Work of Committees: Supplement to the Department of the Senate Annual Report 1992-93*)*.
>
> Committee Office Information Bulletin, Nos 1-20*.
>
> *Work of Committees* (published biannually from 1994; supersedes items marked *).

Select committees

Since 1901, select committees have provided the Senate with the ability to conduct ad hoc inquiries. Select committees are inherently responsive to the needs and composition of the Senate at any time and they can react quickly to the Senate's requirements. Unlike standing committees, they cease to exist when they have reported upon the matters referred to them. (For a select committee appointed for the term of a parliament, however, see the Select Committee on Regional and Remote Indigenous Communities, 19/3/2008, J.293-5.)

In 1970 there was an expectation that the standing committees then established would avoid the need for many select committees. With the emergence and maturing of the legislative and general purpose standing committees, it was expected that most matters would be referred to standing committees because of their readiness and expertise. In its report on the committee system in 1994 (PP 146/1994), the Procedure Committee observed that select committees and their chairs would continue to be appointed on an ad hoc basis, depending on the needs of the Senate. The committee suggested, however, that the Senate might have "as a goal the existence of no more than two select committees at any time" (p. 5). At the time the report was presented there were four select committees. Within a month of the Senate's agreeing to adopt new standing and other orders giving effect to the Procedure Committee's report, a new select committee was appointed.

The Senate has continued to make use of both standing and select committees, although there have been informal attempts to limit the number of select committees operating at any one time to two. Appendix 8, Committees on which senators served, shows the numbers of committees operating in the Senate, and indicates that select committee activity has remained vigorous.

There are several reasons for this. Select committees are an extremely versatile inquiry vehicle. Because they examine single issues, select committees permit a concentration of focus and effort on those issues. While they may undertake short, sharp inquiries, select committees are also appropriate vehicles for lengthy and sustained inquiries. Whereas many legislative and general purpose committee inquiries proceed on a multi-partisan basis and result in unanimous reports, select committees often function in a highly politically charged environment in which a great deal of political heat is generated and unanimous reports are unlikely and unlooked for. Select committees can also be the vehicles for relatively uncontroversial, wide-ranging and effective inquiries into subjects which do not fit readily into existing committee arrangements.

A list of select committees from 1901-1985 may be found in *ASP*, 6th ed., at pp 745-6. Since 1985 (the currency of the 6th ed.), select committees have been appointed by the Senate as shown in appendix 9.

Usually the powers and procedures of select committees are provided for in their resolutions of appointment. Otherwise, the general provisions relating to committees in standing orders 27 to 42 apply. Select committees are required to have a specific reporting date, which may be varied by agreement of the Senate (SO 28). Unless otherwise provided in the resolution of appointment, a select committee chair has a deliberative vote only. The Senate may give a committee inquiry powers, including the power to call for persons and documents. (For a select committee to commence its inquiry on the publication of a treaty, see the Select Committee on the Free Trade Agreement Between Australia and the United States, 11/2/2004, J.2997-8.)

The standard resolution of appointment for select committees usually contains the following elements:

(1) That a select committee, to be known as the Select Committee on ..... be established to inquire into and report upon:

(a).....;

(b) .....; and

(c).....

(2) That the Committee present its final report on or before ....

(3) That the Committee consist of X Senators, as follows:

(a) X to be nominated by the Leader of the Government in the Senate;

(b) X to be nominated by the Leader of the Opposition in the Senate; and

(c) X to be nominated by minority groups or independents.

(4) That the committee may proceed to the dispatch of business notwithstanding that all members have not been duly nominated and appointed and notwithstanding any vacancy.

(5) That the committee elect as chair one of the members nominated by the ....

(6) That the chair of the committee may, from time to time, appoint another member of the committee to be the deputy-chair of the committee, and that the member so appointed act as chair of the committee at any time when there is no chair or the chair is not present, at a meeting of the committee.

(7) That, in the event of an equality of voting, the chair, or the deputy-chair when acting as chair, have a casting vote. [If not specified, SO 31 applies.]

(8) That the quorum of the committee be X members. [If not specified, SO 29 will apply.]

(9) That the committee and any subcommittee have power to send for and examine persons and documents, to move from place to place, to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and have leave to report from time to time its proceedings and the evidence taken and such interim recommendations as it may deem fit.

(10) That the committee have power to appoint subcommittees consisting of X or more of its members, and to refer to any such subcommittee any of the matters which the committee is empowered to consider, and that the quorum of a subcommittee be a majority of the Senators appointed to the subcommittee. [If not specified SO 29 will apply.]

(11) That the committee be provided with all necessary staff, facilities and resources and be empowered to appoint persons with specialist knowledge for the purposes of the committee with the approval of the President.

(12) That the committee be empowered to print from day to day such papers and evidence as may be ordered by it, and a daily Hansard be published of such proceedings as take place in public.

There are few specific requirements relating to the membership of select committees. The standing orders retain the provision for committee members to be nominated by the mover of the committee but this provision is rarely used to select named senators to serve on the committee. The more common approach is for the mover of a committee to nominate a membership formula along the lines of paragraph (3) of the model resolution of appointment above.

The number of senators on select committees has varied between five (Select Committee on Public Interest Whistleblowing, 2/9/1993, J.449) and nine (Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media, 9/12/1993, J.965). On six- or

eight-member select committees, which were once the norm, the chair was usually a government party senator with the ability to exercise a casting vote, giving the government party an effective majority. The use of an odd number membership formula tends, on the other hand, to give the balance of power on committees to minority groups who hold the balance of power in the Senate. The balance of power on a select committee is significant only when the issues under consideration are contentious and divisive. The five-member Select Committee on Public Interest Whistleblowing in 1994, for example, with two government, two opposition and one minority party senator, reported unanimously on a very sensitive issue without dividing along party lines.

Until 1994 select committee chairs were usually government senators. Exceptions were those select committees to which the government of the day failed to nominate members, leaving the chair by default to the opposition (Select Committee on National Service in the Defence Force, appointed 7/12/1950, J.203; Select Committee on Canberra Abattoir, appointed 3/6/1969, J.516-7, J.526; Select Committee on Shipping Services between King Island, Stanley and Melbourne, appointed 3/5/1973, J.145-7). In 1982, the independent Senator Harradine chaired the seven-member Select Committee on Industrial Relations Legislation (appointed 5/5/1982, J.898-901) and in 1983 Senator Peter Rae, who had been the chair of the Finance and Government Operations Committee before the change of government that year, chaired the Select Committee on Statutory Authority Financing, which was appointed to complete an inquiry begun by the standing committee under Senator Rae's chairmanship (appointed 22/4/1983, J.38-9). Whereas the resolution appointing the Select Committee on Industrial Relations Legislation provided for the chair to be elected from the members of the committee, the resolution appointing the Select Committee on Statutory Authority Financing named Senator Rae as chair of the committee. The chair of the Select Committee on Superannuation and Financial Services was appointed by the Senate (30/9/1999, J.1800). In 1992 Australian Democrat Senator Coulter was elected chair of the Select Committee on the Functions, Powers and Operation of the Australian Loan Council (3/11/1992, J.2936). In 1993, opposition chairs were elected to the select committees on Public Interest Whistleblowing, and Certain Foreign Ownership Decisions in relation to the Print Media. Also in that year, in anticipation of the government chair of the Select Committee on Superannuation standing down from the position, a resolution was agreed to by the Senate providing for his successor and the deputy chair of the committee to be "allocated among the members of the committee by agreement between the Leader of the Government in the Senate and the Leader of the Opposition in the Senate and the Leader of the Australian Democrats, and, in the absence of agreement duly notified to the President, the allocation of the chair and deputy chair shall be determined by the Senate" (13/5/1993, J.150). In the event, determination by the Senate was unnecessary as the Leaders agreed that the new chair should be an opposition senator who had previously been deputy chair of the committee. In 1995 the committees on ABC Management, Aircraft Noise, Land Fund Bill and Land Fund Matters all had non-government chairs. The Select Committee on the Victorian Casino Inquiry, appointed in 1996, had a non-government majority and elected an opposition senator as chair. Six select committees established in 2008, on agriculture and related industries, state government financial management, housing affordability, regional and remote indigenous communities, fuel and energy and the national broadband network, had non-government majorities and Opposition chairs (14/2/2008, J.145-8; 19/3/2008, J.293-5; 25/6/2008, J.626-32).

Following the adoption of recommendations in the Procedure Committee's First Report of 1994 (PP 146/1994), the sharing of select committee chairs and deputy chairs became a standard

practice, reflecting formal arrangements for the sharing of standing committee chairs and deputy chairs.

Estimates committees

Estimates committees no longer exist as a separate category of committee, but the estimates scrutiny functions they performed are carried out by the legislative and general purpose standing committees. When performing those functions the committees are still commonly referred to as estimates committees. Like legislative and general purpose standing committees, estimates committees came into existence on 11 June 1970 as part of the modern committee system in the Senate. The estimates scrutiny role of the committees is provided by standing order 26, under which the old estimates committees used to be established.

Estimates scrutiny is an important part of the Senate's calendar and a key element of the Senate's role as a check on government. The estimates process provides the major opportunity for the Senate to assess the performance of the public service and its administration of government policy and programs. It has evolved from early efforts by senators to elicit basic information about government expenditure to inform their decisions about appropriation bills, to a wide-ranging examination of expenditure with an increasing focus on performance. Its effect is cumulative, in that an individual question may not have any significant impact, but the sum of questions and the process as a whole, as it has developed, help to keep executive government accountable and place a great deal of information on the public record on which judgments may be based.

Procedures currently applying to the consideration of estimates are as follows. Twice each year, particulars of proposed expenditure and tax expenditure statements are referred to the committees. The particulars are derived from the two sets of appropriation bills normally introduced twice each year. Portfolio Budget Statements, tabled in May, and Portfolio Additional Estimates Statements, tabled in February, assist the committees in their examination of the particulars. Statements of expenditure from the Advance to the Minister for Finance are also referred to the committees. For the consideration of additional estimates in February, committees also have access to other budget statements tabled with the particulars. Annual reports of agencies, required to be tabled by 31 October, are also available for consideration in the context of an agency's performance over the previous financial year.

Committees hold initial hearings at which the responsible minister, or representative, and officers appear to answer questions on their respective programs. (For membership arrangements, see below.) Although the Senate permitted parliamentary secretaries to appear before estimates committees in the past, an increase in the number of ministers in the Senate following the 1993 election led the Senate to agree to an order ending this practice (sessional order 6/5/1993, J.100; permanent order 11/11/1998, J.54). This prohibition was subsequently relaxed to allow parliamentary secretaries to represent ministers other than Senate ministers in relation to the latter's own responsibilities (6/2/2001, J.3860). Although it is desirable that a minister be present at the hearings, it is not required by standing orders.

Days are set aside for examination of the estimates and on such days the Senate usually does not sit (in earlier years it adjourned early) to enable the committees to meet. On occasions

committees considering estimates have been authorised to meet while the Senate was sitting (29/5/1973, J.208; 23/3/1994, J.1474). When the Senate was "recalled" under standing order 55 on 3 November 2005, scheduled estimates hearings were authorised to proceed (3/11/2005, J.1300-1).

The committees are free to set additional times for estimates hearings if they so choose. Any such additional hearings would have to occur before the time set by the Senate for the committees to report. As there is no requirement for the committees to report after the supplementary hearings (see below) such additional hearings could be held at any time up to the next round of regular hearings. Thus, in the supplementary hearings in early November 2006, the Economics Committee decided to hold an additional hearing later in November.

Committees have been directed by the Senate to hold supplementary hearings on estimates (7/2/1995, J.2895-7; 4/11/1996, J.836; 10/4/2000, J.2582-3, 2585; 28/6/2000, J.2958; 28/11/2000, J.3594-5; 12/3/2002, J.154-6; 25/11/2003, J.2709-10; 16/6/2004, J.3473). **(See Supplement)**
The committees have power to call for persons and documents and may also move from place to place, although no committee considering estimates has yet done so.

Estimates hearings are required to be in public and the committees when considering estimates are not empowered to receive confidential material in the absence of a specific resolution of the Senate to that effect. All such material received by a committee is automatically published. (See also below, under Power to take evidence in private.) Although the Senate in 1981 agreed to consider whether estimates committees should be able to take evidence in camera (11/3/1981, J.142-3; 28/4/1981, J.214), the Procedure Committee has on several occasions recommended against such a change, and the Senate has accepted those recommendations (Standing Orders Committee, report of March 1980, PP 50/1980, p. 3; Procedure Committee, 1st report of 1995, PP 171/1995, pp 4-5; 2nd report of 1997, PP 460/1997, p. 1).

Similarly, because estimates hearings are required by standing order 26 to proceed by way of calling on items of proposed expenditure and seeking explanations from ministers and officers, the committees are not empowered, in the course of estimates inquiries, to adopt inquiry techniques which are available to them in their other activities, such as showing video recordings or undertaking on-site inspections.

No more than four committees may meet in public simultaneously. This provision is intended reasonably to accommodate the interests of senators in the estimates of several departments.

At each hearing, the committee chair calls on the items of proposed expenditure, usually by reference to the programs and subprograms for which funding is described in the Portfolio Budget Statements or Portfolio Additional Estimates Statements. The estimates are then open for examination (SO 26(4)). Committees may also consider the annual reports of departments and budget-funded agencies in conjunction with their consideration of estimates.

Most questions are answered at the hearings, but witnesses may also choose to take questions on notice and provide written responses after the hearing. Members and participating members may also place questions on notice. Such questions are lodged with the secretaries of the committees,

and are distributed to members of the committees and to relevant departments (SO 26(14)). As any senator may participate in estimates proceedings, any senator may place questions on notice. Once questions are lodged they are in the possession of the committees and cannot be withdrawn by the senators who lodged them. There is limited time for estimates questions on notice to be lodged, and the withdrawal of questions after they are lodged could deprive other senators of the right to have the questions answered.

Questions may be lodged only while there are estimates proceedings in process, that is, from the time of the reference of the main or additional estimates to the committees to the time when the committees report, or, in the case of the supplementary hearings on the main estimates (see below), from the expiration of the deadline for the notification of matters to the time when the committees conclude their hearings or report if they present reports. Questions lodged during the supplementary hearings must relate to matters notified for consideration in those hearings.

A senator, on any day after question time in the Senate, may seek an explanation of, and initiate a debate on, any failure to answer an estimates question on notice within 30 days after the deadline set by the committee for answering such questions (SO 74(5), as amended on 9 November 2005).

In November 2004 the Senate adopted a special procedure whereby questions on notice were substituted for supplementary estimates hearings (18/11/2004, J.78).

The committees when considering estimates are authorised to ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure. Usually the committees leave it to the minister to determine which witnesses attend, although they have the power to call particular witnesses if they so choose. On many occasions in the past, however, ministers have cooperated with committees in agreeing to the attendance of particular witnesses.

Although the reference in standing order 26(5) to ministers or officers might be taken to limit estimates hearings to public bodies and office-holders, non-government bodies in receipt of public funds have appeared by agreement to answer questions.

The only substantive rule of the Senate relating to the scope of questions is that questions must be relevant to the matters referred to the committees, namely the estimates of expenditure. Any questions going to the operations or financial positions of departments or agencies are relevant questions. The Senate on 22 November 1999 endorsed the views of the Procedure Committee on the relevance of questions at estimates hearings. This followed earlier disputes between committee members and ministers about relevance of questions. The Procedure Committee adopted advices provided to those members by the Clerk of the Senate (22/11/1999, J.2008-9; supplementary estimates report of the Rural and Regional Affairs and Transport Legislation Committee, 30/6/1999, PP 154/1999; for further developments in this case, see 6/4/2000, J.2567; 13/4/2000, J.2637-9; 19/6/2000, J.2802). As the estimates represent departments' and agencies' claims on the Commonwealth for funds, any questions going to the operations or financial positions of the departments and agencies which shape those claims are relevant. Annual reports are statements to Parliament of the manner in which departments use the resources made available to them, and therefore references to annual reports are relevant. When the budget cycle was changed so that the main estimates were

presented in May instead of August, this necessarily involved the most relevant annual reports not being available at the time of the main estimates hearings but becoming available at the time of the additional estimates hearings. It was therefore accepted that annual reports would be referred to during the additional estimates hearings. In effect, annual reports disclose the financial positions of departments and their activities leading to their financial positions at the very time when departments are seeking additional funds as a result of their financial positions.

An important factor is the availability of audit reports and the participation of officers of the Australian National Audit Office (ANAO) in committees' examination of programs which have been subject to efficiency and project audits by ANAO. Guidelines for provision of assistance by the Auditor-General to committees considering estimates were drawn up in 1986 following a meeting between the Auditor-General and the President and chairs of the former estimates committees. The Auditor-General produces regular reports on departments and their financial statements, on individual efficiency and project audits, and special audits. The chief assistance provided by the Auditor-General is by way of briefings for committees on reports, and throughout the estimates process if required. Although ANAO staff do not attend estimates hearings as a matter of course, it is open to committees to invite the Auditor-General to provide comment, or nominate ANAO officers to provide comment, on matters relevant to audit reports raised during committee hearings. On three occasions, this assistance has taken the form of ANAO officers appearing as witnesses before committees considering estimates, to provide comment on audits conducted within the relevant program. During its consideration of the 1993 Budget estimates, Estimates Committee A invited ANAO officers to give evidence on two separate organisations, the Australian Quarantine and Inspection Service and the Aboriginal and Torres Strait Islander Commission, both of which had been subject to recent audits. In its report to the Senate, tabled on 7 October 1993, the committee commented that the provision of public evidence by ANAO officers had been helpful to the consideration of the proposed estimates. On another occasion, in 1989, ANAO officers gave evidence to Estimates Committee E on audits conducted on the Aboriginal Development Commission and Department of Aboriginal Affairs (Estimates Committees Debates, 3/5/1989, pp E201-20).

After initial hearings have been completed, the committees present reports to the Senate. They are also required to set a date for receipt of answers to questions taken on notice prior to and at the hearings. In relation to the annual estimates, but not the additional estimates, the committees are required to set a date or dates for supplementary hearings to consider answers to questions on notice or any other matters relating to the proposed expenditure of which members and participating members have given notice that they wish to pursue. The date set for the commencement of supplementary meetings must not be less than 10 days after the date set for receipt of answers to questions taken on notice. In practice in recent years, the Senate has set the dates for supplementary hearings. Senators must give notice of matters they wish to pursue not less than three working days before the date for commencement of the supplementary meetings. (For a resolution of the Senate criticising delay in answering questions on notice, see 29/4/1999, J.809.)

Matters considered at supplementary hearings are confined to those matters of which notice has been given. Committees may present further reports to the Senate containing recommendations for further action by the Senate, although they are not required to do so. There is no limit to the

number of supplementary hearings a committee may hold, but after the time for giving notice of matters to be raised at supplementary meetings has expired, there is no further opportunity to give notice of additional matters. In a report on its supplementary meetings in November 1993, Estimates Committee F recommended that the Procedure Committee examine a system for giving notice of matters in respect of a particular portfolio not less than three days before the commencement of supplementary hearings on that portfolio. The recommendation was adopted by the Senate after it had been moved as a second reading amendment to the appropriation bills by the chair of Estimates Committee F (18/11/1993, J.821). The Procedure Committee declined to recommend a change to the procedures on the grounds that the existing arrangements offered clarity and simplicity and the proposed change would make programming of supplementary meetings more difficult (3rd Report of 1993, PP 450/1993, p. 4).

In 2001, on the recommendation of the Procedure Committee, supplementary hearings were confined to the annual appropriation bills, and abolished in respect of the additional appropriation bills. The rationale of this change was that, as the budget cycle had developed, the supplementary hearings for the additional appropriation bills were occurring very near to the main round of the annual appropriation hearings, when unlimited questioning of departments and agencies is possible.

Procedures applying to Senate committees generally apply to estimates hearings in so far as those procedures are consistent with standing order 26. For example, the procedures for the protection of witnesses in Senate Privilege Resolution No. 1 (see Chapter 17, Witnesses, under Protection of witnesses) apply to estimates hearings, but as standing order 26 requires that estimates hearings be held in public, the provisions in those procedures relating to taking evidence in camera cannot apply to estimates hearings.

It is not necessary for the committees to have completed their supplementary hearings before debate on the appropriation bills resumes, or, indeed, before the bills are passed. Normally, however, the hearings are completed before the bills proceed.

Supporting documentation provided by departments is significant to the estimates scrutiny process, and has evolved with the process. From the early 1970s, departments provided explanatory notes to the committees examining estimates. These notes were rudimentary at first and were provided informally to members of estimates committees. As a result of pressure from committees the documents were formally tabled in the Senate from 1976. The introduction of program budgeting in the public sector in the 1980s saw the documents transformed from explanatory notes to program performance statements which provided explanations according to the new program structure and which were also promoted by the Department of Finance as an accountability tool, used for improving program management and evaluation, as well as for providing information to the Senate. Documentation underwent a further change in 1994, when the movement of the Budget from August to May meant that documentation provided for Budget estimates (Portfolio Budget Statements) could not provide the extent of performance information that the Senate was used to. Performance information is now found in annual reports of agencies, required to be tabled by 31 October each year, and which may be examined by the committees when considering estimates. The move to output-based accrual budgeting reinforced the requirement for detailed explanatory material on departmental activities. The committees considering estimates have thus encouraged improvements in the quality, nature and

transparency of information presented to Parliament. (See also below, under Referral of Matters to committees – estimates.)

For the history of changes to the estimates scrutiny process, see Chapter 13, Financial Legislation, under History of expenditure scrutiny.

Joint committees

Joint committees are committees consisting of members of both Houses appointed by both Houses. They are established where it is considered that matters should be the subject of simultaneous inquiry by both Houses.

Joint committees have some potential difficulties in a bicameral legislature. In the Australian situation, in which one House is rigidly controlled by the ministry, the use of joint committees tends to prevent the Senate exercising a review and second opinion function and thereby subvert the concept of bicameralism. The effect is worse when there is unequal representation of the Houses; many of the joint committees on which senators serve (see Appendix 8) have unequal numbers of senators and members. Their value to the Senate must, on that ground alone, be queried. (For the repeated refusal of a joint committee, the Joint Standing Committee on Treaties, to consider a matter referred to it by the Senate, see SD, 20/6/2005, pp 61-4.)

The Constitution does not mention joint committees and, by referring in section 49 to the powers, privileges and immunities of each House, may exclude joint committees from the inheritance of the powers, privileges and immunities provided by that section. For this reason, when the Parliament contemplated the establishment of joint committees in 1913 to examine public works proposals and government accounts, it was thought to be necessary for them to be established by legislation so that the committees could, among other things, be empowered to take evidence on oath. (The doubt about the legal status of joint committees was cleared up by the *Parliamentary Privileges Act 1987*: see Chapter 2, Parliamentary Privilege.) The establishment of joint committees by statute, however, brought with it further difficulties. The inclusion in statutes of provisions relating to the functions, composition, powers and proceedings of the committees may make their operations justiciable. In the case of the early joint statutory committees, the Public Works and Public Accounts Committees, the enabling statutes make provision for such details as the quorums and voting procedures of the committees. This may mean that the operations of the committees are vulnerable to legal challenge (in this connection, see *Corrigan v Parliamentary Criminal Justice Committee* 2001 2 Qd R 23; although the matter there raised was held to be non-justiciable, other actions by a committee under statutory authority may be amenable to judicial review). The inflexibility of providing parliamentary procedures by statute also gives rise to difficulties. An example is a legal opinion given in respect of the Public Accounts Committee in 1982 which supported the view, rejected by the Senate, that the committee did not need the permission of the Senate to meet while the Senate was sitting, notwithstanding a general prohibition to this effect in the Senate standing orders. (Report of Standing Orders Committee, October 1983, PP 117/1983, pp 1-4; 1/3/1984, J.687.)

The difficulties generated by the early models of statutory committees have been ameliorated to a large extent by the adoption of a different approach to statutory committees in later models. In these models, committees are established by statute and provisions for membership and

committee functions are contained in the statute. The statute also provides, however, that all matters relating to the powers and proceedings of the committee shall be determined by resolution of both Houses. This approach reduces the matters relating to joint committees that may be justiciable and reserves for the Houses the appropriate task of determining the powers and proceedings of their committees which are therefore probably not justiciable.

It is apparent that notwithstanding their problematic character, joint committees will continue to be used. There is now a significant group of joint statutory committees whose role is to monitor the operations of sensitive agencies or complex areas of the law. The joint committees on which senators serve are:

Joint statutory committees
Australian Commission for Law Enforcement Integrity
Australian Crime Commission
Broadcasting of Parliamentary Proceedings
Corporations and Financial Services
Intelligence and Security
Public Accounts and Audit
Public Works

Joint standing committees
Electoral Matters
Foreign Affairs, Defence and Trade
Migration
National Capital and External Territories
Treaties

By convention, joint committees follow Senate standing orders where their statutes or resolutions of appointment are silent. Procedures applying to joint committees are therefore referred to throughout the remainder of this chapter under appropriate headings.

Appointment and membership of committees

Standing committees are appointed at the beginning of each Parliament pursuant to standing orders. The life of a Parliament is determined by a general election for the House of Representatives, which usually also corresponds with a periodical election for the Senate (see Chapter 4, Elections, and Chapter 7, Meetings of the Senate).

Membership and chairs of committees

Members are appointed to committees in accordance with any membership formula contained in the relevant standing order or resolution, on motion, usually by a minister, following nomination by party leaders in letters to the President. Membership of the legislative and general purpose standing committees is equally shared between government and non-government senators but the chair has a casting vote when the votes are equally divided.

The provisions governing the appointment of committees usually provide for the chair to be elected by the committee, subject to the prescription as to the party from which the chair is to come. Occasionally the chair is designated by the Senate (30/9/1999, J.1800).

A committee may at any time replace its chair, subject to the governing requirements of the Senate. If a senator is appointed to a committee as a substitute for a particular inquiry for the senator who is the chair (see below, under Substitute and participating membership) the committee may substitute another of its members (not necessarily the senator substituted by the Senate) for the chair for that inquiry. The same applies to the deputy chair. This does not mean that there are two chairs or deputy chairs at any time, but that there are different chairs or deputy chairs for the period of the committee's consideration of the different inquiries.

In the legislative and general purpose standing committees the chair, or the deputy chair when acting as chair, may appoint another member of the committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting (SO 25(9)).

Membership of committees to which the Leader of the Opposition or any minority groups or independent senators may nominate members is normally determined by agreement. Where agreement cannot be reached the question of representation on a committee is determined by the Senate using the provisions in standing orders 25(6), 27(1) and (2), as appropriate, in conjunction with standing order 163 which sets out the mechanism for holding a ballot. Where other standing orders do not apply, standing order 27(1) provides a general mechanism for senators to be nominated for places on committees and, if one senator so requires, to be selected by ballot. Standing order 27(2) provides that a ballot may be held in selecting a senator to replace a senator discharged from a committee. Although the ballot provisions are occasionally used, membership is determined in most cases by agreement.

Membership of committees may change during their life. When this occurs a motion is moved, usually by a minister by leave without notice, discharging the former member and appointing a new member nominated by the relevant party leader or independent in a letter to the President. If a place becomes vacant by virtue of a committee member ceasing to be a senator, there is no requirement for a motion to discharge the former member.

Under standing order 25 the chairs of the legislative and general purpose standing committees must be chosen from the government party members, and the deputy chairs from the non-government members. For procedures for electing chairs and deputy chairs, see below under Conduct of proceedings, Meeting and election of chair.

Substitute and participating membership

Substitute members are members appointed to committees in substitution for other members in relation to particular inquiries (SO 25(7)).

The practice of substitute membership developed, particularly in respect of estimates committees, to enable senators with a special interest in certain policy areas to contribute to the work of committees of which they were not members. Although the standing orders governing the operation of legislative and general purpose standing committees and estimates committees

provided for senators who were not members of committees to participate in their public meetings (in the case of legislative and general purpose standing committees) and deliberations (in the case of estimates committees), their role was limited to asking questions and they were precluded from voting. Substitute membership, on the other hand, although not defined in standing orders, conferred full membership rights on the senator for the purposes of the matter for which they were a member, including the right to attend private meetings, make contributions to reports and vote. Mainly used by the Opposition to enable wide participation of its members in estimates committees, these practices have also been used to enable senators to participate in particular inquiries by legislative and general purpose standing committees.

The procedure for participating membership was written into standing order 25 in 1994.

A difficulty arose in 1993 when the standing committee on Industry, Science, Technology, Transport, Communications and Infrastructure considered a matter of privilege arising from one of its inquiries in which there were two substitute members participating. On advice by the Clerk of the Senate, the standing committee excluded the substitute members from consideration of the matter of privilege, acting on the principle that substitute members should act as members of a committee only in respect of matters that were wholly part of the inquiry for which they were substitute members. The matter of privilege was not wholly part of the inquiry but related to the general operations of the committee, governed by Privilege Resolution 1(18), and should therefore be determined by the permanent membership. In its 3rd report of 1993 (PP 450/1993), the Procedure Committee supported these principles, emphasising that it was open to the committee to consult with substitute members on any matter, regardless of their right to vote.

In respect of the matters for which the substitute member is appointed, the substitute member replaces the other member, who ceases to be a member of the committee for those matters. It is not open to the other member then to participate in committee proceedings on those matters, unless he or she is appointed as a participating member (see below).

Participating members of committees are appointed as such by the Senate, and have all the rights of members except the right to vote (SO 25(7)).

Participating members are counted for the purpose of forming a quorum if a majority of members of a committee is not present.

Participating membership does not have effect for estimates inquiries. In relation to estimates hearings, senators who are not members and who attend meetings of the committees may question witnesses and participate in the deliberations of a meeting, but this does not empower them to move motions at meetings (SO 26(8)). On the other hand, in relation to committees' proceedings other than in respect of estimates hearings, participating members have all the rights of members of committees, except the right to vote, and therefore may move motions in the committees (SO 25(7)(c)).

As well as formalising the practice of substitute membership, the 1994 amendments of the standing orders introduced the concept of participating membership. These amendments replaced the former provisions relating to legislative and general purpose committees, allowing any senator to participate in public meetings, with a regime under which only members or

participating members can take part in committee proceedings. Whereas substitute members have full membership rights in respect of the matter for which they are a member, participating members have all the rights of members in relation to all matters before the committees except the right to vote. They do not possess any rights which members of a committee do not possess; for example, they may not participate in the proceedings of a subcommittee unless the committee has conferred that right on all its members. Participating membership, like substitute membership, does not alter the balance of party numbers on a committee as provided in the standing orders.

Participating membership was initially conceived as a means of facilitating participation in selected inquiries by independents and members of minor parties. It was argued that the opportunities for government and opposition senators to make substitute arrangements were not available to the independents and minor parties (SD, 24/8/1994, pp 171-2, 178, 189). In debate on the changes to standing orders relating to committees on 24 August 1994, the opportunity for participating members to contribute to reports was particularly emphasised. Concern was expressed, however, that participating members may attach conclusions and recommendations to reports without having participated significantly in the committee's evidence-gathering and analysis; and that unanimous and delicately negotiated reports could therefore be compromised. In view of these concerns, a possible review of these arrangements was foreshadowed should any difficulties arise, but the review has not proved necessary.

Soon after the implementation of this system it became apparent that the Opposition, rather than using substitute arrangements, intended to use the concept of participating membership to compensate for the loss of the ability of non-members to attend hearings and ask questions. With many senators nominating as participating members of a large number of committees, the system threatened to become unwieldy and the fundamental features and benefits of committees as small and flexible bodies were challenged. In its First Report of 1995 (PP 171/1995), the Procedure Committee recommended that the former rule, allowing any senator to participate, be restored for estimates hearings.

Participating or substitute membership on committees other than legislative and general purpose standing committees may be arranged through a special resolution of the Senate. In May 1994, for example, Senator Kernot was appointed as an additional non-voting member of the Committee of Privileges for its inquiry into her private member's bill, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (12/5/1994, J.1684). In September 1994, Senator Vanstone was appointed as a substitute member of the Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies for its inquiry into the Classification (Publications, Films and Computer Games) Bill 1994 (21/9/1994, J.2202), the first time this select committee had received a bill under the selection of bills procedures. Participating membership was extended to select committees established in 2008 (14/2/2008, J.145-8; 15/5/2008, J.419-20; 25/6/2008, J.626-32).

(See Supplement) A temporary order agreed to on 14 August 2006, with effect on 11 September 2006, allows a member of a legislative and general purpose standing committee who is unavailable for a meeting to appoint a participating member as a temporary substitute. If a member is incapacitated or unavailable, the relevant party or group leader may make the temporary appointment. (14/8/2006, J.2482)

The standing order relating to the Appropriations and Staffing Committee allows senators who are not members of the committee to attend meetings, participate in deliberations and question witnesses but not vote. This provision recognises senators' rights to participate without restriction in deliberations involving the affairs of the Department of the Senate.

President and Deputy President on committees

The President is excluded from membership of committees other than those of which the President is an ex officio member (SO 27(3)). Thus, a senator upon election as President ceases to be a member of any committees other than those of which the President is an ex officio member. There is no such restriction on the Deputy President. If the Deputy President is elected to serve on any committee but declines to do so, another senator shall be elected (SO 27(4)). The Deputy President chairs the Committee of Chairs established under standing order 25(10).

Senators on committees before taking their seats

Arrangements for membership may also take into account the forthcoming commencement of terms of new senators. A period of four to six weeks frequently elapses between the commencement of senators' terms on 1 July and the date on which they are sworn, and the question arises whether a senator who has not taken the oath or affirmation pursuant to section 42 of the Constitution may participate in the proceedings of a committee, and may be appointed, prospectively, as a member of a committee. The view taken and the practice followed by the Senate is that, while a senator cannot participate in the proceedings of the Senate until that senator has taken the oath or affirmation under the Constitution, a senator can participate in the proceedings of a Senate committee from the date of becoming a senator and may be prospectively appointed by the Senate as a member of the committee (see, for example, 27/5/1993, J.293-4; 28/6/1996, J.446-7; 30/6/1999, J.1402-4; 27/6/2002, J.546-50).

Ministers and parliamentary secretaries on committees

There is nothing in the rules of the Senate to prevent ministers or parliamentary secretaries serving on committees. Ministers usually do not do so, and parliamentary secretaries only occasionally. Their presence on committees could give rise to questions of conflict of interest or bias (see below), for example, where committees are inquiring into actions of government for which ministers and parliamentary secretaries, as members of the executive government, are individually or collectively responsible.

Conflict of interest

Standing order 27(5) provides that a senator shall not sit on a committee if the senator has a conflict of interest in relation to the inquiry of the committee. This standing order was the subject of a statement by President Beahan on 24 February 1994 (SD, 24/2/1994, pp 1036-7). It had been suggested that a senator had a conflict of interest because he had written newspaper articles critical of a committee of which he was a member, without identifying himself as such. The President indicated that the standing order applies to a situation in which a senator has a private interest in the subject of the committee's inquiry which conflicts with the duty of the senator to

participate conscientiously in the conduct of the inquiry, an example being a senator holding shares in a company, the activities of which are under inquiry. There is no precedent of the Senate enforcing this rule by removing a chair or member of a committee, or disagreeing with an appointment.

Disqualification for bias

Occasionally it is suggested that senators should not serve on committees because it may appear that they have prejudged matters under inquiry or cannot bring an unbiased mind to those matters.

The question of whether members of the Committee of Privileges should be disqualified because, having been involved in earlier inquiries relevant to the committee's current inquiries, they may have pre-judged the issues, arose in relation to the committee's 17th and 18th reports. In its 18th report (PP 461/1989), the committee reaffirmed the principle that it was for individual senators to determine for themselves whether they should disqualify themselves in any particular circumstances (p. 129). Advice from the Clerk of the Senate, tabled with the report, cited several cases where members and senators had withdrawn or not withdrawn from inquiries in response to suggestions that they may have pre-judged the issues before those inquiries, and concluded "that questions concerning the service of members on a committee where they may be regarded as not entirely impartial should be decided by the individual members concerned, and that there is no general rule or convention which may be applied to all cases" (advice dated 1/2/89, published in Volume 3 of committee documents tabled with the 18th report of the Committee of Privileges, 16/6/1989, J.1921; see also advice dated 18/1/1989). In the advice provided to the committee, the following examples were cited:

- A challenge was foreshadowed to three members of the Select Committee on Allegations Concerning a Judge who had been members of the earlier Select Committee on the Conduct of a Judge. The three members did not disqualify themselves and the committee reported that the members considered their previous service "did not preclude them from making a proper and unbiased judgment on the matters before this committee on the basis of the evidence to be heard by it, or that they had any sense of vested interest in maintaining their earlier decision" (Select Committee on Allegations Concerning a Judge, report, PP 271/1984, p. 3). The challenge did not eventuate, nor was the report queried because the three senators had participated in the inquiry.

- Senator Wheeldon did not participate in a Committee of Privileges inquiry into the unauthorised publication of a proposed report by a select committee of which he was a member, but another member of the select committee, Senator Branson, served on the Committee of Privileges, stating that he did not think it necessary for him to withdraw unless something arose to alter that decision (Committee of Privileges, 1st report, PP 163/1971, p. 4).

As was pointed out in the advice to the Privileges Committee, senators are called upon to express views and make decisions on many matters, and it would be too restrictive to expect them to disqualify themselves from any inquiry into matters on which they had expressed views or made decisions.

Suspension from the sittings of the Senate

There is nothing in the standing orders to prevent a senator who has been suspended from the sittings of the Senate from attending a committee meeting (see Chapter 10, Debate, under Disorder).

Powers of committees

The power of each House of the Parliament to conduct inquiries is recognised as intrinsic to and essential for a legislature (see Chapter 2, Parliamentary Privilege, under Power to conduct inquiries). For the most part, the Senate does not conduct its own inquiries but delegates this function, along with the necessary powers, to committees.

Committee powers normally include the following:

- to send for persons and documents (that is, to summon witnesses and require the production of documents);
- to move from place to place;
- to take evidence in public or private session;
- to meet and transact business notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives; and
- to appoint subcommittees.

Committees possess some or all of these powers, depending on their functions. Legislative and general purpose standing committees, for example, when conducting estimates hearings may hear evidence only in public and may not take evidence in camera.

Power to call for persons and documents

Legislative and general purpose standing committees and most select committees possess the full range of inquiry powers, enabling them, if necessary, to summon witnesses and order the production of documents. A person failing to comply with a lawful order of a committee to this effect may be found to be in contempt of the Senate and, in accordance with section 7 of the *Parliamentary Privileges Act 1987*, subject to a penalty of up to six months' imprisonment or a fine not exceeding $5 000 for a natural person or $25 000 for a corporation. While committees have power to send for persons and documents, they do not have power to deal with the consequences of a failure to comply with such an order. The committee's role ends with reporting the matter to the Senate to deal with the possible contempt. For a detailed discussion of how the Senate deals with such matters, see Chapter 2, Parliamentary Privilege.

The power of the Senate and its committees to compel the attendance of witnesses, the giving of evidence and the production of documents is virtually unlimited, subject to some possible

qualifications. As discussed in Chapter 2 and Chapter 17, there is probably an implicit limitation on the power of the Senate to summon members of the other House or of a state or territory legislature, and this limitation may extend also to all state officers. It may also be held that the investigatory power of committees is limited to matters within Commonwealth legislative power as delineated by the Constitution. These possible limitations have not been adjudicated. These aside, the extent of the power has been frequently restated although the power itself has been seldom used (see, for example, the 49th report of the Committee of Privileges, PP 171/1994).

Major consideration of the extent of the powers of the Senate and its committees to compel evidence occurred in relation to the efforts of two select committees in 1993 and 1994. The Select Committee on the Functions, Powers and Operation of the Australian Loan Council reported to the Senate in its second report in September 1993 that it had met with "considerable resistance on the part of some prospective witnesses" (Second Report, PP 153/1993, p. 1). There followed a list of members of state parliaments who had declined invitations to appear before the committee. The Treasurer, a member of the House of Representatives, had also declined an invitation. The committee had earlier received advice from the Clerk of the Senate that it could not summon as witnesses members of the House of Representatives and of the houses of state parliaments. In its second report, the committee recommended that the Senate request the various houses to require the attendance of their members before the committee to give evidence. A resolution was agreed to but the requests were declined (see Chapter 17, Witnesses, under Members or officers of other Houses).

The Select Committee on Foreign Ownership Decisions in Relation to the Print Media was established on 9 December 1993 to examine government decisions in 1991 and 1993 in relation to the percentage of foreign ownership of newspapers, and the role of the Foreign Investment Review Board (FIRB). In pursuing its inquiry the committee encountered government claims of public interest immunity, formerly known as executive or crown privilege. (For the major discussion of this topic, see Chapter 19, Relations with the Executive Government, under Claims by the executive of public interest immunity.) The Treasurer refused to release key documents prepared by FIRB and also issued directions to certain current and former FIRB officers not to give information to the committee about the 1991 and 1993 decisions. The committee issued a former Prime Minister and a former Treasurer with summonses to appear; another former Treasurer responded to an invitation to appear and the former Prime Minister appeared a second time at his own request. The documents were not produced to the committee.

The use by committees of inquiry powers through the issuing of a summons for a person to appear or a document to be produced is the exception rather than the rule. Committees usually invite witnesses to attend and give evidence, and witnesses usually attend voluntarily. Resolution 1 of the Senate's Privilege Resolutions of 1988 require committees to proceed by way of invitation unless circumstances warrant otherwise.

It would not be fair for a witness who appears voluntarily by invitation to be required to answer a question; only witnesses under summons should be so required. In 1971 when a witness appearing voluntarily before the Select Committee on Securities and Exchange declined to answer a question, the witness was subsequently summoned to appear and then required to answer the question.

The Senate may order particular witnesses to appear before committees (7/2/1995, J.2895-7; 6/6/1995, J.3364-5; 22/10/1997, J.2673; 21/10/1999, J.1966; 10/4/2000, J.2582-3, 2585; 28/11/2000, J.3594-5; 19/6/2001, J.4322; 12/3/2002, J.154-6; 25/11/2003, J.2709-10).

The procedures contained in Privilege Resolution 1 for the protection of witnesses are analysed in Chapter 17, Witnesses.

Power to take evidence in private

Most committees are empowered to hear evidence in public or in private. It is open to a committee to decide not to pursue a matter because it would be contrary to the public interest for reasons including possible prejudice to court proceedings, national security or individual privacy. In making such decisions, however, most committees have an option not in practice available to the Senate itself, and that is the power to take evidence in camera.

By hearing evidence in private and agreeing to orders forbidding publication of the evidence, a committee may inform itself fully on an issue and at the same time minimise any risk arising from the publication of evidence. A committee may decide to publish the in camera evidence at a later date when the risk of harm has passed, or may decide on partial publication in order to balance competing concerns. For further material on the taking of evidence in camera and other measures to protect witnesses, see Chapter 17, Witnesses, under Protection of Witnesses: (b) procedural protection. The report of the Senate Standing Committee on Foreign Affairs, Defence and Trade, *Sexual Harassment in the Australian Defence Force: Facing the Future Together* (August 1994, PP 147/1994), contains a useful discussion of some of the issues involved in taking evidence in camera and releasing it at a later date, particularly in the context of individual privacy and the right to natural justice of an individual against whom allegations are made (Annex 1, Evidence, pp 327-30).

Committees considering estimates must take all their evidence in public. Documents submitted to a committee considering estimates may not be withheld from publication; nor may evidence be taken in camera. (See above, under Estimates committees.) Matters which arise during the consideration of estimates may be the subject of reference to a legislative and general purpose standing committee in possession of the full range of committee powers.

Power to meet and transact business notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives

Most Senate committees are empowered to continue their operations regardless of the prorogation of the Parliament or the dissolution of the House of Representatives, either of which occurrences terminates a session of Parliament. Committees formed for the life of a parliament continue in existence until the day before the next Parliament first meets.

On many occasions, Senate committees have continued their activities after the dissolution of the House of Representatives or prorogation of Parliament, including by taking evidence and presenting reports. The absolute privilege of these activities has not been called into question and the practice is now firmly entrenched in standing orders as well as being confirmed by declaratory resolution (22/10/1984, J.1276). The power of the Senate to authorise its committees

to meet derives from the Senate's character as a continuing House and from the Constitution. (For the major discussion of the effects of prorogation, see Chapter 19, Relations with the Executive Government, under Effect of prorogation.)

Power to appoint subcommittees

Some committees are authorised by the Senate to appoint subcommittees to assist in carrying out the business of committees. These committees include the Appropriations and Staffing Committee (SO 19(5)), the Scrutiny of Bills Committee (SO 24(3)) and the legislative and general purpose standing committees (SO 25(8)). Resolutions for the establishment of select committees may also contain provision for the appointment of subcommittees.

Senate committees which have inquiry powers but which do not have the power to appoint subcommittees include the Regulations and Ordinances Committee, the Publications Committee and the Committee of Privileges. In the case of the first two committees listed, the absence of the power may be attributed largely to historical reasons. The use of subcommittees by the Committee of Privileges, however, is considered inappropriate given its role.

Subcommittees are usually provided with the same powers as their parent committees. Standing order 25(15), for example, empowers legislative and general purpose standing committees and any subcommittees to send for persons and documents, to move from place to place and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives. Subcommittees may conduct any business which the committee itself may perform, but only in consequence of a committee resolution of appointment. Subcommittees may not report to the Senate, however, other than through their parent committees which may adopt the report of a subcommittee. Generally, the use of subcommittees increases a committee's flexibility and enables it to pursue several tasks simultaneously.

A subcommittee is an agent of the committee and not the committee itself, even in the presence of members who might otherwise constitute a quorum of the committee capable of meeting in the presence of the chair. A transformation from subcommittee to committee is not permissible in these circumstances, as absent members could not have been given proper notice of a committee meeting. However, the absence of sufficient notice is the only impediment to a formal meeting of the full committee in such circumstances and if this can be overcome, a subcommittee meeting may be transformed into a committee meeting.

It is not permissible for a committee to appoint a subcommittee comprised of whichever senators attend a particular meeting or hearing. The full membership of a subcommittee must be specified by name and specific matters referred to it. The resolution of appointment may specify a chair and deputy chair or provide that the members of the subcommittee may elect their own chair and deputy chair. In any event, the subcommittee must exist and function in accordance with the standing orders of the Senate and a committee resolution of appointment that is consistent with the standing orders.

Subcommittees are required to have at least one government and one opposition senator (SO 27(6)).

Access to other committees' documents

Committees are occasionally given the power to consider the documents of other committees or of their predecessor committees. This is done where committees would not otherwise have access to such documents.

The legislative and general purpose standing committees have the power to consider the documents of their predecessor committees (SO 25(4)). This, however, is only a transitional provision consequent on past restructurings of the committees and designed to carry inquiries over the restructuring. When the committees conclude inquiries the documents they have received in the course of those inquiries are in the custody of the Senate (SO 25(15)), so that an order of the Senate would be necessary to enable them to use such material, but published evidence and documents may be freely cited. (For a legislative and general purpose standing committee presenting to the Senate documents of a completed inquiry closely related to material in its report, see additional information tabled by Finance and Administration Committee, 8/8/2006, J.2390.)

Select committees are sometimes given access to the documents of earlier committees to provide a bridge between inquiries or to conclude unfinished inquiries. If a select committee replicates a predecessor it may be taken that it has access to the documents of the earlier committee.

Committees which have continuing functions, such as the legislative scrutiny committees, are taken to have continuing access to documents acquired in earlier parliaments.

As most committees publish their evidence and submissions, which are therefore freely available for reference, access to the documents of other committees is significant only in relation to unpublished evidence and submissions, correspondence, minutes, working papers and the like.

Instructions to committees

Committees being bodies appointed by the Senate for its purposes, they may be given instructions by the Senate.

Instructions to committees are covered in Chapter 22 of the standing orders and apply both to committees of the whole and other committees. The application of these standing orders to committees of the whole dealing with bills is covered in Chapter 12, Legislation, under Instructions to committee of the whole.

The purpose of an instruction to a committee is to empower it to undertake an action it would not otherwise have power to undertake. As indicated in Chapter 12, an instruction may also require a committee to do something which is within its power and which the Senate requires to be done, for example, in the cases of standing and select committees, to hear particular witnesses (see below). An instruction also binds a committee to undertake the action determined by the Senate. It may have application, for example, where the non-government majority of the

Senate seeks to direct a committee with a government party majority. An instruction may also be used to extend or restrict the order of reference to a committee but, in practice, this is invariably achieved by an ordinary resolution altering the terms of reference.

Instructions to committees, other than committee of the whole, have been invoked only rarely. In June 1991 a motion to refer matters relating to the administration of the Department of Foreign Affairs and Trade to a committee was the subject of some disputation. The reference was originally intended to be to the Foreign Affairs, Defence and Trade Committee but was changed to the Finance and Public Administration Committee on the basis that the matters related to general questions of public administration. The chair of the Finance and Public Administration Committee moved an amendment to alter the motion to an instruction to the Foreign Affairs, Defence and Trade Committee to consider the particular matters listed in the proposed reference as part of its scrutiny of the department's annual report, considered by the committee under a standing reference of all annual reports to the relevant committee (19/6/1991, J.1229). The amendment was defeated and the Finance and Public Administration Committee subsequently presented a significant and substantial report on the management and operations of the department. Normally, an instruction to a committee requires notice (SO 151). In this case, although the amendment would have had the effect of instructing the committee, it was moved not as an instruction per se but as an amendment to a motion and therefore did not require notice.

An instruction was given to the Procedure Committee in 1993 in relation to a reference on the hours of sitting and routine of business. Although the committee has no formal evidence gathering powers it was instructed by the Senate to invite submissions from all parties in the Senate and independent senators (18/8/1993, J.357).

Committees may be directed by the Senate to hear evidence on particular matters or from particular witnesses (7/2/1995, J.2895-7; 6/6/1995, J.3364-5; 4/11/1996, J.836; 22/10/1997, J.2673; 21/10/1999, J.1966; 10/4/2000, J.2582-3; 2585; 28/6/2000, J.2958; 28/11/2000, J.3594-5; 19/6/2001, J.4322; 12/3/2002, J.154-6; 18/9/2002, J.760; 25/11/2003, J.2709-10; 16/6/2004, J.3473). For a direction to invite the Prime Minister and another minister to give evidence, see 9/3/1995, J.3063-4 **(See Supplement)**.

The legislative and general purpose standing committees to which the Telstra (Dilution of Public Ownership) Bill 1996 and the Workplace Relations Bill 1996 were referred were instructed to hold public hearings in each state and territory capital city (21/5/1996, J.173-6; 23/5/1996, J.214-5, 217-8).

Conduct of inquiries

Referral of matters to committees

Committees may inquire into and report upon only such matters as are referred to them by the Senate. The terms of reference may be contained in the standing order or resolution establishing the committee.

Legislative and general purpose standing committees receive references from the Senate by specific resolutions referring subjects for inquiry or particular bills. Estimates of expenditure are

referred to them in accordance with standing order 26. The committees have continuing references to consider annual reports and the performance of departments and agencies allocated to them.

The standing orders declare that references to legislative and general purpose standing committees should relate to subjects which can be dealt with expeditiously and committees should take care not to inquire into matters which are being examined by a Senate select committee (SO 25(12) and (13)). This provision is designed to discourage duplication of inquiries; see advice attached to the Legal and Constitutional Affairs Committee report on the budget estimates 2008-09, PP 309/2008.

Unlike select committees (see above), there is no requirement that a reporting date be fixed when a matter is referred to a legislative and general purpose standing committee but, in practice, most motions do include a reporting date. Where a matter is referred to a committee and the resolution specifies a reporting date, a senator may, after notice or by leave, move to modify the resolution to extend or otherwise alter the reporting date (SO 28). The Senate seldom refuses an application for an extension of time, particularly when a reasonable explanation is given for the delay.

References to the legislative and general purpose standing committees lapse at the commencement of a new Parliament, apart from references which are automatically made under the standing and other orders, such as the references of annual reports and the performance of departments and agencies. The committees therefore report in a new Parliament on references which they consider should be continued, with any modifications or changes in reporting dates, and references which should not be continued, and seek the endorsement of the Senate of their proposed courses by means of motions to adopt those reports. Special references to the legislative scrutiny committees are treated in the same way (29/11/2004, J.123).

General references

Matters for inquiry by the legislative and general purpose standing committees are usually referred in accordance with the procedure outlined in standing order 25(11). Notice of a proposed reference may be given by a senator at the usual time for the giving of notices or at any other time, without requiring leave of the Senate, when there is no other business before the chair. Alternatively, a copy of the notice may be delivered to the Clerk, who reports it to the Senate at the first opportunity.

Motions to refer matters to standing committees are characterised as Business of the Senate (SO 58) and therefore take precedence over Government and General Business on the day for which they are given. Motions to refer matters to select committees are characterised as General Business and do not take precedence. Motions to modify references to standing committees by altering the terms of references are treated as equivalent to references to standing committees and are therefore placed on the Notice Paper as Business of the Senate. Notice of such motions, if relating to legislative and general purpose standing committees, may be given at any time without leave in accordance with the procedure set out in standing order 25(11). Motions which merely alter the reporting dates for references, however expressed, are not regarded as modifications of references and therefore are not treated as Business of the Senate, and notice of

such motions may be given only at the time provided for notices or at other times only by leave. Similarly, a motion to transfer a reference from one committee to another is treated as general business unless there is some change in the terms of the reference.

Matters may also be referred to committees by way of an amendment to a motion during the consideration of a bill. During the consideration of appropriation bills an amendment may be moved at any stage of the proceedings, other than in committee of the whole, arising from a recommendation of a committee (SO 115(4)).

In many cases, notice of a motion to refer a general inquiry to a committee is given by the chair of the committee after a proposal for terms of reference has been developed at the committee's instructions by the secretariat. Such notices are usually taken as formal on the day for which they are given; that is, they are determined without debate. In a significant number of cases, however, references are developed outside the committee and may be debated extensively before being agreed to or disagreed to. The debate on a reference provides a useful guide to the reasons for and scope of the inquiry, as envisaged by the senators supporting it.

Legislation

The reference of bills to the committees may be achieved by one of several methods. Bills may be referred by ordinary resolution following the giving of a notice in the manner described above for general inquiries. An amendment may be moved to the motion that a particular bill be read a second time to refer the bill to a committee as an alternative to giving it a second reading or in consequence of it being given a second reading (SO 114(3)). Immediately after a bill has been read a second time, a motion may be moved without notice referring the bill to a committee (SO 115(2)). The most common method is for a bill to be referred to a committee as a consequence of the adoption of a report by the Selection of Bills Committee (SO 24A). This committee, comprising the whips of the major and minority parties and four other senators, meets weekly when the Senate is sitting to consider which bills introduced into the Senate or due for introduction should be referred to committees for inquiry and report. The committee decides which bills should be referred, to which committee, at what stage and on what date the committee should present its report.

This system for the referral of bills leaves it open to individual committees to determine their own procedures. Committees are able to determine the most appropriate method of dealing with particular bills. The most common approach adopted by committees is for evidence to be sought from as wide a range of witnesses as practicable in the time available, including by written submission and by oral evidence at public hearings. Although most legislation inquiries occur in Canberra, some committees travel to obtain evidence. Committees may consider in detail or in principle amendments to bills that have been circulated or foreshadowed and make recommendations to the Senate accordingly. Alternatively, it may not be until all the evidence has been gathered that unintended consequences or unforseen problems with a bill emerge. A committee may recommend that particular amendments be agreed to but the bill itself may be amended only by the Senate. (See also Chapter 12, Legislation.)

Estimates

For considering estimates committees receive their references in accordance with standing order 26. Usually following the introduction of the relevant appropriation bills, a minister moves that the particulars of proposed expenditure be referred to the committees for inquiry and report by a nominated date. These references are usually moved twice a year in relation to the main Budget bills (Appropriation Bills Nos 1 and 2 and the Appropriation (Parliamentary Departments) Bill) and the additional estimates contained in Appropriation Bills Nos 3 and 4 and Appropriation (Parliamentary Departments) Bill (No. 2). Statements of expenditure from the Advance to the Minister for Finance and tax expenditure statements are also referred to the committees.

Further appropriation bills to accommodate specific additional expenditure requirements may be introduced. On occasion, the particulars of this expenditure have been referred to estimates committees. In the 1982-83 financial year there were six appropriation bills, the second pair of which were passed by the Senate on the second day of the new Parliament in order to accommodate the new government's pressing requirement for funds in advance of the usual additional estimates due for introduction later in the Autumn sittings (22/4/1983, J.40-42; SD, 22/4/1983, pp 85-6). The funds in Appropriation Bill (No. 4) 1982-83, for example, were required to respond to the disastrous bushfires of that year. An amendment was moved to the motion for the second reading of both bills to provide for the schedules of expenditure in the bills to be referred to the appropriate estimates committee for examination and report at the same time as the additional estimates for the 1982-83 financial year. In other words, the estimates committees were to examine the proposed appropriations after they became law.

Estimates committees also reported on a bill after it had passed in 1991-92. A fifth appropriation bill was introduced in March 1992 before the third and fourth bills had been agreed to by both Houses. It contained provision for expenditure on three programs which had already been provided for in Appropriation Bill No. 3 but whose urgency was such that the government could not wait for Appropriation Bill No. 3 to undergo the usual lengthy scrutiny. The relevant funds were subsequently omitted from Appropriation Bill No. 3 by amendment in the House of Representatives and the particulars of the expenditure covered by the resulting Appropriation Bill No. 5 were referred to estimates committees (26/3/1992, J.2128). An attempt to postpone consideration of the bill until the estimates committees had reported was unsuccessful as was an attempt to refer the bill to three standing committees for consideration (30/3/1992, J.2144-5). The relevant estimates committees reported on the particulars after the bill became law and in conjunction with their examination of additional estimates for that year (29/4/1992, J.2207-8; 5/5/1992, J.2255).

In the 1993-94 financial year three sets of particulars were referred to estimates committees as a consequence of the bringing forward of the Budget from August to May. In 2003-04 there were two extra appropriation bills (Nos 5 and 6) which were referred to legislation committees for estimates hearings (11/5/2004, J.3382). Two extra appropriation bills (Nos 5 and 6 of 2004-05) were also referred for estimates hearings with the annual appropriation bills of 2005-06 (10/5/2005, J.594).

The particulars of proposed expenditure are detailed in three documents, known as Documents A, B and C, tabled by a minister. Each of the documents refers to one of the bills, with Document A, for example, giving details in relation to Appropriation Bill (No. 1) and Document C giving details in relation to the Appropriation (Parliamentary Departments) Bill. With these documents, another set of documents is tabled, giving a breakdown of expenditure and proposed expenditure, with accompanying explanations, according to the output structure of agencies.

Departmental explanations of the estimates are tabled in the Senate and used by the committees. They were originally known as Explanatory Notes. The name changed briefly to Program Performance Statements (PPS) between 1991 and 1994 to reflect program budgeting, and yet another change of name occurred in 1994 when the Budget was introduced in May. The documents then became known as Portfolio Budget Statements (for the main Budget round of estimates) and Portfolio Additional Estimates Statements (for the additional estimates). These documents were significantly shorter than the former PPSs and attracted adverse comment from all estimates committees when they first appeared in relation to the 1994-95 Budget estimates considered in May-June 1994. The reason provided for the diminution in information was that in the absence of full year performance information, which would not be available before the end of the financial year, the statements focused only on new budget measures and significant variations in expenditure, the latter defined as variations in excess of $10 million and 5 percent of an agency's budget. The focus of the documents was therefore designed to be prospective. Retrospective information would be provided in the annual reports of agencies, now required to be tabled by 31 October each year and to contain information about the year's performance which had previously been provided in the PPSs.

Under previous arrangements for an August Budget, PPSs provided a comprehensive picture on a program basis of departmental expenditure from all sources including the appropriation bills and any special or standing appropriations (which now account for over 80 percent of government expenditure). The documents provided an effective agenda for the full consideration in September-October of an agency's performance over the previous year and its expenditure proposals for the current financial year. Estimates committee scrutiny of additional estimates in February-March was confined to those programs for which additional moneys were being sought (see Procedure Committee, First and Third Reports of 1992, PP 527/1992 and 510/1992). Changes in timing now mean that the fuller examination of performance occurs in the context of additional estimates (now November-February) in light of performance information provided in annual reports at the end of October. Orders of the Senate of 24 August 1994 (now in SO 25(20)) provide explicitly for committees to examine annual reports in conjunction with their consideration of estimates, thus opening up the agenda, particularly for additional estimates.

In 1999 the government converted the Commonwealth's budget to an output-based accrual as distinct from a cash flow basis, the main change being full accounting for liabilities, assets and depreciation. This change affected the content of the appropriation bills and the documents now called Portfolio Budget Statements. It also potentially widened the scope of inquiry at estimates hearings.

Annual Reports

Annual Reports of government departments and agencies are examined by committees in accordance with standing order 25(20) and an order of the Senate allocating portfolios to committees.

Under the procedure, committees are required to consider in more detail those reports which are apparently not satisfactory and may select other annual reports for more detailed consideration. In their examination of the reports, the committees are also required to note late receipt of any reports and to take into account any relevant remarks about the report made in debate in the Senate and to draw to the Senate's attention any significant matters relating to the operations and performance of bodies furnishing annual reports. As well as the 'normal' consideration of annual reports, committees may also consider the annual reports of departments and budget-related agencies in conjunction with their examination of estimates. Reports on annual reports tabled by 31 October each year are due by the tenth sitting day of the following year. Reports on annual reports tabled by 30 April each year are due by the tenth sitting day after 30 June that year. This timetable ensures regular and timely information on annual reports. Finally, committees are required to report to the Senate each year whether there are any bodies which do not present annual reports to the Senate but which should do so.

Although it is still rare for committees to hold public hearings on annual reports as such, scrutiny of annual reports is important for the assessment of an agency's performance.

The systematic evaluation of annual reports by committees has its origin in a report by the Standing Committee on Finance and Public Administration in 1989, entitled *The Timeliness and Quality of Annual Reports* (PP 468/1989). The committee envisaged that examination of annual reports would go further than mere examination of style, format and compliance with guidelines. The reviews would focus on the operation and performance of executive agencies and would complement the work of estimates committees.

Before 1989, committees dealt with annual reports on an ad hoc basis in a variety of ways ranging from simple examination to the seeking of submissions and holding of hearings. From 1973, successive resolutions of the Senate had the effect of referring all annual reports of departments, authorities and statutory corporations to the relevant legislative and general purpose standing committee. Committees had a discretion to pursue or not pursue inquiries into the reports. Orders of 14 December 1989 and 13 May 1993 formalised the process, until incorporation in the standing orders in 1997.

Performance of government agencies

Another element of the committees' work is scrutiny of the performance of departments and agencies allocated to the committees (SO 25(2)(b)). There is no requirement in the standing orders for committees to report separately on this function, although they may do so. Committees may also report on performance in the context of their examination of annual reports or estimates of departments and agencies.

The Standing Committee on Finance and Public Administration has several standing references dealing with the accountability of statutory and non-statutory bodies and Commonwealth-owned companies.

Petitions

All petitions presented to the Senate are provided to the appropriate standing committee for consideration. This practice arose in 1982 from a suggestion that there should be some mechanism for following up petitions if appropriate. Committees have occasionally reported on petitions which have relevance to their standing references, for example the performance of government agencies. If a committee wished to pursue other matter raised in a petition, it would need to seek the reference of the matter by the Senate. In its 3rd Report of 1995 (PP 477/1995) the Procedure Committee recommended against a suggestion that the reference of petitions be formalised.

Evidence gathering

Advertising the reference

Many, but by no means all, committee inquiries are publicised in appropriate media, including through the Internet and paid advertisements in the press. Depending on the nature of the inquiry, the most appropriate publications are chosen in order to reach those people and organisations most likely to make submissions. These publications may include national, regional or specialised newspapers. Inquiries are also commonly notified to the media by way of press releases. Some limited use has been made of radio advertisements, but to date television advertisements and freephone technology have been seldom used because of the cost.

Inviting submissions

In addition to advertising, all committees maintain mailing lists or lists of contacts who may be a vital source of input to committee inquiries. At the beginning of each inquiry, submissions are routinely invited from the relevant government agencies and non-government organisations known to have an interest in the matter under examination. Invitations may also be issued to individuals with a special interest or expertise in the field.

In advertisements and in information supplied to assist people in making submissions, prospective witnesses are advised of their rights and obligations. For example, it is stressed that a submission made to a committee becomes a committee document, and it is for the committee to decide whether to receive it as evidence and whether to publish it. Unless there are strong reasons to withhold publication, committees normally authorise the publication of submissions received. Authors of submissions are advised that they should not publish or disclose their submissions to others until the committee has authorised publication. Notes to assist in the preparation of submissions and for the advice of witnesses appearing before committees are provided. Witnesses are informed of their rights under the Senate's Privilege Resolutions (see Chapter 17, Witnesses).

Selecting witnesses

Committees normally select witnesses from those people and organisations who have made submissions, but they may also seek out additional witnesses, for example, if an important issue or aspect of the inquiry is not addressed by the submissions received. The analysis of submissions and the testing of such material at public hearings is the chief means by which committees conduct inquiries. Where time is too short to seek written submissions, which often is the case with inquiries into legislation, the public hearing is the main vehicle for the inquiry and the selection of witnesses is of paramount importance. While most committees attempt to hear from a cross section of witnesses in such circumstances, other approaches have also been used. The Standing Committee on Finance and Public Administration, for example, in its inquiry into the ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994, took evidence from witnesses who had difficulties with the bill in order that those problems could be tested. Although this approach attracted some criticism in the minority report, it nonetheless enabled the committee to make effective use of limited time (SD, 17/10/1994, pp 1817-9).

Public hearings

It is usual for witnesses to be invited to attend committee hearings, in the first instance (Privilege Resolution 1(1); see Chapter 17, Witnesses). The taking of evidence at public hearings is a key element of most Senate committee inquiries and is an opportunity to test, in public, views expressed in the written submissions already received by the committee.

Many public hearings held by Senate committees are held outside Canberra. This enables committees to "take the Senate to the people" and to obtain first hand experience of the issues under consideration through inspections and briefings that are often undertaken in conjunction with public hearings.

Public hearings are governed by rules relating to the conduct of proceedings (see below) and resolutions of the Senate for the protection of witnesses (see Chapter 17). The examination of witnesses is conducted by the members of a committee in accordance with procedures agreed to by the committee, subject to the rules of the Senate (SO 35(1)). From time to time the question has arisen whether persons other than members of the committee may question witnesses. Privilege Resolution 2(9) explicitly authorises counsel appointed to assist the committee of Privileges to examine witnesses before the committee. In all other cases only members of the committee may examine witnesses. Exceptions to this rule must be authorised by the Senate. The only explicit authorisation for this practice occurred in relation to the Select Committee on Allegations Concerning a Judge whose resolution of appointment included provision for commissioners, counsel appointed to assist the committee and counsel for witnesses to examine witnesses before the committee (6/9/1984, J.1078, J.1080).

In most cases the procedures for examining witnesses at public hearings are relatively informal, but relevant rules of the Senate also apply to committees to the extent that this is necessary to maintain order and expedite business. Order in a committee is maintained by the chair but may be enforced only by the Senate on receipt of a report of an offence. The rules of debate also apply to committee proceedings; for example, in relation to offensive language and personal reflections

(SO 193(2) and (3). Points of order and privilege may be raised (SO 197) and objections to a chair's ruling may be taken (SO 198, although as a matter of practice there is no requirement in a committee for the objection to be in writing). Privilege Resolution 1(9) requires that discussion of a ruling of the chair on the relevance of questions shall occur in private session.

Committees may hear several witnesses together and may allow witnesses to exchange views in the course of a hearing (see statement by President Reid, SD, 18/3/1997, p. 1655).

Briefings, inspections and seminars

Committees may choose to augment their formal evidence-taking by informal briefings and inspections which provide committee members with valuable contextual and background information. One of the more unusual site inspections to have occurred was undertaken by members of the Standing Committee on Foreign Affairs, Defence and Trade who spent a day at sea on the HMAS Swan, which had been the setting for alleged incidents of sexual harassment into which the committee was inquiring. The committee reported that these "experiences made an invaluable contribution to the committee's understanding of the issues and circumstances surrounding the incidents on the Swan" (*Sexual Harassment in the Australian Defence Force: Facing the Future Together*, PP 147/1994, p. iii). Many other site inspections have occurred in the context of committee inquiries into rural and regional issues, technology, environmental issues and transport matters, among others.

The term briefings is used to describe two different arrangements. If a briefing takes place at a meeting of a committee, this is simply an in camera hearing in another guise. Committees are prevented from hearing evidence in camera on estimates (SO 26(2)), so that kind of briefing is not available to committees in relation to estimates. If a briefing occurs at a gathering which is not a committee meeting but simply an informal gathering of senators who happen also to be members of a committee, the standing orders do not authorise any of the processes available to a committee, such as taking a transcript, receiving documents or citing the information provided in a report. This limits the utility of briefings.

Another means of information gathering is the seminar or conference, sponsored or co-sponsored by a committee, which brings together experts in a field for presentation of papers and discussions with committee members. The Standing Committee on Finance and Public Administration, for example, held a conference in association with the Centre for Research in Public Sector Management, University of Canberra, on public service reform. The committee had a standing reference on the central administration of the Australian Government under which it reviewed a government report. Rather than proceeding by way of public hearings, the committee decided to co-host a conference involving senior public servants, past and present, unionists, academics, consultants and journalists. The committee presented the conference papers and proceedings as a report of the committee in order to contribute to better informed debate on the subject but without drawing conclusions from the conference information or making recommendations (*Public Service Reform*, PP 149/1994, 150/1994).

Such proceedings are usually not conducted as formal meetings of committees and there would be some doubt that they fall within the definition of "proceedings in parliament" which attract parliamentary privilege. A speaker presenting a paper may not have the protection afforded to a

witness giving evidence before the committee. Committees have held such informal proceedings on the basis that doubt on whether the discussions would be covered by parliamentary privilege was not a significant issue in the circumstances.

Hansard

Standing order 35(2) requires that the examination of witnesses be recorded in a transcript of evidence. The standing orders relating to the Appropriations and Staffing Committee, legislative and general purpose standing committees and committees considering estimates all provide for a daily Hansard to be published of the public proceedings of a committee (SO 19(10), 25(16) and 26(7) respectively). For committees considering estimates, the Hansard report is to be circulated in a manner similar to the daily Senate Hansards, as soon as practicable after each day's proceedings (SO 26(7)).

A provision requiring the publication of a daily Hansard of a committee's public proceedings is a standard inclusion in resolutions establishing select committees. Most committees may also take evidence in camera and a Hansard record is made of this evidence but not published. Committees may, however, decide to publish such evidence at a later date and witnesses are required to be warned, before giving evidence in camera, that this may occur (Privilege Resolution 1(8); for use of in camera evidence, see Chapter 17, Witnesses, under Publication of in camera evidence).

Hansard is initially produced as a proof version and is supplied to members and witnesses for correction. Corrections are restricted to typographical errors and errors of transcription or fact. New material may not be introduced; nor may the sense of evidence be altered. A witness who wishes to provide additional material may do so by way of a supplementary submission, as required by Privilege Resolution 1(17). A committee may decide what wider circulation the uncorrected proof should have. Many committees prefer to have the evidence distributed as soon as possible, albeit in proof form, rather than some weeks later when the corrected transcript becomes available. Uncorrected proofs carry a warning that the document may contain errors and should not be quoted in public without acknowledging that the source is an uncorrected proof. Committees usually authorise the secretary to distribute copies of the transcript by an appropriate resolution.

Broadcasting of committee proceedings

A committee may authorise the broadcasting of its public hearings, in accordance with any rules provided by the Senate (SO 25(19)). The following order governs the broadcasting of committee proceedings:

> The following rules apply in relation to broadcasting, including rebroadcasting, in sound or visual images, or in combined sound and visual images, of the proceedings of a committee.
>
> (1) Recording and broadcasting of proceedings of a committee may occur only in accordance with the authorisation of the committee by a deliberate decision of the committee.
>
> (2) A committee may authorise the broadcasting of only its public proceedings.

(3) A committee may determine conditions, not inconsistent with these rules, for the recording and broadcasting of its proceedings, may order that any part of its proceedings not be recorded or broadcast, and may give instructions for the observance of conditions so determined and orders so made. A committee shall report to the Senate any wilful breach of such conditions, orders or instructions.

(4) Broadcasting of committee proceedings shall be for the purpose only of making fair and accurate reports of those proceedings, and, in particular:

(a) shall not be the subject of commercial sponsorship or be used for commercial advertising; and

(b) shall not be used for election advertising.

(5) Recording and broadcasting of proceedings of a committee shall not be such as to interfere with the conduct of those proceedings.

(6) Where a committee intends to permit the broadcasting of its proceedings, a witness who is to appear in those proceedings shall be given reasonable opportunity, before appearing in the proceedings, to object to the broadcasting of the proceedings and to state the ground of the objection. The committee shall consider any such objection, having regard to the proper protection of the witness and the public interest in the proceedings, and if the committee decides to permit broadcasting of the proceedings notwithstanding the witness' objection, the witness shall be so informed before appearing in the proceedings. (23/8/1990, J.237; incorporated in consolidated order 13/2/1997, J.1447)

Committees may impose conditions on the recording and broadcasting of their proceedings. Such conditions are usually designed to minimise disruption to the committee's proceedings caused by intrusive lighting or movement of equipment. A discussion of this issue occurred at a supplementary hearing of Estimates Committee D in November 1993. The committee chair had received requests from three television networks to bring cameras into the hearing room to obtain coverage of a controversial issue, notwithstanding that the committee's proceedings were being televised by the parliamentary television system and that it was standard practice for networks to take footage from the parliamentary service. The chair suggested that the networks follow this standard practice and also advised still photographers that only one photographer would be permitted into the hearing at a time, for a maximum period of five minutes each. These proposed arrangements were discussed during the hearing and a private meeting of the committee was held in which the chair's suggestions were upheld. In conveying the committee's decision to the hearing, the chair emphasised the distractions caused by multiple television cameras as the basis for the committee's decision (Estimates Committee D transcript, 9/11/1993, pp D443-6). In making such decisions, committees have needed to balance the detrimental effects of potential distraction against the value of having the committees' proceedings disseminated as widely as possible.

Witnesses whose evidence is to be broadcast are given the opportunity to object. A committee considers any such objection having regard to the protection of the witness and the public interest in the proceedings. Although a committee is not required by the order of the Senate to give reasons for its decision, as a matter of practice they are given and made public. Witnesses, the vast majority of whom attend voluntarily in response to committee invitations to appear, almost never object to the televising of their evidence, but in the face of an objection, a committee must

balance competing principles of open proceedings, public interest, committee effectiveness and fairness to the individual witnesses.

When considering estimates committees are covered by a provision of an order which provides:

> The public proceedings of committees when considering estimates may be relayed within Parliament House and broadcast by radio and television stations in accordance with the conditions contained in paragraphs (4) and (5) of the order of the Senate relating to the broadcasting of committee proceedings, and in accordance with any further conditions, not inconsistent with the conditions contained in those paragraphs, determined by a committee in relation to the proceedings of that committee (consolidated order, 13/2/1997, J.1447).

In all other cases a deliberate committee decision is required to broadcast committee proceedings. Committees may choose, however, to pass wide-ranging resolutions covering all hearings in relation to a particular inquiry, for example. In accordance with the order of 23 August 1990, the committee must nonetheless take into account any objections to the practice by individual witnesses.

Reports

It is the chair's responsibility to prepare a draft report and submit it to the committee (SO 38(1)). The usual practice is for the chair to give drafting instructions to the secretary who prepares a draft for the chair. When the chair is satisfied with the draft it is circulated to other members of the committee.

Other committee members have two options to frame their own reports. A committee member other than the chair may submit a draft report to the committee and the committee decides on which report to proceed (SO 38(3)). After a report has been agreed to by the committee, a minority or dissenting report may be added to the report by any member or group of members, and any member or participating member may attach relevant conclusions and recommendations to the report. Individual members may otherwise influence the content of the report by proposing amendments to it either during the initial deliberative phase (SO 38(2)) or upon reconsideration (SO 38(4)).

In 1995 the Senate passed a resolution asserting the right of senators who add dissenting or minority reports to committee reports not to disclose their reports to committee majorities until the reports have been printed. This motion arose out of past difficulties with committees, particularly the Joint Foreign Affairs, Defence and Trade Committee, with complaints by those submitting dissenting or minority reports that majority reports were subsequently rewritten to respond to dissenting or minority reports (22/11/1995, J.4198).

In 1989, Senator Alston gave an unusual notice of motion, alleging that Opposition members of the former Standing Committee on Legal and Constitutional Affairs had not been given sufficient opportunity to consider a final draft of the committee's report on the duties and responsibilities of company directors. The motion would have directed the committee to reconsider the draft report and to provide opportunity for all members of the committee to consider it fully (25/10/1989, J.2145). On 1 November 1989, statements were made by the chair of the committee and Senator

Alston indicating that the matter had been resolved. The notice of motion was then withdrawn (SD, 1/11/1989, p. 2760).

Legislative and general purpose standing committees are required to make regular reports to the Senate on the progress of their proceedings (SO 25(18)). Such general progress reports are rare, as committees usually present their substantive reports in a timely manner, or in stages where appropriate, thus fulfilling their obligation to report regularly. For an example of a general report on proceedings, see *Report on References Not Disposed of by the Standing Committee on Foreign Affairs and Defence During the 34th Parliament*, November 1987 (PP 218/1987). Select committees are required to comply with the reporting dates fixed at their establishment, unless an extension is sought and granted (SO 28). A select committee is usually empowered on appointment to report from time to time. If it is not, it will need to seek the agreement of the Senate to make an interim report.

A committee may include in camera evidence in its report after a formal decision to that effect, although before doing so it will have regard to any assurance it may have given to the witness at the time the evidence was heard (see Privilege Resolution 1(8) and Chapter 17, Witnesses). Although not formally required to do so, a committee should inform the witness of its intention and provide an opportunity to respond. A possible course is to edit the evidence so as to permit the committee's objectives to be met while preserving as much as possible of what the witness considers should not be disclosed. On 13 February 1991, the Senate agreed to an order regulating the use of in camera evidence in dissenting reports (now in SO 37(2)). If a committee cannot reach agreement on the disclosure of the evidence, the dissenting senator may refer to the evidence only to the extent necessary to support the reasoning of the dissent. If practicable, the witnesses involved should be informed in advance of the proposed disclosure and given reasonable opportunity to object to the disclosure and ask that particular parts not be disclosed. The order also obliges committees to give careful consideration to a witness's objections and to disclosing the evidence in a way that would conceal the identities of the witness or persons referred to in the evidence.

The report of a committee is a record of an inquiry but does more than merely record the evidence taken by the committee. The main purpose of a report is to make recommendations for future action. Senators may be required to make forward-looking political judgments which tend to lead rather than follow public opinion. Some committee reports may therefore break new policy ground, while others provide definitive reviews of existing policies, organisations, programs or legislation and contain recommendations for their development.

Successive governments have undertaken to respond to the recommendations of committees, and the current undertaking is for a response within three months. The Senate indicated its view that the government should provide such responses not only to recommendations in the majority report of a committee but also to any minority or dissenting report or any additional material attached by members or participating members (see below, under Consideration of committee reports).

Conduct of proceedings

Meeting and election of chair

The first meeting of a committee is usually decided upon by agreement among the members in communication with the committee secretary who liaises informally with them and the senator who is likely to be elected chair. However, the mover of a committee, if a member of it, is entitled to fix a time for the first meeting of a committee. Where the mover of a committee is not a member the secretary is authorised to fix a time for the first meeting (SO 30(1)).

At the first meeting the secretary takes the chair until a chair has been elected. At the appointed time and when a quorum is present the secretary calls the meeting to order and refers to the resolution of the Senate establishing the committee and appointing its members. The secretary normally circulates copies of these resolutions to members prior to the meeting as part of the documents for the meeting. The secretary calls for nominations for the position of chair, drawing attention to any provisions in the standing orders or resolution establishing the committee which require the chair to be a member nominated by the Leader of the Government in the Senate, Leader of the Opposition in the Senate or minority groups or independents.

It is customary for only one nomination to be received for chair, in which case the secretary declares the nominated senator elected. If two or more senators are nominated, the procedure for election follows that for a President of the Senate, provided for in standing order 7, and a ballot is held. After declaring the result of the election, the secretary hands over the chair to the senator elected.

The election or appointment of a deputy chair may also need to be dealt with at the first meeting, depending on the terms of the relevant standing order or resolution. Legislative and general purpose standing committees are required to elect a deputy chair to act as chair when the chair is absent from a meeting or the position of chair is temporarily vacant (SO 25(9)(d)). There is no requirement for the deputy chair to be elected immediately after the chair is elected, although committees find it convenient to do so. Deputy chairs of those committees are required to be from non-government parties. Other committees have varying requirements in relation to the deputy chair. Most of the standing domestic committees have no formal requirements (see SO 17, 18 and 20-22 relating to the Procedure, Privileges, Library, House and Publications Committees, respectively). Another group of committees is governed by orders providing that the chair may from time to time appoint another senator as deputy chair, to act as chair when the chair is absent from a meeting or when there is no chair. This group includes the Appropriations and Staffing Committee (SO 19(6)), the Committee of Senators' Interests (SO 22A(5)), the Regulations and Ordinances Committee (SO 23(7)), the Scrutiny of Bills Committee (SO 24(5)) and the Selection of Bills Committee (SO 24A(2)(c)). There is no requirement for such committees to have a deputy chair from a different party, although in practice most do. For precedent for a deputy chair appointed from time to time required to be of a different party to the chair, see 14/8/1991, J.1366.

One case in which the question of deputy chair needs to be resolved at the first meeting is when a committee is governed by a resolution requiring the appointment of a deputy chair immediately

after the election of the chair. Such provisions are included from time to time in resolutions establishing select committees. See, for example, 25/6/1992, J.2635 (Sales Tax Legislation); 25/6/1992, J.2640 (Subscription Television Broadcasting Services); 2/9/1993, J.450 (Whistleblowing); and 9/12/1993, J.965 (Print Media). Another variation is apparent in 13/5/1993, J.150 (Superannuation).

In the legislative and general purpose standing committees, the chair, or the deputy chair when acting as chair, may appoint another member of a committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting (SO 25(9)(f)).

Meetings subsequent to the first meeting are notified to each member by the secretary. The secretary acts in response to resolutions of the committee determining meeting times, or in accordance with instructions from the chair who may fix the time and place of committee meetings, or on request from a quorum of members who duly notify the secretary, either personally, in writing or through some authorised agent (SO 30(2)). A meeting held in response to a request from a quorum of members must be presided over by the chair or, in the chair's absence, the deputy chair.

Committees are authorised to hold "electronic meetings", that is, meetings at which the members and other participants communicate by electronic means, subject to prescribed conditions, principally that the participants can all hear each other and communicate contemporaneously (SO 30(3)). Until the adoption of this provision in 1997, the principle was followed that a duly constituted meeting of a committee required a quorum of members present in one place, but other members and witnesses could participate in such a meeting by telephone or television.

Where the standing orders and the resolution of appointment of a committee are silent, the procedures of the Senate apply so far as they are applicable.

A chair of a committee may make a ruling on any question of order relating to the proceedings of the committee. Rulings must conform with the rules of the Senate. In particular, it is not open to a chair of a committee to impose restrictions on senators which are not imposed by some known rule prescribed by the Senate. A member of a committee may move a motion that the chair's ruling be dissented from, and, if this motion is passed, the decision of the committee is substituted for the ruling of the chair for the time being, subject to any decision by the Senate. If the motion is not passed, the chair's ruling stands, also subject to any decision by the Senate.

When a motion of dissent is moved, there is no requirement for the chair to be vacated and taken by another senator. The chair may vote on the motion of dissent, and exercise a casting vote where such a vote is provided for in the terms of appointment of the committee. This is the procedure which applies in the Senate, but of course the President does not have a casting vote.

The standing orders contain no provisions about how a committee is to proceed in a case of disorderly conduct by a senator in a committee, such as a senator using offensive words and refusing to withdraw them. This is one of the areas in which committees follow the procedures of the Senate in so far as they are applicable. Following those procedures, if a

senator is asked to withdraw offensive words and refuses, the chair may report ("name") the senator and a motion may be moved that the senator be directed to withdraw from the meeting of the committee. Before that stage is reached, it is within the discretion of the chair to ask a disorderly senator to withdraw from the meeting. If a senator were to refuse to withdraw from a meeting after the committee has ordered his or her withdrawal, the committee would not be able to take any action other than to terminate the meeting and report the matter to the Senate.

Quorum

Apart from the requirement that either the chair or deputy chair be present, a committee may not meet without a quorum. The following provisions apply to every Senate committee and subcommittee:

> In each committee and subcommittee, unless otherwise provided, a quorum shall be
>
> (a) a majority of the members of the committee or subcommittee; or
>
> (b) two members, where one member present was appointed to the committee on the nomination of the Leader of the Government in the Senate and one member present was appointed to the committee on the nomination of the Leader of the Opposition in the Senate. (SO 29)

A majority of members on a committee with an even number of members is defined as half the members of the committee plus one. Thus on eight member committees a majority is five. On a subcommittee of three members, a majority is two. The fact that a chair has a casting vote is of no relevance in establishing a quorum: a chair does not count as two members towards a quorum. On committees with chairs from minority groups, the lesser quorum would be constituted by the chair, a member nominated by the Leader of the Government in the Senate and a member nominated by the Leader of the Opposition in the Senate. The requirement would remain at two on such committees only if the deputy chair (a government or Opposition senator) were in the chair for that meeting.

Participating members of the legislative and general purpose standing committees are counted for the purpose of forming a quorum if a majority of members of a committee is not present (SO 25(7)(d)).

A meeting may not commence in the absence of a quorum. If a quorum is not present, the chair suspends the proceedings until a quorum is present, or adjourns the committee. If a quorum has not formed within 15 minutes after the time appointed for the commencement of the meeting, the senators present may retire, after entering their names in the minutes, and the secretary convenes a meeting for another time (SO 29(2) and (3)).

If a senator draws attention to the absence of a quorum during a meeting the proceedings are suspended until a quorum is present, or, if no quorum is present after 15 minutes, the committee is then adjourned (SO 29(2)).

For the question of whether an inquorate committee meeting is protected by parliamentary privilege, see below, under Privilege of proceedings.

Equally divided votes

On the legislative and general purpose standing committees, the Appropriations and Staffing Committee, the Committee of Senators' Interests, the legislative scrutiny committees and the Selection of Bills Committee, the chair, or deputy chair when acting as chair, in addition to a deliberative vote, has a casting vote when the votes are equally divided. Most select committee resolutions also include a provision to this effect. In all other cases, standing order 31 applies, whereby a chair has a deliberative vote only, and in that situation, where the votes for and against a motion are tied, the question is resolved in the negative (SO 32(1)).

A chair is not obliged to exercise a casting vote. Where such a vote is provided, however, this prevents standing order 32(1) applying, and a tied vote leaves the question in issue unresolved.

Meetings during sittings

Meetings of committees during sittings of the Senate are regulated by standing order 33:

> **33.** (1) A committee of the Senate and a joint committee of both Houses of the Parliament may meet during sittings of the Senate for the purpose of deliberating in private session, but shall not make a decision at such a meeting unless:
>
> (a) all members of the committee are present; or
>
> (b) a member appointed to the committee on the nomination of the Leader of the Government in the Senate and a member appointed to the committee on the nomination of the Leader of the Opposition in the Senate are present, and the decision is agreed to unanimously by the members present.
>
> (2) The restrictions on meetings of committees contained in paragraph (1) do not apply after the question for the adjournment of the Senate has been proposed by the President at the time provided on any day.
>
> (3) A committee shall not otherwise meet during sittings of the Senate except by order of the Senate.
>
> (4) Proceedings of a committee at a meeting contrary to this standing order shall be void.

Originally there was a complete prohibition on committees meeting while the Senate is sitting, but this was significantly modified. The prohibition was based on two principles: that a senator's duty lay first with the Senate and should not be subordinated to a lesser duty; and that it was an infringement of the rights of individual senators to participate in debates in the Senate and meetings of committees if the two were scheduled concurrently. From early days, however, the Senate granted permission, in certain circumstances, for committees to meet while the Senate was sitting. In 1987 the prohibition was modified to allow committees to deliberate in private session provided that decisions were not taken unless all members were present. The current provision was adopted in 1994.

Not every private meeting of a committee falls within the category of deliberating in private session. Generally, a deliberative meeting is one where a draft report is being considered or other

committee business, such as the settling of inquiry programs, is being undertaken. No one other than the members and officers of a committee may be present when the committee is deliberating (SO 36). Thus, a briefing involving persons other than committee members or officers is not a deliberative meeting and may not occur while the Senate is sitting in the absence of express authority from the Senate.

The rule in the standing order applies to Senate committees and joint committees on which senators serve. It provides sufficient flexibility for committees to proceed with their business during sittings without having to reconvene in non-sitting periods to take decisions formally.

Committees must seek the agreement of the Senate to hear evidence in private session or to hold public hearings while the Senate is sitting. This is usually done by giving notice of a motion to that effect, but may also be done by motion moved by leave in emergencies. The Select Committee on Political Broadcasts and Political Disclosures, for example, did not complete its examination of an interstate witness before the Senate convened on 14 November 1991. A motion was moved by leave authorising the committee to take further evidence later that day (J.1710). There have been many occasions when the Senate has authorised committees to take evidence during the sittings of the Senate and refusal of such authorisation would now be regarded as highly unusual. Committees may also be authorised to hold deliberative meetings other than in accordance with the standing order. The importance of committee meetings being duly authorised is underlined by paragraph (4) of standing order 33 which provides that proceedings of a committee at a meeting contrary to the standing order shall be void.

As an alternative to authorising committees to meet during sittings, the Senate has on many occasions adjourned early to enable committees to meet without restriction. This was formerly used for committees considering estimates, during the periods when the particulars of proposed expenditure stand referred to the committees. For a precedent for the Senate suspending its sitting for several hours to enable legislative and general purpose standing committees to meet, see 9/3/1978, J.63.

Public and private meetings

Any person may attend a public meeting of a committee. Persons other than committee members and officers of a committee may not attend a deliberative meeting of a committee, but may be expressly invited to attend other private meetings of committees (SO 36). A deliberative meeting is one at which a committee considers proposed actions or decisions, for example, a meeting at which a draft report is considered to determine whether it should be the report of the committee. For suspensions of the standing order to allow the legislative scrutiny committees to invite members of their state counterpart to their deliberations, see 2/6/2001, J.4368, 26/6/2001, J.4405.

Disclosure of evidence and documents

Evidence taken by a committee and documents presented to it, and not published by the committee or presented to the Senate, may not be disclosed to any person other than a member or officer of the committee (SO 37). A committee may authorise the publication of such material. If a committee does not deliberately resolve to publish any such material, it is automatically

published on presentation to the Senate. The Senate may separately authorise the disclosure of evidence or other material presented to a committee.

Persons who make a submission to a committee are routinely advised that they may not disclose their submission to other persons until the committee has resolved to publish it. To do so may be a contempt of the Senate.

The principle contained in standing order 37, that only the Senate or a committee may authorise the disclosure of material belonging to it, is elaborated in Privilege Resolution 6, which defines matters constituting contempts to include unauthorised disclosure of evidence:

> A person shall not, without the authority of the Senate or a committee, publish or disclose:
>
> (a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;
>
> (b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or
>
> (c) any proceedings in private session of the Senate or a committee or any report of such proceedings,
>
> unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings (paragraph 16).

It is also an offence under section 13 of the *Parliamentary Privileges Act 1987* to publish or disclose, without the authority of a House or committee, a confidential submission, oral evidence taken in camera or a report of such evidence. Such an offence may be prosecuted in the courts.

Orders of the Senate, adopted on the recommendations of the Procedure and Privileges Committees, require committees to investigate in a preliminary way any unauthorised disclosures of their unpublished materials, and form a conclusion about whether the disclosures tended to interfere with their work, before raising such disclosures as matters of privilege for investigation by the Privileges Committee (20/6/1996, J.361; 6/10/2005, J.1200-2; 17/9/2007, J.4388). For examples of action by committees under these provisions, see statement by the chair of the Senators' Interests Committee, SD, 13/9/2006, pp 90-2; report by the Rural and Regional Affairs and Transport Committee, PP 205/2007.

All oral evidence taken in public is automatically published, but any other evidence, written or oral, requires specific authorisation by the committee or the Senate for disclosure.

Given the public interest focus of most Senate committee inquiries, it is usual for most evidence taken by a committee to be published during the course of, or at the conclusion of, the inquiry. There may be reasons why some evidence should remain confidential, including personal privacy, active litigation or possibly adverse commercial consequences.

Where an inquiry has been concluded and unpublished evidence is in the custody of the Senate (SO 25 (15)), an order of the Senate is necessary to publish it. The Senate occasionally makes

such an order on the recommendation of the committee concerned (30/11/2000, J.3638). This procedure has been used for limited publication of evidence, for example, to police to assist in fraud inquiries subject to the limitation imposed by parliamentary privilege (31/8/2000, J.3181).

On 30 August 2001 the Senate took the unusual step of ordering the publication of documents held, and not published, by a committee. The Rural and Regional Affairs and Transport Committee was given a reference on the role of the Australian Maritime Safety Authority (AMSA) in the search for the Tasmanian fishing vessel the *Margaret J.* A majority of the committee subsequently accepted representations by AMSA and counsel assisting the Tasmanian coroner that it should not proceed with its inquiry until the coroner had concluded his inquiry into the matter, a decision opposed by the non-government members of the committee. The representations were based on a claim that the committee's inquiry could prejudice the coroner's inquiry. Advice to the committee from the Clerk (which was tabled in the Senate), however, pointed out that this claim rested on misapprehensions that the coroner could not receive documents which were laid before the committee or evidence which contradicted evidence given in the committee or remarks made in the Senate, misapprehensions clearly arising from a misunderstanding of parliamentary privilege. While not seeking to compel the committee to proceed with its inquiry, the majority of the Senate directed the publication of relevant documents supplied by AMSA and held by the committee, so as to ensure that the documents provided to the committee could not be withheld from the coroner (30/8/2001, J.4830-1).

Standing order 37(3) provides procedures for regulating access to historic committee material which has not been published. It authorises the President to permit any person to examine and copy evidence submitted to, or documents of, committees which are in the custody of the Senate, have not previously been published and have been in the Senate's custody for at least ten years. Confidential and in camera material may not be disclosed until it has been in the custody of the Senate for at least thirty years and unless the President is of the opinion that it is appropriate that such evidence or documents be disclosed. The President is required to report to the Senate the nature of any evidence or documents made available and the persons to whom they have been made available. The House of Representatives agreed to similar conditions under which the President and Speaker may jointly authorise access to evidence and documents of joint committees (resolution of the Senate of 6 September 1984, J.1086, concurred with by the House of Representatives on 11 October 1984). In 1996 the President tabled an unpublished document of a former select committee on the basis that it would normally have been made public (9/5/1996, J.282).

Committees sometimes table in the Senate submissions or other material received after the committees have concluded their inquiries. Thus on 9 May 1996 Senator Campbell, the former chair of the Select Committee on Certain Land Fund Matters, tabled a document submitted by a person who had featured in the committee's inquiry and which referred to disputes between witnesses before that inquiry (J.138). This procedure is used to allow witnesses to respond to evidence adverse to them (see Chapter 17, Witnesses, under Protection of witnesses).

For the publication of in camera evidence in a report, see Chapter 17, Witnesses, under that heading.

Committees are occasionally asked to provide unpublished evidence or documents to particular persons for purposes which those persons wish to pursue, particularly for use in litigation. Committees have been advised that they should not publish the documents unless they would do so having regard to the purpose for which documents are normally published, that is, to assist a committee and its witnesses in its functions of inquiring into and reporting on matters referred to it by the Senate. Committees have been advised that, if they have not, and would not, publish documents for that purpose, they should not, particularly after the conclusion of an inquiry, publish such documents for the purposes of other persons, such as the pursuit of litigation. The basis of this advice is that committees should use their powers only to enable them to perform their functions on behalf of the Senate, and not for purposes unrelated to those functions. If this principle is not followed committees risk having their powers used to support one side or another in disputes which are unrelated to the Senate's purpose in conducting an inquiry. Committees have generally adhered to these principles.

A committee may consider, however, that there is an overriding public interest in providing unpublished material in particular circumstances. It is a matter for the committee's judgment whether there is such an overriding public interest which should overcome the general principle.

Staff of committees

Standing orders require each legislative and general purpose standing committee to be provided with "all necessary staff, facilities and resources" (SO 25(17)). As a matter of practice, each committee is supported by a full-time committee secretary and a number of research and clerical staff. The secretary is the committee's principal adviser on committee procedures and manages all aspects of the committee's research and operations. The secretary prepares an initial draft of the chair's report (SO 38(1)). At the first meeting of the committee the secretary takes the chair, calls for nominations for the chair, conducts any subsequent ballot and declares the outcome. The successful candidate for chair then assumes control of the proceedings.

The secretary is responsible for preparation of the committee's minutes. The secretary records members' attendances and absences, motions and amendments moved and the name of the senator proposing them, resolutions agreed to and the names and votes of senators in the event of any division to determine the matter (SO 32(2)).The draft record of meetings, votes and resolutions is subject to the endorsement, amendment or rejection of the whole committee, not only the chair.

The secretary also assists the chair in maintaining a quorum by ensuring that the attendance and presence of members furnishes a quorum at all times. A committee cannot commence formal business in the absence of a quorum. It is a secretary's role to monitor this requirement to ensure that no doubt can arise about the validity and hence the privileged status of the proceedings. The secretary records the names of senators present and constituting a quorum. Where no quorum is formed within 15 minutes of the appointed meeting time, the senators attending may depart after the secretary has recorded their names in the minutes. In these circumstances, the secretary fixes another time for the meeting (SO 29).

Where a committee or subcommittee has resolved to invite witnesses to assist it, or has ordered the attendance of a witness or the production of documents, the chair directs the secretary to carry out the committee's wishes by signing the invitation or order to attend and produce documents (SO 176). As a courtesy to particular witnesses, such as ministers, members of the judiciary or ambassadors, the chair signs the invitation to attend before the committee.

With the approval of the President, a committee may agree to engage the services of a consultant to advise on matters of technical complexity associated with or arising from an inquiry (SO 25(17)). A contract of engagement is drawn up by the secretary who is responsible for managing the quality, timeliness and cost effectiveness of the consultant's contribution.

Committees other than the legislative and general purpose standing committees have designated secretaries, who may be senior officers of the Senate Department performing other duties in the department.

Privilege of proceedings

Section 16 of the *Parliamentary Privileges Act 1987* declares that for the purposes of the immunity of proceedings of the Parliament from impeachment or question before the courts,

> "proceedings in Parliament" means 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, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
>
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

A committee is defined to include a subcommittee. Proceedings in committees therefore have the same legal status as proceedings in the Houses.

It is arguable that proceedings contrary to the standing orders are not properly constituted "proceedings in Parliament" and are not, therefore, covered by parliamentary privilege. Although only one standing order expressly provides that proceedings contrary to the standing order shall be void (SO 33, meetings during sitting), it is arguable that proceedings not presided over by the duly elected chair or deputy chair, or occurring without committee authority or proper notice to the members, or without a quorum available, are also void and may not be protected by the *Parliamentary Privileges Act 1987*. On the other hand, the procedures of each House are generally not justiciable but are matters for each House (see Chapter 2, Parliamentary Privilege, under Immunities of the Houses). Clearly such a risk is greater where a committee is hearing sensitive evidence in public or members are making controversial statements at a public hearing. The outcome of, for example, a suit or prosecution arising from statements made during proceedings which were contrary to standing orders is not sufficiently certain for any senator or

committee to treat the procedural rules for valid committee meetings other than with the strict compliance from which absolute parliamentary privilege will certainly flow.

As noted in Chapter 10, the sub judice convention applies to proceedings in committees, but not so as to prevent an inquiry which the Senate has directed (see Chapter 10, Debate, under Sub judice convention). Committees have the capacity to avoid prejudice to legal proceedings by hearing evidence in camera.

The question of whether a legislative committee may inquire into matters at issue in legal proceedings was the subject of leading cases on legislative powers in the United States, and the courts have consistently held that the legislature and its committees are not inhibited in inquiring into such matters, and may, indeed, examine the executive's conduct of prosecutions and suits (*McGrain v Daugherty* 1927 273 US 135; *Sinclair v US* 1929 279 US 263; *Hutcheson v US* 1962 369 US 599).

Committees may, however, indirectly cause difficulties in legal proceedings by generating evidence which, because of parliamentary privilege, cannot be used in any substantive way in the legal proceedings (see Chapter 2, Parliamentary Privilege, under Immunities of the Houses). For example, if a party to legal proceedings makes statements before a committee relevant to those proceedings, the other party may claim that the inability to examine those statements leads to unfairness in the proceedings, perhaps even justifying their termination (see Chapter 2 under Is the 1987 Act too restrictive?, for the point that proceedings may be stayed if the inability to examine privileged material leads to significant difficulty). Particularly in criminal proceedings, there may be a danger of defendants deliberately placing material before a parliamentary committee in the hope of aborting or disrupting the court proceedings. Committees should therefore be wary of taking evidence relevant to legal proceedings.

On this basis, committees on several occasions have refrained from taking particular evidence. In 2002 the Legal and Constitutional Affairs Committee sustained an objection by the Commissioner of the Australian Federal Police to answering questions put by a senator concerning police investigations of that senator (transcript of the estimates hearing of the committee, 28/5/2002, and advice from the Clerk of the Senate included in the transcript, pp 297-8; see also the statement by the Commissioner of the Australian Federal Police at a hearing of the Select Committee on a Certain Maritime Incident, 11/7/2002, transcript pp 1926-8; estimates hearing of the Employment, Workplace Relations and Education Legislation Committee, 3/6/2005, transcript p. 44; estimates hearing of the Finance and Public Administration Committee, 26/5/2008, pp 52-3).

The potential difficulty clearly arises where parties to legal proceedings give evidence, but may also exist in relation to other persons involved in proceedings.

The taking of evidence from investigating police and potential defendants during the course of police investigations which have not yet led to prosecutions may also give rise to the potential difficulty.

For a committee refraining from an inquiry while a coroner concluded an examination of a matter, see the case of the Rural and Regional Affairs and Transport Legislation Committee's

inquiry into the search for the *Margaret J*, above, under Disclosure of evidence and documents.

Questions to chairs of committees

(See Supplement) Under standing order 72 a question may be put to the chair of a committee relating to the activities of that committee. Such a question may be asked only on notice unless leave of the Senate is granted for the question to be asked without notice. The question must not attempt to interfere with the committee's work or anticipate its report. The chair must answer only on behalf of the committee.

Questions to chairs of committees on notice, under current procedures, are placed on the Notice Paper, as with other questions on notice (Notice Paper 14/8/2003, question 1773).

The provisions in the standing order relating to questions to chairs of committees are based on an assumption that questions will be directed to current committees about their current operations. They cannot ask a committee to answer for the activities of its predecessors or to disclose documents of concluded inquiries which are in the custody of the Senate (see above, under Disclosure of evidence and documents).

This procedure of questions to chairs emerged with the development of the committee system in the 1970s, when chairs of committees would be asked questions without notice relating to the activities of their committees. In recent years the procedure has been used only occasionally (see, for example, SD, 31/10/1989, p. 2594; 20/12/1990, p. 6158).

Presentation of reports

Committees may not present reports without authority from the Senate. Reports are presented pursuant to standing orders or other orders of the Senate. Such orders may be specific, requiring the presentation of a specific report on a particular day, or they may generally authorise the presentation of reports from time to time (SO 38(6)).

Legislative and general purpose standing committees may report from time to time their proceedings, evidence taken, and any recommendations, and should make regular reports on their progress (SO 25(18)). Matters referred to the committees are usually referred with a specific reporting date. The presentation of the report becomes a Business of the Senate order of the day and therefore has priority over government and general business for the relevant day (SO 58(d)). Similarly, bills referred to the committees carry a specific reporting date, as do the particulars of proposed expenditure or estimates. Such dates are determined on a case by case basis. For reports on annual reports the committees are subject to fixed reporting times. Reports on annual reports tabled by 31 October each year are due by the tenth sitting day of the following year. Reports on annual reports tabled by 30 April each year are due by the tenth sitting day after 30 June that year (SO 25(20)).

Resolutions establishing select committees are required by standing order 28 to fix a time for presentation of the committee's final report. Such resolutions usually also include a provision authorising the committee to report from time to time. Long term select committees have also

been required to present reports on a regular basis by the inclusion of a provision along the following lines:

> That the committee report to the Senate by the end of each June and December until the end of the Parliament or until the committee presents its final report, whichever first occurs.

The Select Committee on Superannuation and the Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies were subject to such a requirement (see 5/5/1993, J.67, as modified by 8/2/1994, J.1219; and 19/5/1993, J.200, as modified by 22/2/1994, J.1278).

Some standing committees are required to present annual reports of their operations. These include the Appropriations and Staffing Committee (SO 19(3)(c)) and the Committee of Senators' Interests (SO 22A(9)). Such reports are in addition to the committees' other reporting obligations.

The Scrutiny of Bills Committee and the Selection of Bills Committee are required to report on virtually all bills considered by the Senate. Although the standing orders do not specify the frequency of reports of these committees, in practice they usually report each sitting week. When presented on sitting days, reports of the Selection of Bills Committee are required to be presented after the giving of notices; leave is required to present them at other times.

A report of a committee is signed and presented to the Senate by the chair (SO 38(5)). In the chair's absence, the deputy chair or another senator may present the report on behalf of the chair. Until a report is tabled, it may not be disclosed to any person other than a member or officer of the committee (SO 37).

Where members of a committee indicate an intention to present a minority report, they may present, without leave, such a report subsequent to the presentation of the main committee report. In the absence of a notification of intention to the committee, however, such a minority report is simply another document for which a senator requires leave to table. (10/5/2007, J.3805)

Reports of committees may be presented at any time when no other business is before the Senate (SO 63). By convention, time is set aside after question time and discussion of any matter of public importance or urgency each day, for the presentation of documents by the President, by senators presenting reports from committees and by the Clerk. Reports presented pursuant to Business of the Senate orders of the day are presented when the business of the day is called on, while reports of the Selection of Bills Committee are presented after the giving of notices of motion on any sitting day. An hour is set aside on Wednesdays and Thursdays for committee reports to be presented and debated. During the hour, a motion relating to a report may be moved and senators may speak for up to 10 minutes each (SO 62(4)).

Reports when Senate not sitting

When a committee has completed its report it is desirable that it should be publicly available as soon as possible, particularly if the report deals with matters of significant public interest. Publication of the report should not be delayed by a long adjournment of the Senate. Provision is therefore made for the release of reports when the Senate is not sitting.

Standing order 38(7) provides for a report to be presented to the President or, in the President's absence, the Deputy President or, in the absence of the Deputy President, any one of the Temporary Chairs of Committees. The report is deemed then to have been presented to the Senate and its publication is authorised. Whoever receives the report may also give directions for its printing and circulation. The report is subsequently tabled by the President at the next sitting of the Senate.

The Senate agreed first in 1990 to an order providing for the presentation of committee reports to the President when the Senate is not sitting. The order was agreed to following a recommendation by the Procedure Committee (First Report of 1990, PP 436/1990). The committee examined issues relating to the presentation of reports following an inquiry by the Committee of Privileges into a case of unauthorised disclosure of a committee report before presentation to the Senate. The Privileges Committee drew attention to the practice that had developed of committees seeking permission to present reports to the President when the Senate was not sitting, and noted that this practice had the advantage of minimising the danger of premature disclosure of reports finalised during long adjournments. First adopted as a sessional order (23/8/1990, J.237), the procedure was subsequently adopted as an order of continuing effect (13/2/1991, J.738). The order formalised and extended a practice which had been operating frequently on an ad hoc basis since 1984.

Consideration of committee reports

Standing order 39 provides that no discussion shall take place on the presentation of a report but that the report and any documents accompanying it may be ordered to be printed. Any further proceedings on a report occur by motion after notice. Standing order 62, however, provides two special times for the presentation and debate of committee reports when they may be debated (see Chapter 8, Conduct of Proceedings, under Consideration of committee reports and Auditor-General's reports). In conjunction with the acceptance of motions moved by leave on the presentation of reports at other times, this means that in practice most committee reports, except reports on bills, are debated on presentation.

The procedures for presentation and debate of committee reports have been considered several times by the Procedure Committee. In its First Report of 1990, the Procedure Committee examined a suggestion by the Committee of Privileges that there should be a limited debate on the presentation of reports and that, to discourage unauthorised disclosure, reports should be presented as early as possible on days when the Senate meets in the mornings (PP 436/1990, pp 1-2, 7, 9). The Procedure Committee reported that the idea had merit but its preferred approach was to allow limited debate as a matter of right regardless of when a committee report was presented. The matter was referred back to the committee for reconsideration and in its Second Report of 1991 the committee suggested that any such debate on a committee report should be interrupted after 30 minutes (PP 466/1991, pp 1-2). Again, the Senate referred the matter for reconsideration but the Procedure Committee, noting resistance to its earlier proposals, recommended no changes to the procedures current at the time (First Report of 1992, PP 527/1992, pp 3-4). Eventually, variations on these proposals were incorporated into changes to the hours of sitting and routine of business adopted by the Senate on 2 February 1994. These changes, recommended by the Procedure Committee in its Second Report of 1993 (PP

212/1993), included provision of an opportunity, on Wednesday and Thursday mornings, for committee reports to be presented and debated by right, without the need for the Senate to grant leave, and these provisions are now reflected in standing order 62.

At other times when committee reports are presented, it is customary for the Senate to grant leave for a motion to take note of the report to be moved. When this occurs, senators may speak for up to 10 minutes to the motion and there is a 30 minute limit on the total time for debate. Debate on all such motions is limited to 60 minutes where two or more motions are moved in succession (SO 169(2)).

Standing order 60 provides that a motion for the consideration or adoption of the report of a committee of the Senate and any government statement on such a report takes precedence of any other General Business on the day on which it is set down for consideration. Since most initial consideration of committee reports occurs by debate on a motion moved by leave when the report is presented, this procedure is rarely used.

When debate on a motion in relation to a committee report is adjourned or interrupted by other business, consideration of the report becomes an order of the day for the next day of sitting, in accordance with standing order 62. One hour is allocated for such debate on Thursday and senators may speak for not more than 10 minutes. A senator who has already spoken to the report on its presentation may speak to it again when debate is called on again under standing order 62. During consideration of orders of the day relating to committee reports and government responses, reports are called on in the following order:

- orders of the day relating to reports or government responses presented that week are called on in the order in which they were presented;

- orders of the day relating to reports or government responses presented prior to that week are called on in the reverse order of presentation; that is, from latest to earliest.

If an order of the day is called on and no senator speaks to it or wishes to adjourn the debate, the question on the motion is put and the item removed from the Notice Paper.

In most cases, the motion moved in relation to a report is that the Senate take note of the report. Where a report presents recommendations requiring some action by the Senate, the motion is that the report be adopted. Such motions are usually moved in relation to reports of the Committee of Privileges and the Selection of Bills Committee, whose recommendations require adoption by the Senate to bring them into effect.

Government responses

Since the 1970s, successive governments have undertaken to respond to committee reports within specified periods. The Senate first declared its view that the government should respond to committee reports in 1973 when the following resolution was agreed to:

> (1) The Senate declares its opinion that, following the presentation of a Report from a Standing Committee or Select Committee of the Senate which recommends action by the Government, the Government should, within the ensuing three months, table a

> paper informing the Senate of its observations and intentions with respect to such recommendations.
>
> (2) The Senate resolves that the President communicate this Resolution to the Government with a request that the foregoing procedure apply, from the date of the passing of this Resolution, to Reports already presented during the present Session and, in respect of future Reports, from the date of presentation of a Report. (14/3/1973, J.51)

For government undertakings to present responses see SD, 26/5/1978, p. 1933; 24/8/1983, p. 141.

In 1994 the resolution was amended following the adoption by the Senate of new standing orders authorising members or groups of members to add dissenting reports, and members or participating members of committees to attach relevant conclusions and recommendations to reports. The amended resolution requires the government to respond also to any minority or dissenting report and any matter added to the report by a member or participating member (24/8/1994, J.2054).

The Senate has also developed a mechanism for monitoring government compliance with this resolution. On 23 August 1979, the Senate considered the Standing Orders Committee's 4th Report of the 59th Session and agreed to adopt a proposal that the President provide reports to the Senate identifying committee reports to which the government had not delivered a response within the prescribed time (J.883-4). Such reports have been regularly presented since 1981 (10/11/1981, J.627).

Government responses are regularly subject to motions moved by leave that the Senate take note of the document. When debate on such a motion is adjourned, the resulting order of the day comes up for reconsideration on Thursdays during the hour set aside for consideration of orders of the day relating to committee reports and government responses, pursuant to standing order 62.

On occasions government responses have been presented in response to questions at question time. There is nothing in the rules of the Senate to prevent this, although question time does not facilitate the consideration of responses (SD, 29/11/2005, pp 36-8).

Action on committee reports

Where committees recommend action by the Senate, for example, in relation to legislation before the Senate, such recommendations may be, and usually are, swiftly adopted by the Senate. Most recommendations, however, involve new legislation or administrative action by the executive government, and therefore cannot be carried out by the Senate acting alone. Ensuring expeditious and considered government responses to such recommendations is therefore important. Most Senate committee recommendations, if not adopted in the short term, are frequently reflected in public policy in the long term, partly because they often embody the considered views of relevant institutions and persons or of the community as a whole.

Apart from the adoption of recommendations, Senate committee inquiries influence the conduct of public affairs by providing persons and organisations with an interest in issues an opportunity to be heard in the parliamentary forum, and for problems and proposed solutions to be aired and

debated. Committee inquiries also increase the knowledge and expertise of senators as legislators and participants in the framing of public policy.

Meeting with House committees

Meetings between Senate and House of Representatives committees are governed by standing order 40. A Senate committee may not confer or sit with a committee of the House of Representatives except by order of the Senate. Any such order is conveyed by message to the House of Representatives with a request that leave be given to the committee of that House to confer or sit with the Senate committee. Conferring may occur orally or in writing and includes exchange of information. The term "sit with" refers to two committees formally meeting together, transacting business and making decisions as if they were a joint committee. Committees meeting together under this standing order may exercise only such powers as are conferred in the order of the Senate authorising the meeting. Proceedings of any conference or joint sitting must be reported to the Senate by its committee.

Some of the domestic standing committees commonly meet as joint committees with their House of Representatives counterparts, pursuant to the standing orders governing their establishment and operations. These include the Library Committee (SO 20), the House Committee (SO 21) and the Publications Committee (SO 22). Other cases of committees of the two Houses meeting together are extremely rare.

In November 1987 the Senate Committee on Transport, Communications and Infrastructure was empowered to sit as a joint committee with its House of Representatives counterpart for consideration of a reference on any proposed variations to the Canberra City Plan. The resolution provided for the following conditions:

> (2) That the Joint committee appoint as its chairman the Chairman of the Senate Committee or the Chairman of the House of Representatives Committee.
>
> (3) That the quorum of the committee be 2 Senators and 2 Members of the House of Representatives.
>
> (4) That a subcommittee of the Senate Committee, when considering the matters referred to in paragraph (1), be empowered to sit with a subcommittee of the House of Representatives Committee, when that subcommittee is considering those matters, as a subcommittee of the joint committee.
>
> (5) That a Senator who is not a member of the Senate Committee may attend a meeting of the joint committee or a subcommittee, with the approval of the joint committee or subcommittee, and participate in its proceedings and deliberations, but may not vote.
>
> (6) That nothing in these resolutions be taken to affect the power of the Senate Committee to consider the matters referred to in paragraph (1) or its duty to report to the Senate on those matters. (3/11/1987, J.250-1)

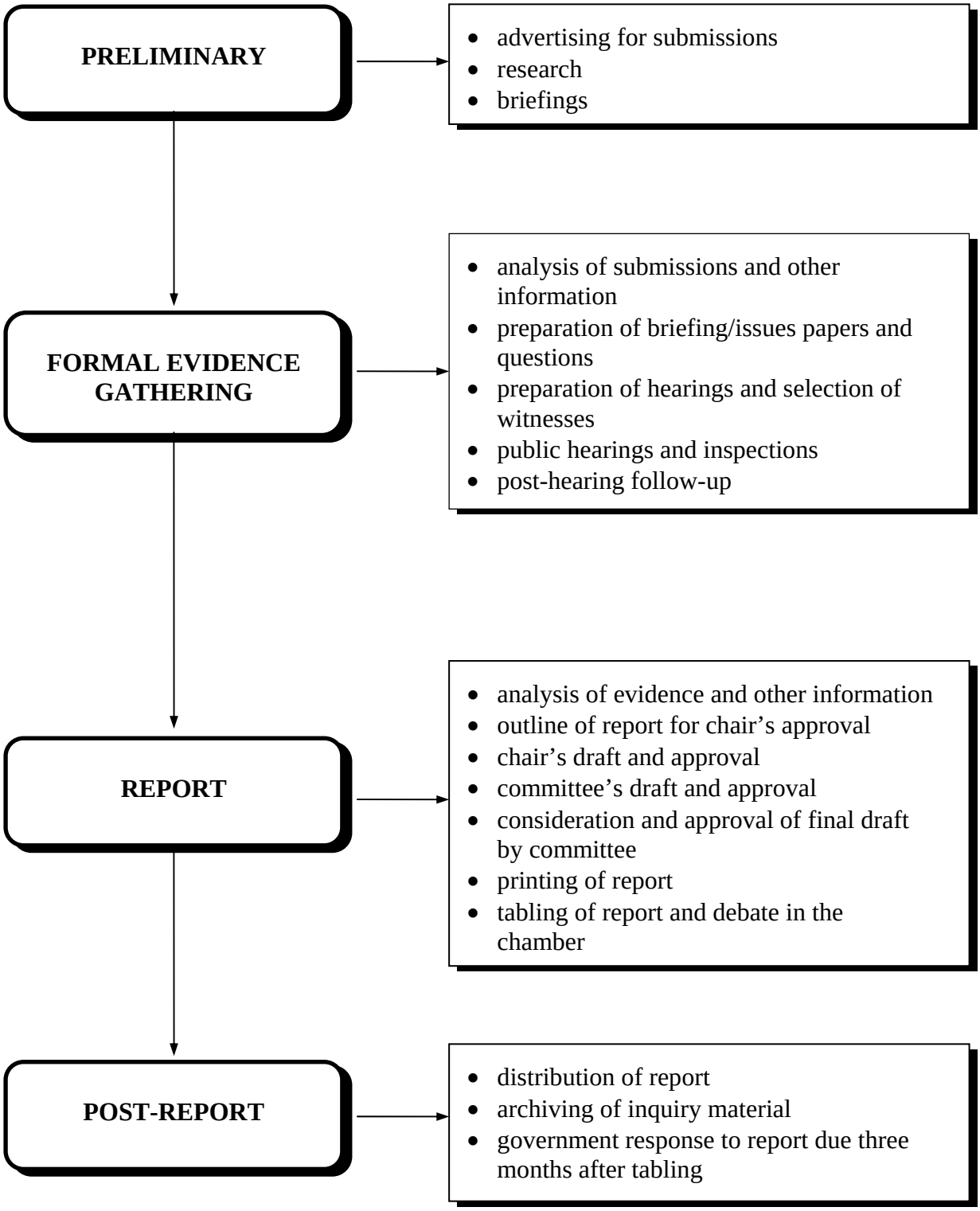
When the committee received a reference on the Canberra leasehold system on 14 April 1988, it was empowered to sit as a joint committee with its House of Representatives counterpart under the same provisions as in the resolution of November 1987, to which the House of Representatives had agreed on 5 November 1987 (J.628). This further resolution was also agreed

to by the House of Representatives on 18 April 1988, and the inquiry was undertaken by a joint subcommittee, whose report was adopted as a report of the Senate Standing Committee on Transport, Communications and Infrastructure and presented to the Senate on 24 November 1988 (PP 411/1988).

A message was received from the House of Representatives on 3 May 1994 (J.1558) requesting that the Senate agree to an order that its Standing Committee on Legal and Constitutional Affairs confer with its counterpart committee in the House in relation to inquiries being undertaken by both committees into section 53 of the Constitution. In response, the Senate directed its committee to confer with its counterpart. A further message from the House of Representatives, dated 30 June 1994, and reported in the Senate on 23 August 1994 (J.2038), contained more specific provisions for a joint meeting of the two committees to take evidence on their references. No action was taken by the Senate in response to this message.

The independence of each House from the other, and their differing composition and history, make joint meetings of committees a rarity not lightly authorised by the Senate, which values particularly the advice of its own committees. Practical difficulties in reaching agreement on rules for joint meetings and in securing agreed reports are also grounds for the traditionally strong resistance in the Senate to such joint meetings.

STAGES OF A SENATE COMMITTEE INQUIRY



Chapter 17

WITNESSES

ONE OF THE PRINCIPAL functions of the Senate, perhaps more important than the functions of making laws and debating matters of public interest, is to conduct inquiries into such matters of public interest and into the conduct of government. Inquiries assist the Senate to obtain information which is necessary to enable it to legislate effectively and to inform the public of the manner in which government is conducted so that the electors will also be capable of making informed decisions.

Inquiries are conducted principally by seeking information and opinions from persons who possess the information and whose views are likely to be significant. The formal method whereby this information-gathering is conducted is through hearings of evidence at which witnesses attend and provide information by making submissions and answering questions.

Inquiries and witnesses

In order that this information-gathering process may be effective, the Senate has the power to require persons to attend and give evidence and to produce documents, and may punish any default as a contempt of Parliament, although, as is noted below, these powers are in practice seldom used. (See also Chapter 2, Parliamentary Privilege, particularly under Power to conduct inquiries.)

The necessity of the inquiry function and of the power to compel evidence and documents as an essential attribute of the legislative power was well expressed by the United States Supreme Court in 1927:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. (*McGrain v Daugherty* 1927 273 US 135 at 174-5)

Inquiries are normally conducted through the medium of Senate committees, which are appointed by the Senate and are given the task to inquire into particular matters on behalf of the Senate and report to the Senate on those matters (see Chapter 16, Committees). The Senate may, however, conduct inquiries and hear evidence directly, and has occasionally done so by requiring witnesses to appear before the Senate. The considerations applying in relation to witnesses apply

equally to witnesses before the Senate and witnesses before committees, and are therefore analysed in this chapter.

In practice, the power to compel the attendance of witnesses and the production of documents is normally not used in the conduct of inquiries. Senate inquiries proceed on a voluntary basis, with witnesses invited to make submissions, to produce other documents and to appear and give oral evidence. Witnesses are normally very willing to place their views and the information they possess before the Senate to assist in an understanding of issues and in the framing of legislation. On rare occasions, however, witnesses are summoned to give evidence and required to produce documents where the Senate or its committees believe that the proper conduct of inquiries entails the exercise of those inquiry powers. Some witnesses ask to be summoned in the mistaken belief that this gives them greater legal protection (see under Protection of Witnesses, below), and committees accede to such requests.

The Senate may order particular witnesses to appear before committees and give evidence. For precedents, see 7/2/1995, J.2895-7; 6/6/1995, J.3364-5; 22/10/1997, J.2673; 21/10/1999, J.1966; 10/4/2000, J.2582-3, 2585; 28/11/2000, J.3594-5; 19/6/2001, J.4322; 12/3/2002, J.154-6; 25/11/2003, J.2709-10. In all cases the orders were complied with (witnesses duly appeared, or, in one case, required documents were produced). They were all public office-holders; this procedure has not been used in respect of private citizens.

Protection of witnesses

The formal power possessed by the Senate in relation to witnesses is therefore very great: witnesses may be summoned to appear to give evidence and produce documents and any failure to do so may be punished as a contempt. There are no explicit legal limitations to these powers, except that a person punished for a contempt may seek judicial review of the penalty on the basis that a refusal to attend, produce documents or give evidence did not amount to an obstruction of the Senate (see Chapter 2, Parliamentary Privilege), but such an application would be unlikely to succeed.

The corollary of the great power over witnesses possessed by the Senate, however, is that witnesses possess extensive legal protection in respect of their cooperation with Senate inquiries. Moreover, to ensure that its powers over witnesses are not used oppressively, the Senate has adopted significant procedural protections of the rights of witnesses.

(a) legal protection

Under the *Parliamentary Privileges Act 1987*, the giving of evidence and the production of documents by a witness has the same legal status as a senator's participation in Senate proceedings, and therefore attracts the very wide protection which is given to proceedings in Parliament against prosecution, suit, examination or question before any court or tribunal (see Chapter 2, Parliamentary Privilege). The action of a witness in giving evidence and producing documents and the evidence given therefore cannot be used against the witness in any sense in subsequent proceedings before a court or tribunal.

It must be emphasised that a person is protected in the act of submitting a document to the Senate or a committee even if they do not accept the document. The act of submitting the document also cannot be used as evidence against the person in any action relating to the composition or acquisition of the document. If the document is composed or acquired for the purpose of submission to the Senate or a committee, the composition or acquisition of the document is also protected.

Witnesses occasionally submit statutory declarations to committees, apparently to add credibility to their statements. If such a declaration is prepared for the purpose of submission to a committee, however, making it is an empty gesture; because of parliamentary privilege no prosecution for a false declaration, under the laws relating to such declarations, can proceed. Committees deal with such declarations as normal submissions.

Standing order 181 declares that "A witness examined before the Senate or a committee is entitled to the protection of the Senate in respect of the evidence of the witness.". This is a declaration by the Senate that it will use its powers to protect witnesses against any adverse consequences arising from their giving evidence. The Privilege Resolutions of the Senate of 25 February 1988 (see also Chapter 2, Parliamentary Privilege) declare that any interference with a witness and the infliction of any penalty on a witness in consequence of their giving evidence may be treated as a contempt (Resolution 6, paragraphs (10) and (11)). In 1984, after apparent threats to a witness engaged in a particular inquiry, the Senate had occasion to issue a reminder that interference with witnesses could be dealt with as a contempt. The following resolution was passed:

> That the Senate —
>
> (a) reaffirms the long-established principle that it is a serious contempt for any person to attempt to deter or hinder any witness from giving evidence before the Senate or a Senate Committee, or to improperly influence a witness in respect of such evidence; and
>
> (b) warns all persons against taking any action which might amount to attempting to improperly influence a witness in respect of such evidence. *(13 September 1984 J.1129)*

Committees have also issued general warnings against interference with witnesses. In April 2005 the Finance and Public Administration References Committee placed advertisements in local newspapers containing such warnings.

The Senate and its Privileges Committee have always taken very seriously, and investigated thoroughly, any suggestion that witnesses have been interfered with in any way in respect of their evidence, and in several cases persons have been adjudged guilty of contempt for that offence; usually remedial action by the offenders has avoided the imposition of penalties (for particular cases, see Chapter 2, Parliamentary Privilege, under Matters constituting contempts, and Appendix 3).

Interference with witnesses may also be prosecuted as a criminal offence under section 12 of the *Parliamentary Privileges Act 1987*.

(b) procedural protection

The Senate has adopted a number of procedures for the protection of its witnesses. These procedural measures for the protection of witnesses are mainly contained in Privilege Resolution 1, which is shown in full in appendix 2. This resolution provides rules which all Senate committees are obliged to observe in their dealings with witnesses. If the Senate were to conduct an inquiry directly, with witnesses appearing before the Senate, the Senate would also follow these rules so far as they were applicable.

The principal procedural rules contained in Resolution 1 are as follows:

- Witnesses are normally invited to appear, and are summoned (ie, formally ordered to appear) only where a committee makes a deliberate decision that the circumstances warrant the issue of a summons.

- Similarly, a formal order for the production of documents is made only if a committee makes a deliberate decision that such an order is warranted.

- Witnesses are given reasonable notice of a meeting at which they are to appear, and are supplied with a copy of the committee's terms of reference, a statement of the matters to be dealt with during the witness's appearance, a copy of Resolution 1 and a copy of any relevant evidence already taken.

- Witnesses are given an opportunity to make a submission in writing before appearing to given oral evidence.

- Witnesses are offered the opportunity to give their evidence in private session (in camera), and any application to do so must be considered by a committee.

- Witnesses are to be informed whether any evidence given in camera is to be published.

- Committees are enjoined to ask only relevant questions necessary for their inquiries.

- Witnesses may object to answering any questions on any grounds, and committees must consider and determine any objections by a witness.

- Persons must be given reasonable opportunity to respond to any evidence adversely reflecting on them.

- Where appropriate witnesses may be accompanied by, and may consult, an adviser.

- Committees are required to investigate, and report to the Senate on any evidence that a witness may have been interfered with or penalised in respect of their evidence.

Special procedural protections are provided for witnesses involved in investigations by the Privileges Committee into allegations of contempt of the Senate (Resolution 2; see Chapter 2, Parliamentary Privilege, under Proceedings before the Privileges Committee). The reason for this

is that the Privileges Committee investigates in particular cases whether contempts have been committed. If a finding of contempt is adopted by the Senate, the consequences for the person or persons concerned are very serious. A finding of contempt may in itself damage a person's reputation or professional standing, and it is open to the Senate to impose a penalty of up to 6 months' imprisonment or a fine of up to $5 000 for a natural person and $25 000 for a corporation. Witnesses before the Privileges Committee are therefore given all the rights of persons involved in legal proceedings, and additional rights not available to such persons.

It is in practice rare for a committee to order the attendance of a witness because it is rare for anyone to refuse a committee's invitation to give evidence. A summons may be issued whether or not an invitation has been issued. This is necessary because an obligation to invite in every instance could conceivably result in an essential but reluctant witness refusing an invitation and then becoming incommunicado. In such a situation a summons might not be capable of effective delivery and a failure to answer it may not therefore be justly punished. Where this is anticipated a committee may issue a summons in the first instance. These principles also apply where a committee wishes to order the production of documents.

Before a witness is invited to attend before a committee to give oral evidence they must be given a reasonable opportunity to make a written submission (Resolution 1(4)). This does not mean that no witness may appear unless they have made a submission. The rule is to ensure that witnesses have an opportunity to make a considered written statement about the matters before a committee. Witnesses often appear, at the committee's invitation, without first submitting a document. This can occur, for example, when time is short. A witness ordered to attend, however, must be given reasonable opportunity to formulate a written submission before an order to attend would be enforced by the Senate.

Where a witness has supplied documents to a committee, whether in response to an invitation or a summons, reasonable access must be given to the witness to consult those documents (Resolution 1(6)). Documents received by legislative and general purpose standing committees remain in the custody of the Senate after the completion of an inquiry (SO 25(15)). An original submission received from a submitter will not be returned, although where necessary a copy may be provided to them. Where a committee insists on examining original documentary evidence in relation to a matter and receives and accepts this material in response to its invitation or order, the documents may not be returned to the sender without an order of the Senate to that effect (precedent: 16/5/1990, J.90-1). This circumstance in which original documents are required seldom arises. Photocopies of relevant documents are normally adequate for most committee purposes.

A witness must be given reasonable notice of the meeting at which they are to appear (Resolution 1(3)). Every effort is made by committees to give such reasonable notice. However, there are occasions when a committee will seek the cooperation and tolerance of witnesses given very late notice of a hearing at which their evidence would be helpful. For example, when bills have been referred to committees for inquiry and report within extremely short times, witnesses may receive no more than 72 or even 48 hours notice. In many cases, the witnesses concerned are keen to ensure that the committee is made aware of their views and hears their evidence and committees are appreciative of their cooperation in making themselves available.

A witness has a right to certain information and documents about a committee. This information usually accompanies the committee's invitation to attend. A witness must receive a copy of the committee's terms of reference, a statement of the particular matters expected to be dealt with during the appearance of the witness and a copy of Resolution 1. Where appropriate a witness is provided with a transcript of relevant evidence already taken. There is a committee discretion here: not every witness receives as a matter of course every transcript. The requirement is designed to ensure fairness to a witness whose proposed evidence may be affected by, or has already been referred to during, an earlier committee hearing.

Evidence which reflects adversely on another person, including a person who is not a witness, must be made known to that person and reasonable opportunity to respond given. The committee must consider whether to hear the evidence, publish it, and seek a response to it from another person. These rules, in Resolution 1(11) to (13), do not define the meaning of evidence which reflects adversely on another person. However, certain general principles of interpretation apply.

Evidence given to a committee encompasses written statements or submissions accepted by the committee as well as oral presentations at hearings. The rules do not apply to evidence merely on the basis that it is contrary to other evidence. For the purposes of its inquiry, a committee will seek as many considered views on the subject matter as is reasonably possible. In many cases, the views offered will, and should, differ, contradicting each other and criticising the rationality, accuracy or acceptability of alternative or competing opinions. Thus, evidence adverse to another witness's case does not fall within the application of the rules. The rules deal with adverse "reflections", that is, evidence which reflects adversely "on a person" (including an organisation) rather than on the merits or reliability of an argument or opinion. To bring the rules into operation, a reflection on a person must be reasonably serious, for example, of a kind which would, in other circumstances, usually be successfully pursued in an action for defamation. Generally, a reflection of poor performance (for example, that relevant matters have been overlooked) is not likely to be viewed as adverse. On the other hand, a statement that a professional person lacks the ability to understand an important conceptual or practical aspect of their profession and, therefore, is not a reliable witness, would be regarded as an adverse reflection. Reflections involving allegations of incompetence, negligence, corruption, deception or prejudice, rather than lesser forms of oversight or inability which are the subject of criticism in general terms, are regarded as adverse reflections. Mere disagreement with another person's views, methodology or premises is not considered as an adverse reflection.

If during a public hearing a committee believes it is about to hear evidence which "may reflect adversely on a person", the committee must consider whether it would be more appropriate to hear that evidence in private session. On so resolving, the committee meets in camera and the transcript of evidence then taken must not be published except in accordance with procedures for the disclosure of in camera evidence (see below). In some circumstances, a committee might realise that evidence adverse to a person is about to be given and that it is likely to be irrelevant to the inquiry. In this case the committee may direct the witness to say no more. In most cases, however, a committee does not know in advance that an adverse reflection will be made in oral evidence and a problematic statement may be made by a witness, the acceptability of which the committee must determine. In such cases, the committee must initially decide whether the statement is an adverse reflection. If it is considered to be such, the committee must then decide whether it amounts to relevant evidence for the purpose of the inquiry. If it is so considered, the

committee may continue to hear it in public because of its potential significance to the inquiry, or may decide to proceed in camera.

If the committee considers some evidence to be an adverse reflection and irrelevant to the inquiry, the committee must consider whether it would be proper to expunge that evidence from the transcript of evidence and to forbid the publication of it by anyone including, for example, members of the public or media at the hearing.

Committees are very reluctant to expunge any material from transcripts of evidence. Expungement results in the public record of proceedings not being a complete and accurate record. In considering expungement a committee must balance the need to protect persons from unnecessary or irrelevant defamatory evidence, perhaps by witnesses intent on misusing the privileged environment of a committee, against the need to maintain an accurate record of its proceedings and evidence. A committee may properly conclude that irrelevant adverse reflections by a witness about others should remain on the record where this provides an insight into the witness's credibility and responsibility.

In relation to written evidence, if it is not relevant to a committee's inquiry, the committee may determine that the evidence is to be treated as not received and returned to the submittor, or retained but not considered by the committee. If either of those courses is followed, there is no occasion for the application of the adverse reflections rule.

If evidence contains allegations of criminal conduct, and those allegations could be investigated, or contains matter relevant to a criminal investigation in progress, the committee may invite the submittor to provide the evidence to the police or other investigating authority. If the evidence contains matter relevant to a criminal trial or a civil action in progress, the submittor may be invited to have the evidence put before the courts. In these circumstances, the adverse reflections procedures need not be followed. In making such decisions a committee should have regard to the nature of its inquiry and to the risk of creating more material which is unexaminable in court proceedings because of parliamentary privilege and which may thereby cause difficulties in those proceedings (see Chapter 16, Committees, under Privilege of proceedings). It is preferable for the evidence concerned not to be published.

The fact that a person against whom adverse evidence is given is notorious, or has had ample opportunity to respond to allegations through public controversy, does not affect the application of the right-of-reply procedure (see, for example, report of the Legal and Constitutional Legislation Committee on additional estimates 2004-05, PP 64/2005, p. 165).

Where evidence is given which reflects adversely on a person and which is relevant to an inquiry, the committee must provide the person reflected on with a reasonable opportunity to have access to that evidence and to respond to it in writing and by appearing before the committee. In practice, access to the evidence means obtaining a copy of the relevant submission or hearing transcript. In the case of in camera evidence the committee will disclose only the adverse reflection and such other contextual evidence as it considers to be reasonably necessary to enable the person to respond.

While the person reflected on has a right to be notified of the evidence and to make a written response, they have no automatic right of audience before the committee on the matter. The committee must provide a "reasonable opportunity" for the person to write and appear. "Reasonable opportunity" means that the person must have a proper and timely opportunity to consider the matter and respond to it. The circumstances of the inquiry, including the nature and seriousness of the reflection, its significance to the inquiry, the other demands on committee members' time, the ability of the committee or a subcommittee to meet the person, and the person's resources and ability to travel to Canberra or elsewhere, must all be considered in deciding what would amount to a "reasonable opportunity". In the first instance what is a reasonable opportunity is a matter for the committee to determine. It would, however, be a matter for the Senate to consider if an aggrieved person contended that a reasonable opportunity to respond in person to an adverse reflection had not been afforded and that, therefore, the order of the Senate had not been complied with by the committee. A written response is now regarded as affording a reasonable opportunity to respond in most cases, even where an oral hearing is requested.

If the adverse reflections are on a group of persons, for example, on a company, whether relevant persons are invited to make a response will be a matter of judgment. For example, if it is an existing company the principals of the company may be invited to make a response, but if it is an obscure company no longer registered such an invitation need not be issued.

In the interests of fairness, the process of informing a person of an adverse reflection should not be delayed but should proceed as soon as possible, to enable the person concerned to respond as soon as possible.

The fact that evidence contains adverse reflections is not, of itself, a reason for not publishing the evidence in the usual way. However, immediately prior to releasing unpublished evidence, for example, a submission containing an adverse reflection, the person reflected on should be notified that the evidence is to be published and advised of their rights under the Privilege Resolutions.

It would not be viewed as fair practice for a committee not to publish a person's response to an adverse reflection, if the person requests it, at least to the same degree as the adverse reflection was published.

If a response goes beyond responding to the original evidence and contains new and irrelevant adverse reflections on persons, the committee has the option of not accepting the response and directing that it be reframed so as to confine it to a relevant response to the original evidence. If a response is accepted and contains new adverse reflections on persons other than the person who provided the original evidence, it should be treated as new evidence. If multiple exchanges of adverse reflections, in responses to responses, ensue or appear likely, the committee at any time may indicate to the parties that the subject is closed and that the committee will not receive any further responses.

Responses by persons to evidence adversely reflecting on them may be presented to the Senate where the committee concerned has concluded the relevant inquiry (by the President: 25/11/1993, J.895; by report of the committee: Standing Committee on Rural and Regional

Affairs, report on a matter arising from the committee's consideration of the Plant Breeder's Rights Bill 1994, 2 June 1994, PP 183/1994; see also document tabled by that committee, 9/2/1995, J.2927; by the former chair of a select committee: 9/5/1996, J.138). In 1999 the Community Affairs References Committee presented to the Senate responses by witnesses to a document which, although prepared as a result of a recommendation by the committee, had not been published by the committee (29/4/1999, J.814).

Privilege Resolution No. 1 provides in paragraph (13) a right of witnesses to respond to adverse references to them in *evidence*. Although this could be interpreted as allowing responses only to remarks by other witnesses, it has been taken to refer to any remarks made at a committee hearing (9/8/2001, J.4642).

Any proposal to take evidence in private session is always considered carefully by a committee. In camera hearings defeat the purpose of parliamentary inquiries of informing the public. The other main purpose of gathering evidence is that the evidence may be used to support conclusions and recommendations, and may be seen by the public to support those conclusions and recommendations. The vast majority of hearings of evidence by committees are therefore in public. When they occur in Parliament House they are all sound broadcast and many are also televised. In camera hearings, however, are occasionally used as a means of protecting witnesses and their interests which may be harmed by disclosure of information.

A witness must be informed of, and be offered, the opportunity to apply at any time for their evidence to be heard in camera. The witness will be asked for reasons, the statement of which may itself be heard by the committee in public or in private. The committee then must consider the application. It may do so either in public or in private, in the presence of the witness or in their absence, as the committee considers appropriate. Where the application to proceed in camera is refused, the committee must notify the witness of its reasons. As a matter of practice and interpretation, while an immediate explanation may be given orally to the witness by the chair, a written statement repeating or elaborating on them must be supplied to the witness within a reasonable time to comply with the requirement of notification (Resolution 1(7)).

The grounds on which a witness may ask to be heard in camera include the grounds on which objection may be taken to a question (see below).

There is no obligation on a committee to publish the fact that a witness has applied for their evidence to be received or heard in camera or to publish the reasons for the application or the committee's reasons for its decision. Where an application is made during the course of a public hearing, the fact, the reasons and the outcome may be on the public record. Where an application is made in writing for a written submission or oral evidence to be received or heard in camera, the matter may not come to light. Public disclosure that a witness desired their evidence to be treated in secret could be prejudicial to the witness. As a matter of principle the same approach is adopted for this question and its determination as is applied to the question whether the substantive evidence should be received or heard in camera.

Before giving evidence in camera, a witness must also be informed that the committee, and the Senate itself, have the power subsequently to publish the evidence if they so decide. The witness must also be informed whether in fact the committee intends to publish all or any of the in

camera evidence (Resolution 1(8)). This second requirement can present a committee with a dilemma, as it may be difficult to assess at that stage the overall value for the inquiry and the report of the particular evidence. In practice, the rule is interpreted to mean that a witness must be informed of the committee's intention where this has been decided, or that no decision has been made. The purpose of the rule is to ensure that the witness is as fully informed of the committee's intentions as possible. (For the publication of in camera evidence, see below.)

Apart from taking evidence in camera, committees may take other precautions to protect witnesses; for example, their identity may be concealed by not including their names in transcripts of evidence and in reports (see Economics References Committee, inquiry into operations of the Australian Taxation Office, published transcripts of in camera evidence, report PP 37/2000).

The provisions whereby a committee must consider and determine any objection by a witness to answering any question (Resolution 1(10)) is seldom in practice formally invoked. If witnesses have some difficulty in answering a question, they usually indicate that difficulty and the committee does not press the question or seeks the desired information by an alternative form of questioning. Where a witness raises a formal objection to answering a question, it is normal for the committee, having followed the procedures set out in the resolution, to adopt the same methods of overcoming the objection. It is for a committee to decide whether a particular objection will be sustained and whether a question will be pressed. Where a committee considers that the answer to the question is essential for the purposes of its inquiry, or that the objection to answering the question is not well founded, the committee insists on an answer to the question, and reports any refusal to answer to the Senate.

Grounds on which a witness may object to answering a question include:

- The question is not relevant to the committee's inquiry. It is for the chair of the committee in the first instance and the committee ultimately to determine whether a question is relevant (Resolution 1(9)).

- Answering the question may incriminate a witness. As has been noted, witnesses are completely protected against any use of their evidence against them in any legal proceedings. An answer to a question may, however, incriminate a witness in the non-technical sense that it may make publicly known offences or improprieties committed by the witness, which may affect the witness's dealings with others, or may lead to investigations of the witness by other agencies (other than by making direct use of the witness's evidence).

- The information required by a question is otherwise protected from disclosure, and the committee ought not to disclose it. Committees are not bound to observe prohibitions on disclosure of information which operate elsewhere (see Chapter 2, Parliamentary Privilege, under Parliamentary privilege and statutory secrets provisions), but a committee may consider that the fact that information is protected from disclosure elsewhere should persuade the committee not to disclose the information in its public hearings.

- The disclosure of information required by a question would be prejudicial to the privacy or the rights of other persons, particularly parties in legal proceedings.

In some cases the difficulty a witness has in answering questions may be overcome by hearing the answers in camera (see above).

For the grounds on which the executive government may seek to withhold information from a parliamentary inquiry see Chapter 19, Relations with the Executive Government, under Public interest immunity.

Witnesses do not normally apply to be accompanied by counsel, and a committee would not normally grant such an application unless its inquiry involved contentious and complex matters in relation to which a witness might seriously prejudice their interests by ill-advised or hasty answers. Such inquiries are rare. The Privileges Committee, however, is required to extend to witnesses the right to be represented by counsel (Resolution 2).

Witnesses are not paid fees, but committees normally meet the travel costs and other reasonable expenses of witnesses other than public officials. In 1999 the Senate, adopting a report of the Procedure Committee, resolved that committees should be informed of any payment of witnesses' expenses by others, the rationale being that a committee may need to assess whether evidence is influenced by such payment (29/4/1999, J.815).

In carrying out the requirement in Resolution 1(18) to investigate possible interferences with witnesses, committees may take their investigations as far as they consider necessary, and may resolve such matters themselves or recommend to the Senate that they be referred to the Privileges Committee (for an example see report by the Environment, Communications, Information Technology and the Arts Committee on two privilege matters, PP 176/2007).

Summoning of witnesses

Where the Senate or a committee makes a decision to summon a witness, a summons is issued by the Clerk of the Senate or the secretary of the committee, respectively. In the case of a committee, the failure of a witness to respond to a summons is reported to the Senate (SO 176). This requirement for committees to report any failure to comply with a summons arises from the fact that only the Senate can deal with any contempt (see Chapter 2, Parliamentary Privilege).

The Senate may order particular witnesses to appear before committees (7/2/1995, J.2895-7; 6/6/1995, J.3364-5; 22/10/1997, J.2673; 21/10/1999, J.1966; 10/4/2000, J.2582-3, 2585; 28/11/2000, J.3594-5; 19/6/2001, J.4322; 12/3/2002, J.154-6; 25/11/2003, J.2709-10).

Where a committee with power to do so resolves to order the attendance of a witness a summons is prepared, signed by the secretary and delivered to the person by a means which satisfies the committee that the person will receive it. In the past, summonses have been personally delivered by a committee's secretary or faxed to a business or legal adviser's address and receipt confirmed by telephone. The important element is not the means of delivery but the certainty of receipt.

Immunity from summons

It has not been established as a matter of law that any category of persons has any immunity from summons by the Senate or its committees, although theses have been advanced that various officer-holders should be recognised as having such an immunity on grounds of constitutional propriety. Possible and mooted limitations on the Senate's power to compel witnesses are summarised in 'The Senate's power to obtain evidence and parliamentary "conventions"', paper by the Clerk of the Senate, published by the Finance and Public Administration References Committee, September 2003.

The procedures of the Senate acknowledge that special considerations apply to two categories of office-holders: senators and members and officers of other houses.

Senators as witnesses

Where the Senate conducts an inquiry directly it may order one of its members to appear (SO 177(1)). A committee, however, has no power to summon a senator. In case of refusal by a senator of a request to attend a committee, the committee must report the refusal to the Senate, and the Senate may order the senator to attend the committee (SO 177(2) and (3)). In practice, these procedures are not used; senators often voluntarily offer their views and information to committees.

Members or officers of other Houses

As noted in Chapter 2, under Power to conduct inquiries, as a matter of comity between legislatures, and perhaps as a matter of law, the Senate may not summon members of the House of Representatives or of state and territory legislatures. Senate procedures reflect this rule.

If the Senate or one of its committees requires the attendance of a member or officer of the House of Representatives, standing order 178 requires a message to be sent to that House. The message is framed as a request that the House give leave for the member or officer to attend. A similar provision is in the standing orders of the House of Representatives and is referred to in standing order 179, which provides that, on receipt of a message from the House of Representatives, the Senate may authorise the attendance of a senator or Senate officer before a House committee.

The standing orders are interpreted as not preventing the voluntary appearance by invitation of members and officers of one House before the committees of the other. It is quite common for members of the House of Representatives or of state parliaments to appear before Senate committees by invitation, and many have done so. In 1981, a Speaker of the House of Representatives appeared before a Senate committee for the first time, the Select Committee on Parliament's Appropriations and Staffing (see SD, 19/11/1981, p. 2409). On several occasions, House of Representatives ministers have appeared before Senate committees, rather than following the usual practice of being represented by a Senate minister. The Senate Industry, Science and Technology Committee, for example, during its inquiry into the Australian Nuclear Science and Technology Organisation Amendment Bill 1992 in May 1992, heard evidence from

the Minister for Science and Technology who was a member of the House of Representatives, the New South Wales Minister for the Environment and a state member. The systematic consideration of bills by Senate committees has resulted in more frequent appearances by state parliamentarians representing their interests in relation to bills affecting Commonwealth-State relationships, such as the Forest Conservation and Development Bill 1991, the Medicare Agreements Bill 1992 and the Native Title Bill 1993. The Community Affairs Legislation Committee on 5 May 1998 heard evidence from most state and territory health ministers simultaneously in relation to the Health Legislation (Health Care Amendments) Bill 1998. The Select Committee on Medicare in 2003 heard several state health ministers. The New South Wales Minister for Justice represented all his state and territory counterparts at the hearing of the Legal and Constitutional Legislation Committee into the Anti-terrorism Bill (No. 2) 2004. State and territory ministers appeared before the Employment, Workplace Relations and Education Legislation Committee in its inquiry into workplace agreements and workplace relations legislation in October and November 2005.

This informal procedure of appearance by invitation is used only in cases where members are offering their views on matters of policy or administration under inquiry by Senate committees. The procedure has not been used in cases where the conduct of individuals may be examined, adverse findings may be made against individuals or disputed matters of fact may be under inquiry. For such cases it is considered that the formal process of message and authorisation to appear should be employed. This procedure was invoked in December 1993 when the House requested the appearance of a senator before its Committee of Privileges in relation to an investigation of an alleged unauthorised disclosure of the draft report of a joint committee of which the senator was a member. The Senate authorised the appearance of the senator before the House Committee of Privileges (16/12/1993, J.1077; see also 5/12/1986, J.1576; 7/3/2001, J.4043).

The standing orders are also not regarded as preventing the Privileges Committee of one House seeking the written comments of a member of the other House on a matter under inquiry. This has been done by the Senate Privileges Committee on occasions when it has conducted inquiries into unauthorised disclosures of documents of joint committees. The committee has, on these occasions, written to members of the House of Representatives and asked them whether they have any relevant knowledge about the matter under inquiry. To have members of one House attend for examination before a committee of the other, however, would require the formal process of a message. The rationale of this distinction between providing written information and giving oral evidence is that a written inquiry is in the nature of a preliminary step to see whether a full formal hearing is warranted, whereas submitting a member to examination before a committee is a more formal and rigorous inquiry process which also involves a much greater possibility of inquiry into the conduct of the member. (By contrast, see report of the United Kingdom House of Commons Standards and Privileges Committee, HC 447 2003-04, for a contempt found, against a minister (the Lord Chancellor), in the absence of a culpable intention, after he gave evidence voluntarily before the committee.)

Although the standing orders refer to the House to which a request is made giving permission for its member to appear, it is open to that House to compel the member to appear. As either House

may compel its members to appear for the purposes of its own inquiries, it follows that a House can compel its members to appear in an inquiry by another House.

The granting of permission for members of one House to appear before the other House or its committees does not, however, suspend the rule that one House may not inquire into or adjudge the conduct of a member of the other House, other than the conduct of a minister in that capacity. The Senate so declared in granting permission for senators to appear before the House Privileges Committee in an inquiry into the unauthorised disclosure of joint committee documents in 2001 (7/3/2001, J.4043). (See also Chapter 19, Relations with the Executive Government, under Ministerial accountability and censure motions, for material on censure of private members of the other House.)

One of the rare occasions of the use of the procedure under standing order 178 highlights this principle, as well as a probable limitation on the Senate's power to compel evidence. The Select Committee on the Powers, Functions and Operation of the Australian Loan Council was appointed on 3 November 1992 to investigate reports that the state of Victoria had exceeded its borrowing limits with the knowledge of the federal Treasurer. The committee's invitations to appear were met with refusals from several witnesses, including members of state parliaments and the House of Representatives. The committee sought advice from the Clerk of the Senate on whether the Senate could compel members of the House of Representatives and members of state parliaments to appear.

The Clerk's advice was that the Senate did not possess this power. Two bases for the advice were given. The first was that it is a parliamentary rule that a house of parliament does not seek to compel the attendance of members of the other house, as a matter of comity between the houses and of respect for the equality of their powers. This rule is embodied in standing order 178. The Clerk advised that this parliamentary rule should be regarded as extending to the houses of state and territory parliaments, as a matter of comity with those houses and respect for their powers of inquiry.

Secondly, it was advised that, should the matter ever be adjudicated by the courts, the courts could find that as a matter of law the Senate does not possess this power. The courts could arrive at such a finding by reading the parliamentary rule as a rule of law, as courts have done with other parliamentary rules in the past, or, more probably, could find in the Constitution an implied limitation on the powers of the federal Houses in respect of each other and the state houses, on the basis of the doctrine of integrity of state institutions which has been expounded in other judgments. The committee was also advised that the House of Representatives and the state houses could, at the request of the Senate, compel their members to attend before a Senate committee if they considered it was in the public interest to do so. (The advice is contained in the interim report of the committee, March 1993, PP 78/1993.)

The committee presented a report to the Senate on 30 September 1993 (Second Report, PP 153/1993), recommending that the Senate request the House of Representatives and certain state houses to require the attendance of certain of their members before the committee to give evidence. The Senate agreed to a resolution to make the various requests on 5 October (J.566). A message from the House of Representatives, declining to accede to the request in respect of the Treasurer, was received on 7 October. Responses from the Victorian Houses were received on 20

and 21 October. The Victorian Houses did not accede to the requests to require their members to appear, but passed resolutions giving the members leave to appear if they thought fit. As these resolutions were passed without debate, it is not clear whether the view was taken that the Houses do not have the power to require their members to appear before a committee of another house, or whether the Senate's requests were declined for other reasons. The New South Wales Legislative Assembly accepted a statement by its Speaker that it did not have the power to compel its members to appear before a Senate committee.

The Select Committee on Unresolved Whistleblower Cases (report, PP 344/1995, pp 138-40) and the Select Committee on the Victorian Casino Inquiry (report, PP 359/1996) received and accepted similar advice.

For an instruction by the Senate to a committee to invite the Prime Minister and another minister to give evidence, see 9/3/1995, J.3063-4.

In the course of its inquiry into the regional partnerships program in 2005, the Finance and Public Administration References Committee received evidence about the conduct of members of the House of Representatives, but did not consider such evidence except to the extent that it was relevant to the matter under inquiry by the committee (statement by Senator Forshaw, chair of the committee, transcript of hearing 3/2/2005, pp 26-7).

The Privileges Committee in 2007 refrained from finding the contempt of improper refusal to provide evidence on the part of a person because a full hearing of the matter would have involved allowing the person to question a member of the House of Representatives (131st report of the committee, PP 171/2007, endorsed by the Senate 20/9/2007, J.4463).

This probable immunity of members of other houses does not apply to former members. During the course of an inquiry by the Select Committee on Certain Foreign Ownership Decisions in relation to the Print Media in 1994, evidence was taken from two former Treasurers and a former Prime Minister, all of whom had ceased to be members of the House of Representatives. One former Treasurer appeared voluntarily but the other two former members appeared only in response to summonses. The former Prime Minister subsequently reappeared before the committee voluntarily.

In 2002, in the context of the Senate Select Committee on a Certain Maritime Incident, which investigated, amongst other things, the role of ministers and former ministers in election publicity about refugees, a claim was raised by the Clerk of the House of Representatives that former House of Representatives ministers, and ministerial staff (see below), possess some kind of immunity against being summoned by a Senate committee. This was based on a notion of a supposed exclusive right of the House, and inability of the Senate, to hold ministers accountable, a notion which, given rigid executive government control of the House, amounts to a rejection of parliamentary accountability. Advice provided by the Clerk of the Senate and a senior barrister experienced in parliamentary privilege law and litigation made it clear that there is no constitutional or legal basis for any such immunity. The claim was not accepted by any members of the committee, although they disagreed about whether a former minister should be summoned. (report of the committee, 23/10/2002, PP 498/2002; SD, 23/10/2002, pp 5756-7)

The question has occasionally arisen as to whether Senate committees may summon ministerial staff and departmental liaison officers to appear before them and give evidence. Such persons have no immunity against being summoned to attend and give evidence, either under the rules of the Senate or as a matter of law. Departmental liaison officers are not in any different category from other departmental officers. From time to time it has been suggested that ministerial staff are in a special category and should not give evidence before parliamentary committees (Senator Collins, SD 30/5/1996, p. 1391). Such staff have, however, appeared before Senate committees and given evidence, both voluntarily and under summons. In February 1995 the then Minister for Finance, Mr Beazley, declined to allow the Director of the National Media Liaison Service (NMLS) to appear before a Senate committee to give evidence about the activities of the NMLS on the ground that that person was a member of ministerial staff. The Senate passed a resolution directing that person to appear before the committee, and he subsequently appeared and gave evidence accordingly (7/2/1995, J.2895-7). The preamble to the Senate's resolution pointed out that the NMLS was provided with public funds, and it was stated in debate that the resolution did not set a precedent for summoning ministerial staff, but the passage of the resolution indicates a view on the part of the Senate at that time that such persons can be summoned in appropriate circumstances. A report by the Finance and Public Administration References Committee on the role and accountability of ministerial staff recommended measures to increase their accountability (16/10/2003, J.2591, PP 266/2003).

In 1975 the private secretary to the Prime Minister and the private secretary to the Minister for Labour and Immigration appeared before the Senate Standing Committee on Foreign Affairs and Defence in the course of its inquiry into the contentious matter of South Vietnamese refugees.

In other jurisdictions governments have resisted the appearance of ministerial staff and advisers before legislative committees, but the legislatures and their committees have asserted their right to summon such persons. (See the Fourth Report of the Transport, Local Government and the Regions Committee of the United Kingdom House of Commons, HC 655 2001-02; First Special Report of 2005-06 of the United Kingdom House of Commons Select Committee on Public Administration, HC 690 2005-06.) In the United States various administrations have claimed that it is not appropriate for presidential staff and advisers to give evidence to congressional committees, but many such persons have appeared, both voluntarily and under summons. A judgment of a District Court in 2008 held that they have no immunity (*Committee on the Judiciary v Miers*, 31/7/2008, not reported).

A ministerial staff member appeared under summons before a committee of the New South Wales Legislative Council (the Orange Grove inquiry) in August 2004, among others attending voluntarily.

In June 2008 the government issued a code of conduct for ministerial staff (J.656). The code seeks to overcome problems with the lack of accountability of ministerial staff, particularly by prescribing that such staff do not have executive functions or the power to direct public servants.

Public servants as witnesses

Special rules are provided in Privilege Resolution 1(16) in relation to public servants as witnesses. An officer of the Commonwealth or state public service must not be asked to give opinions on matters of policy and must be given reasonable opportunity to refer questions to a superior officer or to a minister.

The rule relating to the giving of opinions on matters of policy is designed to avoid public servants becoming involved in discussion or disputation with committee members about the merits of government policy as determined by ministers. Public servants may explain government policy, describe how it differs from alternative policies, and provide information on the process by which a particular policy was selected, but may not be asked to express opinions on the relative merits of alternative policies.

The rule concerning reasonable opportunity to refer questions to a superior officer or to a minister is designed to ensure that an officer is not required to answer a question where all the necessary information may not be available to the officer, and that, if there is any difficulty in answering a question, the difficulty is referred to a superior officer, and, if necessary, ultimately to a minister, for resolution. It is not the role of a public service witness to refuse to provide information to a committee. If there is some difficulty in providing information the officer states that there is a difficulty and indicates its nature to the committee, and asks that a superior officer or a minister consider the matter. If a superior officer considers that the information should not be supplied, the matter is referred to the minister. A decision to decline to provide information to a committee is thereby made only at ministerial level by the office-holder who can accept political responsibility for any dispute between a committee and the executive government.

In adopting a report by the Privileges Committee in 1993 the Senate resolved that public servants should receive training in accountability to Parliament (42nd report, PP 85/1993, 21/10/1993, J.684; resolution reaffirmed, with requirement that departments report on compliance, 1/12/1998, J.225-6; see also 64th and 73rd reports, PP 40/1997, 118/1998).

In 1999 the Senate endorsed the Procedure Committee's condemnation of public service witnesses giving evidence on legislation bringing with them private persons in support of the legislation (29/4/1999, J.815). The committee considered that such a practice violated a committee's right to select witnesses. There was also concern arising from the payment of the private witnesses' expenses (see above, under Protection of witnesses).

The government issues a document, entitled 'Guidelines for official witnesses appearing before parliamentary committees', which sets out practices and principles to be followed by public service witnesses (for text of guidelines, see SD, 30/11/1989, pp 3693-3702). The guidelines are based on the principle that public servants have a duty to assist parliamentary inquiries, and are generally consistent with the rules laid down by the Senate, but have no status in proceedings of Senate committees other than as persuasive principles.

For claims by the executive government to public interest immunity from giving evidence to committees, see Chapter 19, Relations with the Executive Government, under that heading.

Statutory office-holders as witnesses

On several occasions the Senate has, by resolution, asserted the principle that, while statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds and have no discretion to withhold from the Senate information concerning their activities (9/12/1971, J.846; 23/10/1974, J.283, 18/9/1980, J.1563; 4/6/1984, J.902; 19/11/1986, J.1424; see also report of the Standing Committee on Finance and Government Operations on ABC Employment Contracts and their Confidentiality, 3 December 1986, PP 432/1986, and the government's response to the committee's report, SD, 17/11/1987, pp 1840-4; Privileges Committee, 64th report, PP 40/1997, and 29/5/1997, J.2042).

Officers of statutory authorities, therefore, so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees.

Foreigners as witnesses

Evidence may be taken from foreigners. When in the jurisdiction of Australia they are liable to be summoned and to be required to produce documents, and may be dealt with for any contempt (unless, of course, they have diplomatic immunity as official representatives of their countries). This applies to corporations with foreign "parents" as well as to individuals. Australian law cannot protect them, however, in respect of the publication of their evidence in another country, and if they give evidence from overseas they are subject to the law of the country they are in as it may apply to the giving of their evidence, for example, where a foreign law forbids the communication of particular information.

The issue of a legislative subpoena to an official of an organisation possessing diplomatic immunity came before a US district court in 2005 (*United Nations v Parton*, not reported). The court in effect suspended the operation of the subpoena to allow the parties to reach agreement.

Evidence from overseas

The same consideration applies to Australian citizens or residents who give evidence from overseas, by submitting documents or providing oral evidence by telephone or video conference. While fully protected in Australia in respect of their giving evidence, they cannot be protected by Australian law in another country. Such witnesses are informed by committees of this situation.

Because of this lack of protection, it would not be fair for a committee to summon a witness to give evidence from overseas, or to seek to take action against them in Australia for any lack of co-operation.

Witnesses in custody

Standing order 180 applies to witnesses who are in prison. It provides that a person in charge of the prison may be ordered to bring the witness, in safe custody, to be examined. The President may be ordered by the Senate to issue a warrant accordingly.

Use of this procedure would give rise to a difficulty if prisoners are held in state or territory prisons, which, in the absence of any federal prison, is invariably the case. As noted above and in Chapter 2, Parliamentary Privilege, under Power to conduct inquiries, the Commonwealth Houses and their committees do not, as a matter of comity between governments in a federal system, and perhaps as a matter of law, exercise a power to summon state office-holders, and this rule is extended to self-governing territories. The Senate and its committees would not, therefore, issue an order to a state or territory officer in charge of a prison, but would seek the co-operation of the state or territory government. Prisoners, of course, are liable to be summoned regardless of who has them in custody and regardless of whether they are convicted of a state or territory or federal offence. If it appeared that a state or territory government sought without justification to shield a prisoner from a Senate inquiry, a summons to the prisoner could be issued and left at the place of imprisonment, and the Senate could then test any refusal to produce the prisoner, perhaps by means of a writ of habeas corpus.

There has been no occasion to use the procedure in the standing order, but Senate committees have otherwise had access to witnesses in custody by virtue of their general powers of inquiry. In 1989 the Standing Committee on Environment, Recreation and the Arts met at the Brisbane Correctional Centre in order to obtain evidence from two prisoners in relation to its inquiry into drugs in sport. Although media representation was permitted at the hearing, the public was excluded for security reasons and the meeting could not therefore be regarded as a public hearing. The committee held a special private meeting at which a transcript of evidence was taken, and subsequently published the transcript, other than those parts containing in camera evidence. The Parliamentary Joint Committee on the National Crime Authority in 1988 took evidence from persons in custody in relation to its inquiry on witness protection. Prisoners were brought to committee hearings at venues such as Commonwealth Parliamentary Offices in State capitals, but the hearings were in camera.

Swearing in of witnesses

With the exception of hearings before the Privileges Committee, there is no requirement in the standing or other orders of the Senate for witnesses before the Senate or a committee to be sworn. The power to take evidence on oath, however, is one of the undoubted powers of the Houses and their committees under section 49 of the Constitution (see Chapter 2, Parliamentary Privilege).

Standing order 35 provides for the examination of witnesses to be conducted by a committee in accordance with procedures agreed to by the committee, subject to the rules of the Senate. It is open to a committee to decide that witnesses should be sworn but in most cases this is not required. The swearing in of a witness has no effect on the witness's obligation to provide truthful answers to a committee or on the Senate's ability to deal with a recalcitrant or untruthful

witness. Nor does it affect the privileged status of committee proceedings. A witness who gives false or misleading evidence, or evidence which the witness does not believe on reasonable grounds to be true or substantially true, may be guilty of a contempt regardless of whether the witness was sworn. If a committee requires a witness to be sworn, however, it is a contempt for a witness, without reasonable excuse, to refuse to make an oath or affirmation or give some similar undertaking to tell the truth (Privilege Resolution 6(12)).

Privilege Resolution 2 requires that witnesses before the Privileges Committee be heard on oath or affirmation. As the Privileges Committee performs something like a judicial function, it is considered necessary that evidence is taken by the committee on oath.

Committees usually do not exercise their power to take evidence on oath. Where witnesses provide committees with their views or opinions on the subject of the inquiry, the taking of evidence on oath may not be appropriate and, indeed, may inhibit the free flow of information to a committee. It may also create invidious distinctions between witnesses if some are sworn and some are not. On the other hand, it may serve to remind witnesses of the gravity of the proceedings and the need to be truthful, particularly where inquiries involve contentious issues of fact and it may have been necessary to compel witnesses to attend by summons.

A witness may take an oath on the Bible or other religious text, such as the Koran, or may make an affirmation. The following forms are used:

Oath

I swear that the evidence I shall give before this Committee shall be the truth, the whole truth and nothing but the truth, so help me God.

Affirmation

I sincerely and solemnly affirm and declare that the evidence I shall give before this Committee shall be the truth, the whole truth and nothing but the truth.

The oath or affirmation is administered in a committee by the secretary to the committee.

Procedures for the examination of witnesses

The standing orders allow the Senate and its committees to formulate procedures for the giving of evidence before them (SO 35, 182; for rules adopted by the Senate for the examination of certain witnesses in 1975, see 16/7/1975, J.832-3). This allows maximum flexibility in the conduct of hearings of evidence. Any procedures adopted by committees, however, must be consistent with the rules laid down by the Senate.

Standing order 35 requires that the examination of witnesses before a committee be conducted by members of the committee. It is therefore not open to a committee to provide procedures whereby other persons put questions to witnesses. Such a procedure would require the authorisation of the Senate. The committee appointed in 1984 to inquire into allegations concerning a justice of the High Court was so authorised: see Chapter 20, Relations with the Judiciary. The Privileges Committee, under Privilege Resolution 2, is also excepted from this

rule because of the character of its proceedings, and witnesses before that committee may be examined by counsel for the committee and counsel for other witnesses.

Committees are able to overcome any disadvantage arising from this restriction on the procedures for formal hearings of evidence by adopting information-gathering techniques other than formal hearings. Committees often arrange seminars, symposia or round table discussions to be heard in their presence, whereby witnesses can more freely discuss issues and put questions to each other (see also Chapter 16, Committees, under Evidence gathering).

Publication of in camera evidence

As has been noted above, it is open to a committee and to the Senate to publish evidence which has been taken in camera. (See also Chapter 16, Committees, under Disclosure of evidence and documents.)

Normally such evidence is not published by either the committee or the Senate. Evidence is usually taken in camera only when a committee has made a deliberate decision that it is appropriate to do so for the protection of a witness. It may subsequently be decided, however, that the appropriate protection of a witness does not require that the evidence be kept confidential. As has also been noted above, witnesses are completely protected against any use of their evidence against them in subsequent proceedings in a court or tribunal, and against penalty or injury in consequence of their evidence. A committee may decide that this protection is sufficient to ensure that a witness is unharmed by the publication of their evidence. If evidence has been taken in camera to protect a witness against extra-legal difficulties, however, that decision is normally sustained by the committee and the Senate subsequently.

Standing order 37(3) provides for the disclosure by the President of unpublished evidence and documents which have been in the custody of the Senate for 10 years, and in camera evidence and documents which have been in the custody of the Senate for 30 years. This provides for access to material for the purposes of historical research.

In 1991 the Senate, with the advice of the Procedure Committee, gave consideration to the question of whether senators who added a dissenting report to a report of a committee may refer to evidence taken in camera by the committee. This question involved competing considerations. It is desirable that in camera evidence not be disclosed except by a deliberate decision by a committee, but there is a possibility of a majority of a committee suppressing evidence which is essential for a senator to make out the senator's case in a dissenting report. As noted above, the purpose of gathering evidence is to support conclusions and recommendations, and this applies equally to a dissent. The Senate therefore adopted a resolution which requires that a committee and any dissenting senator seek to reach agreement on the disclosure of any relevant in camera evidence, but provides a residual ability of a dissenting senator to use in camera evidence for making out a dissent. The relevant provisions are now contained in standing order 37 (2):

> A senator who wishes to refer to in camera evidence or unpublished committee documents in a dissenting report shall advise the committee of the evidence or documents concerned, and all reasonable effort shall be made by the committee to reach agreement on the disclosure of the evidence or documents for that purpose. If agreement is not reached, the senator may refer to the in camera evidence or unpublished documents in the dissent only to the extent

> necessary to support the reasoning of the dissent. Witnesses who gave the evidence or provided the documents in question shall, if practicable, be informed in advance of the proposed disclosure of the evidence or documents and shall be given reasonable opportunity to object to the disclosure and to ask that particular parts of the evidence or documents not be disclosed. The committee shall give careful consideration to any objection by a witness before making its decision. Consideration shall be given to disclosing the evidence or documents in such a way as to conceal the identity of persons who gave the evidence or provided the documents or who are referred to in the evidence or documents.

The publication of evidence taken in camera except by the authorisation of the Senate or a committee is declared to be a contempt punishable by the Senate (Privilege Resolution 6(16)). Such publication may also be prosecuted as a criminal offence under section 13 of the *Parliamentary Privileges Act 1987*. These provisions reinforce the protection of witnesses by the taking of evidence in camera.

Offences by witnesses

The Senate's Privilege Resolutions set out actions by witnesses which may have the tendency or effect of obstructing the Senate or its committees in conducting inquiries, and which may therefore be treated as contempts (Resolution 6(12), (13), (14) and (15)). These offences include:

- refusing to make an oath or affirmation or to give some similar undertaking to tell the truth when required to do so
- refusing without reasonable excuse to answer a question
- giving false or misleading evidence
- failing to attend or to produce documents when required to do so
- avoiding service of an order by the Senate or a committee
- destroying or tampering with documents required by the Senate or a committee.

It is extremely rare for witnesses to be charged with any of these offences. Most cases of alleged contempts involving witnesses concern allegations that witnesses have been interfered with (see Chapter 2, Parliamentary Privilege, for cases investigated). This is an indication that the main concern of the Senate in conducting inquiries is to ensure that its witnesses are protected rather than to coerce witnesses.

It would not be fair for a witness who appears voluntarily by invitation to be required to answer a question; only witnesses under summons should be so required. In 1971 when a witness appearing voluntarily before the Select Committee on Securities and Exchange declined to answer a question, the witness was subsequently summoned to appear and then required to answer the question.

For observations on the destruction of documents by witnesses, see Chapter 2, Parliamentary Privilege, under Should the power to deal with contempts be transferred to the courts?

Evidence given elsewhere by senators or officers

Senators or officers of the Senate may not give evidence before any other body in respect of proceedings of the Senate or its committees without the permission of the Senate, or, if the President is authorised by the Senate to give permission, of the President (SO 183). The rationale of this rule is that the Senate should know of any evidence given elsewhere in relation to its proceedings so that it may ensure that such evidence is not given contrary to the law relating to the protection of parliamentary proceedings from question in other bodies. (For precedent see 27/6/1996, J.423.)

Witnesses as participants in the legislative process

The legal status of witnesses as participants in proceedings in Parliament has been noted above. Apart from the technical legal situation, by providing information to the Senate and its committees witnesses assist in the process of informing the legislators and the public and of framing the laws. Public hearings of evidence are a powerful means not only of discovering, sifting and testing information, but of allowing citizens to participate in government, which is why they are an important feature of legislatures in all free countries.

Chapter 18

DOCUMENTS TABLED IN THE SENATE

ONE OF THE PRINCIPAL MEANS whereby the Senate informs itself in relation to public affairs is the formal presentation of documents to the Senate.

A document formally presented to the Senate is said to be "laid on the table", and that expression is used in the standing orders. In common usage a document presented to the Senate is said to be "tabled". Such a document is then formally before the Senate, and may be the subject of action by the Senate.

Tabling of documents

Documents may be presented to the Senate by means of the following procedures:

(a) the Senate may make an order requiring that documents be tabled (SO 164);

(b) the Senate may request that documents relating to the Governor-General be tabled, by means of an address to the Governor-General (SO 165);

(c) a statute may require that documents be laid before the Senate (SO 166);

(d) the President may present documents to the Senate (SO 166); and

(e) ministers may present documents to the Senate (SO 166).

Reports of Senate committees are regarded as documents which the Senate has ordered to be presented, because committees on appointment are required to report to the Senate on the matters referred to them.

The rationale of allowing the President and ministers to present documents to the Senate without the authorisation of an order of the Senate or a statute is that the President and ministers have a duty to inform the Senate, in relation to the powers, responsibilities and proceedings of the Senate in the case of the President, and in relation to public affairs generally in the case of ministers, and therefore they ought to be able to present documents when they consider it appropriate.

Documents which may be presented to the Senate under the standing orders may be tabled at any time when there is no other business before the chair (SO 63), or during consideration of a

relevant matter. For example, material from a committee arising from the committee's inquiry into a bill may be tabled during consideration of the bill (22/8/2001, J.4682).

There is no provision in the standing orders giving senators other than the President and ministers a right to table documents. Such senators may table documents only in response to an order of the Senate, by leave or by the suspension of standing orders, on behalf of a committee, or according to statute.

A minister or a parliamentary secretary (the latter have this and other powers of ministers: see Chapter 19, Relations with the Executive Government, under Parliamentary secretaries) who tables a document is presumed to do so in a ministerial capacity unless the contrary is indicated. If acting in a non-ministerial capacity, they are in the same situation as other senators (7/6/2000, J.2762).

The Senate usually grants leave for documents to be tabled. A senator wishing to present a document shows it to the minister and party leaders or whips present in the chamber before seeking leave, so that they may be aware of the contents of the document before granting leave. Leave may be refused if any senator considers that it would not be appropriate for the document to be tabled and therefore published (see below, under Publication of documents).

An instance of a senator's tabling a document after the suspension of standing orders occurred on 15 October 1992, when the Leader of the Opposition in the Senate sought leave to table a document relating to the Australia Quarantine and Inspection Service (J.2925). Leave having been refused, he successfully moved for the suspension of standing orders to enable him to table the document and move to take note of the document.

A senator refused leave to table a document may quote it in the course of a speech, provided that the rules of debate are not infringed. Another senator may then move that the quoted document be tabled (see below, under Documents quoted in debate), and the question of the tabling of the document is then determined by vote rather than by leave.

The term 'document' refers to any item recording information, which may include sound, video or computer tapes (see also s. 25 of the *Acts Interpretation Act 1901*). Occasionally documents other than written documents have been tabled. On 17 March 1988, for example, a senator tabled a sound recording which she had quoted in debate (J.563). Other non-paper documents tabled include a message stick, video recordings, computer discs and a nanochip.

On a document being tabled, a motion may be moved without notice to appoint a day for its consideration or for it to be printed (SO 169). An order to print a document has the effect of including it in the parliamentary papers series (see below, under Publication of documents).

In practice, motions to appoint a day for consideration are rare, and motions to print documents are generally moved only in relation to reports of parliamentary committees, to have them printed as part of the parliamentary paper series.

The accepted vehicle for debate on the subject matter of a document is a motion, moved by leave or on notice, to take note of the document, which allows the Senate to conduct a debate without

coming to any substantive decision. Debates on motions moved by leave to take note of documents are subject to a special time limit. Each senator speaking is limited to 10 minutes, with a limit of 30 minutes per motion and a total limit of 60 minutes for any such motions moved in succession (SO 169(2)).

A motion to appoint a day for consideration of a document may nominate only a future day; a document cannot be considered on the day on which it is tabled except by leave (30/4/1992, J.2221).

Types of tabled documents

Committee reports are presented by the chairs of committees or by other senators acting on behalf of the chairs.

Documents ordered to be produced by the Senate are usually tabled by ministers to whom the orders are directed, but are occasionally provided to the Clerk who then tables them as contemplated by standing order 164.

Delegated legislation, that is, legislation made by the executive government or a statutory body under the authority of a statute, must be tabled in the Senate within a prescribed time. Delegated legislation includes instruments such as regulations, ordinances, by-laws, determinations, orders and guidelines. These instruments, which may be disallowed by either House of the Parliament, are sent to the Clerk of the Senate, who presents them at a time allocated for the presentation of documents each day. Details of the documents are entered in the Senate Journals. Although the instruments are almost invariably presented by the Clerk, there is nothing to prevent a senator presenting such documents. Procedures relating to delegated legislation are discussed in detail in Chapter 15, Delegated Legislation.

Many other documents are also tabled pursuant to statute. These include the annual reports of departments and statutory authorities and annual reports on the operation of certain statutes. These documents are tabled by a minister and, together with other documents such as reports of government-appointed committees of inquiry, are referred to as ‘government documents’.

Documents presented by the President include reports of the Auditor-General, responses by Australian and foreign governments to resolutions of the Senate and various parliamentary publications, such as the annual report of the Department of the Senate.

An entry is also made in the Journals of the Senate of tabled documents, and this record, which has a wide circulation, supplies a reference to the documents presented to the Senate. An index of tabled documents is also published.

Orders for production of documents

The Senate may make an order for the production of documents. Standing order 164 provides:

> (1) Documents may be ordered to be laid on the table, and the Clerk shall communicate to the Leader of the Government in the Senate all orders for documents made by the Senate.

(2) When returned the documents shall be laid on the table by the Clerk.

Orders under this standing order are sometimes known as "orders for returns", and the documents when produced as "returns to order".

A motion for the production of documents is moved on notice, although leave of the Senate may be given to move it without notice. The terms of the motion describe the documents and usually specify a day for their production.

Orders for the return of documents are relatively common. In the Parliament of 1993-96, for example, 53 such orders were made, all but 4 being complied with. In the Parliament of 1996-98, 48 orders were made and 5 were not complied with. In the Parliament of 1998-2001, there were 56 orders, and 15 not complied with, in that of 2002-04, 89 orders and 46 not complied with, these figures reflecting increasing resistance by the then government to the orders (see below, under Resistance by government to orders).

Orders for documents are used by the Senate as a means of obtaining information about matters of concern to the Senate. They usually relate to documents in the control of a minister, but may refer to documents controlled by other persons. Documents called for are often the subject of some political controversy, but may simply relate to useful information not available elsewhere.

Orders for the production of documents may require the production of documents in the possession of a person or body, or the creation and production of documents by the person or body having the information to compile the documents (see SD, 27/9/1993, pp 1165-6; 9/5/1996, J.139; 5/3/1997, J.1560-1). Some orders require the production by the relevant officers or bodies of statements about particular matters (28/9/1995, J.3887; 17/10/1995, J.3935; 11/9/1996, J.562; 7/3/2001, J.4050; 8/3/2001, J.4065; 10/3/2005, J.463-4). See also below for orders requiring statutory bodies to produce reports on matters relating to their responsibilities.

Orders for the production of documents may be permanent orders, requiring periodical productions of documents for an indefinite period. Examples of permanent orders include:

- an order requiring the production of indexed lists of government files (30/5/1996, J.279);
- an order made by way of a second reading amendment in respect of the Shipping Grants Legislation Bill 1996 for production of regular reports on international shipping standards (29/11/1996, J.1161-2);
- a permanent order (now in SO 139(2)) for the production of lists of commencement dates of legislation (see Chapter 12, Legislation, under Commencement of legislation);
- an order of 25 March 1999 requiring the Australian Competition and Consumer Commission to produce reports on the practices of health funds (25/3/1999, J.626; 18/9/2002, J.748-9, 761);

- an order of 20 June 2001 requiring departments and agencies to publish on the Internet lists of contracts to the value of $100 000 or more with statements of reasons for any confidentiality clauses or claims (20/6/2001, J.4358-9; 26/9/2001, J.4976; 27/9/2001, J.4994-5; 18/9/2002, J.757; 12/12/2002, J.1344; 4/12/2003, J.2851);

- an order of 29 October 2003 requiring the production of statements giving details of government advertising campaigns costing $100 000 or more (29/10/2003, J.2641; the then government subsequently refused to comply with this order, but the information was pursued through estimates hearings: SD, 12/2/2004, pp 20168-9; Finance and Public Administration Legislation Committee transcript, 16/2/2004, p. 154ff);

- an order by way of an amendment to the motion for the adoption of the report of the committee of the whole on the Transport and Communications Legislation Amendment Bill (No. 3) 1993 for regular reports on action taken under the bill (24/3/1994, J.1517);

- two orders made on 24 June 2008 for the production of regular reports on government appointments and grants by departments and agencies, the timing of the reports linked to the estimates hearings (J.589-90).

The Finance and Public Administration Committee presented in February 2007 a report on the order requiring the Internet listing of contracts, recommending the maintenance and strengthening of the order (PP 45/2007).

Occasionally the Senate has inserted orders for documents into statutes by way of amendments to bills (eg., measures to Combat Serious and Organised Crime Bill 2001, 27/8/2001, J.4780; for reports under this provision, see 8/12/2005, J.1748; 6/12/2006, J.3271).

Orders for documents usually specify a time by which the documents are to be produced. The time allowed varies greatly, from days to years. In 1995, by way of an amendment to the motion for the adoption of the report of the committee of the whole on the First Corporate Law Simplification Bill 1995, the Senate made an order requiring the Australian Securities Commission to produce a report on the first two years of operation of certain amendments to the bill. The report was duly produced in 1998. (28/9/1995, J.3887; 22/6/1998, J.3969-70)

Several orders for production of documents have related to an order of the Senate (now in SO 74(5)) requiring that answers to questions on notice be supplied within 30 days. The order provides that if a Senate minister does not supply an answer within 30 days and does not give an explanation of why the answer has not been provided, a senator may move a motion, without notice, relating to the minister's failure to provide either an answer or an explanation. On a number of occasions this motion has taken the form of an order for the production of a document, namely, the answer to the question. The government has complied with these orders (23/11/1988, J.1144; 28/11/1990, J.485; 21/2/1991, J.785; 14/3/1991, J.875; 17/4/1991, J.951; 16/6/1992, J.2443; 11/5/1995, J.3289; 12/8/1999, J.1489-90).

Orders have also been made to require the production of answers to questions placed on notice during committee hearings on estimates (30/8/1999, J.1592; 31/8/1999, J.1607).

On a motion being agreed to for the production of documents, the Clerk transmits copies of the resolution to the Leader of the Government in the Senate and to the relevant minister in the Senate. Although the standing order specifies that the Clerk shall table the document, it is now more usual for the responsible minister to do so, in accordance with standing order 166.

Although orders for the return of documents are almost invariably directed to ministers, orders may be made to other persons or organisations.

Orders were formerly addressed to the Auditor-General (16/12/1992, J.3382; 22/6/1994, J.1830; 22/9/1994, J.2214; 20/10/1994, J.2349; 2/2/1995, J.2850; see also 52nd report of Committee of Privileges, PP 21/1995.) Following the passage of the *Auditor-General Act 1997*, which provides that the Auditor-General is immune from parliamentary as well as executive government direction, the Senate has requested, rather than ordered, the production of reports by the Auditor-General (2/11/2000, J.3474; 20/6/2001, J.4358-9; 7/8/2001, J.4595; 27/9/2001, J.4994-5; 29/8/2002, J.706; 4/12/2003, J.2851).

On 14 May 2003, the Senate, adopting recommendations in a report of the Foreign Affairs, Defence and Trade References Committee, made requests to the Auditor-General, as well as an order to the government, for reports on Defence Department equipment acquisitions (14/5/2003, J.1799-1800; response by Auditor-General, 17/6/2003, J.1865).

Orders have been directed to the Australian Securities Commission (28/9/1995, J.3887; 22/6/1998, J.3969-70); to the Australian Competition and Consumer Commission to produce reports (25/3/1999, J.626; 12/4/2000, J.2621; 8/11/2000, J.3523; 8/2/2001, J.3910-1; 24/9/2001, J.4925-6; 27/6/2002, J.527; 18/9/2002, J.748-9, 761; 12/11/2002, J.1025; 30/8/2001, J.4846; 14/5/2002, J.322; 15/10/2002, J.874; 9/12/2002, J.1261; 24/11/2003, J.2689; 25/11/2003, J.2713; 10/3/2005, J.463-4; 11/5/2005, J.621; 14/6/2005, J.655; 30/11/2005, J.1461; 7/12/2005, J.1721; 4/12/2006, J.3227; 13/3/2008, J.228). The Human Rights and Equal Opportunity Commission responded with a report to a request from the Senate (13/4/2000, J.2631; 11/5/2000, J.2706). Telstra responded to an order for documents in 2001 (28/8/2001, J.4798; 18/9/2001, J.4866). **(See Supplement)**

(See Supplement)

Orders for the production of documents normally require that they be laid before the Senate. Orders for documents may, however, require the provision of documents to committees. An order passed by the Senate on 5 November 1992 required that a report to the government on Medicare fraud be provided to the Standing Committee on Community Affairs that day. 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 that he was unwilling 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 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 (J.2973, 2996-7, 3000; for further precedents of orders to produce documents to committees, see 22/3/1995, J.3106-7; 26/3/2001, J.4084-5; 3/4/2001, J.4152; 5/4/2001, J.4215). In 2005 the

Australian Competition and Consumer Commission was ordered to produce a report on a confidential basis to a committee. The report was duly produced. (10/3/2005, J.463-4; 17/3/2005, J.566)

A senator, after question time on any day in the Senate, may seek an explanation of, and initiate a debate on, any failure by a minister to respond to an order for documents within 30 days after the documents are due (SO 164(3)).

The Senate occasionally passes resolutions calling for the production of documents, such as reports on particular matters. These resolutions which "call for" documents are not technically orders for documents, but governments often respond to them as if they were (30/9/1999, J.1803-4; 5/9/2000, J.3203; 6/12/2000, J.3753).

Resistance by government to orders

Refusals by the government to comply with orders for documents are usually based on the argument that to produce the documents would not be in the public interest. (See Chapter 19, Relations with the Executive Government, under Claims by the executive of public interest immunity.)

On 10 September 1991 the Senate agreed to an order requiring the government to table a tape recording of conversations between a minister and representatives of conservation groups. On 12 September a letter from the Leader of the Government was tabled, stating that the government would not table the tape recording, but attaching an extract from the transcript of the tape recording. The Senate censured the government for its refusal to table the tape. In the terms of the censure motion it was noted that, unlike previous refusals to provide documents in response to orders of the Senate, this refusal was not based on any claim of executive privilege (J.1497-8; J.1509).

On 19 May 1993, after considerable debate on the tendering process for pay television licences, an order was passed requiring the Minister for Transport and Communications to table relevant documents by noon on the following day. On the next day the minister stated that he was unable to comply with the order because of the voluminous nature of the documents, but that he intended to table documents as soon as possible. He also produced a report by a government-appointed inquiry into the matter. His statement and the report were debated later in the day. On the following sitting day, 24 May, the minister tabled a large collection of documents in response to the order of the Senate. After further consideration of the matter, on 27 May the Senate appointed a select committee to inquire into the pay television tendering process, including "the extent to which the Minister for Transport and Communications discharged his ministerial responsibilities" (19/5/1993, J.201-2; 20/5/1993, J.217-8, 221; 24/5/1993, J.238; 27/5/1993, J.301-3).

In March 1999 the Leader of the Government in the Senate, Senator Hill, was censured by the Senate for not responding properly to an order for documents relating to the Jabiluka uranium mine. The minister had tabled some documents and listed others which were withheld on stated grounds, but subsequently stated that only "key documents" had been produced. (24/3/1999, J.612-13)

Frequent claims of commercial confidentiality in relation to government contracts led to the continuing order of the Senate for lists of contracts to the value of $100 000 or more to be published on the Internet with statements of reasons for any confidentiality clauses or claims (20/6/2001, J.4358-9). A claim by the government that the order was beyond the power of the Senate was rejected and later tacitly abandoned (26/9/2001, J.4976; 27/9/2001, J.4994-5; report of the Finance and Public Administration References Committee on accountability to the Senate in relation to government contracts, PP 212/2001, advice from the Clerk of the Senate in that report, opinion by the Australian Government Solicitor's Office and comments by the Clerk on that opinion, published by the committee; report by the Auditor-General, 18/9/2002, PP 367/2002; further report by the Finance and Public Administration References Committee, 12/12/2002, PP 610/2002; reports by Auditor-General, 5/3/2003, PP 23/2003; 11/9/2003, PP 183/2003, and subsequent reports; order amended 18/6/2003, J.1881-2; 26/6/2003, J.2011-13; 4/12/2003, J.2851).

On 16 May 1991 a minister raised a point of order to the effect that a motion for an order to require the tabling of certain documents was not in order because the documents in question were advices to government which should not be tabled. The Deputy President ruled that the standing orders do not preclude orders for the tabling of advices to government, and that the motion was in order. The motion was passed and the documents were subsequently tabled (16/5/1991, J.1049-50; 28/5/1991, J.1053).

An order of August 2000 for contracts entered into by Telstra allowed the withholding of "genuinely commercially sensitive" material. Documents were produced in response to the order (31/8/2000, J.3169; 7/9/2000, J.3253).

A remedy against government refusal was included in an order for documents made on 1 November 2000. It provided that, should the required documents not be produced, the responsible Senate minister would be obliged to make a statement and a debate could then take place. Documents were produced in response to the order. (1/11/2000, J.3462; 2/11/2000, J.3479; 27/11/2000, J.3586)

Orders for production of documents are among the most significant procedures available to the Senate to deal with matters of public interest giving rise to questions of ministerial accountability.

It is open to the Senate to treat a refusal to table documents as a contempt of the Senate. In cases of government refusal without due cause, however, the Senate has preferred political remedies. In extreme cases the Senate, to punish the government for not producing a document, could resort to more drastic measures than censure of the government, such as refusing to consider government legislation. (See also Chapter 19, Relations with the Executive Government, under Remedies against executive refusal of information.)

Addresses for documents

If the Senate requires the tabling of a document concerning the royal prerogative or correspondence addressed to the Governor-General, it must present an address to the Governor-General requesting that the documents be laid before the Senate (SO 165).

This procedure has not been used for many years. On 17 June 1914 the Senate agreed to a motion for an address to the Governor-General requesting him to allow the publication of the communications between the Governor-General and his advisers relating to the simultaneous dissolution of both Houses of the Parliament (J.86-8). The Governor-General, however, in a reply to the address, stated that, on the advice of his ministers, he was unable to accede to the request contained in the address. (Correspondence relating to simultaneous dissolutions has been frequently tabled since that time: see Chapter 21, Relations with the House of Representatives, under Disagreements between the Houses.)

Presentation of documents when Senate not sitting

Documents may be certified by the President, and on that certification are deemed to be presented to the Senate and their publication authorised (SO 166(2)). This procedure is used for documents the President would normally present to the Senate when it is sitting, but only the President may exercise the power conferred by the provision.

Committee reports, government documents and reports of the Auditor-General may be presented to the President when the Senate is not sitting, and on presentation to the President are deemed to be presented to the Senate and their publication authorised (SO 38(7), 166(2)).

These procedures were used by way of special orders relating to particular reports over several years, and were adopted as permanent orders on 13 February 1991 on the recommendation of the Procedure Committee (Second Report of 1990, PP 435/1990 pp 11-2; Auditor-General's reports were included by an amendment made on 27 May 1993, President's documents on 7 December 1998).

The provision relating to committee reports is as follows:

> If the Senate is not sitting when a committee has prepared a report for presentation, the committee may provide the report to the President or, if the President is unable to act, to the Deputy President, or, if the Deputy President is unavailable, to any one of the Temporary Chairs of Committees, and, on the provision of the report:
>
> (a) the report shall be deemed to have been presented to the Senate;
>
> (b) the publication of the report is authorised by this standing order;
>
> (c) the President, the Deputy President, or the Temporary Chair of Committees, as the case may be, may give directions for the printing and circulation of the report; and
>
> (d) the President shall lay the report upon the Table at the next sitting of the Senate.

The provision authorising the publication of a report attracts paragraph 16(2)(d) of the *Parliamentary Privileges Act 1987*, which provides that proceedings in Parliament includes the publication of a document by or pursuant to an order of a House or a committee, and the document so published (see Chapter 2, Parliamentary Privilege, under Preparation and publication of documents).

The provision relating to documents presented by ministers and reports of the Auditor-General is in similar terms.

Publication of documents

The publication of each document laid on the table of the Senate is authorised on tabling (SO 167). This provision attracts paragraph 16(2)(d) of the Parliamentary Privileges Act, which extends the protection of proceedings in Parliament to the publication of a document by or pursuant to an order of a House or a committee, and to the document so published (see Chapter 2, Parliamentary Privilege, under Preparation and publication of documents).

A standing order in these terms was first adopted on 19 February 1988 after the Procedure Committee had drawn attention to a potential difficulty arising from the wording of the old standing order, which did not make it clear that the publication of every tabled document was authorised. It was considered that there was no absolute privilege for the publication of a tabled document in the absence of an order of the Senate authorising its publication. In recommending that the standing order be changed, the committee suggested that the new order should enable the Senate to continue the past practice of making tabled documents generally available (First Report, 63rd Session, PP 215/1987).

All documents laid upon the table and not ordered to be printed are referred to the Publications Committee, which considers all such documents, and reports from time to time on which documents ought to be printed. The Senate usually adopts the reports of the committee, thereby ordering the printing of documents in accordance with recommendations of the committee.

Documents ordered to be printed, either by order of a House or by the adoption of the recommendations of the Publications Committee, are published as Parliamentary Papers. This series of papers is widely distributed according to a list approved by the Presiding Officers on the recommendation of the Clerks of the Houses. The series is distributed to organisations such as state public libraries and universities, which retain them for reference and research purposes.

Petitions

It is the right of any person or organisation to petition Parliament to obtain redress of grievances, or to ask it to take some action or not to do something that is contemplated. The right to petition Parliament is of great antiquity.

The presentation of a petition to the Senate is a proceeding in Parliament and is protected by parliamentary privilege. The publication of a petition before presentation is not similarly protected. (See Chapter 2, Parliamentary Privilege, under Circulation of petitions.)

Petitions nowadays are mainly used to express views on public policy issues. The use of petitions to request redress of personal grievances has declined as other avenues for that purpose have developed. Senators frequently attend directly to the problems of constituents, and other sources of redress have been provided by the establishment of the Office of the Commonwealth Ombudsman and legislation relating to administrative appeals and reviews.

Petitions when presented, like other documents presented to the Senate, are public documents. Any person may therefore inspect a petition and extract any information from it, including names and addresses of signatories. There is nothing to prevent such a person then sending material to the signatories. The harassment or other adverse treatment of a person in consequence of their signing a petition could be held by the Senate to constitute a contempt and punished accordingly.

Petitions are presented only by senators. This means that a person who wishes to petition the Senate must forward the petition to a senator and ask the senator to present it. Senators are not obliged to present petitions, but most senators take the view that they should present any petition forwarded to them, unless it is contrary to the rules of the Senate, and despite any disagreement they may have with its contents.

Petitions to be presented are lodged with the Clerk (SO 69). The senator presenting the petition places the senator's name at the beginning of it, together with a statement of the number of signatures. Petitions must be lodged with the Clerk at least 3 hours before the meeting of the Senate at which it is proposed to have them presented. In practice the rule is that petitions for presentation on days when the Senate meets early are lodged the previous evening.

Petitions must be certified by the Clerk as being in conformity with the standing orders. Rules relating to the form and content of petitions are set out in standing orders 70 and 71. The most important rule is that a petition must be addressed to the Senate and contain a request for action by the Senate or the Parliament.

Petitions which are posted and signed electronically on the Internet are accepted if the Senator certifies that they have been duly posted with the text available to the signatories.

Petitions are tabled by the Clerk at the time provided in the routine of business (SO 57). A summary which is circulated indicates in respect of each petition the senator who presents it, the number of signatures and the subject matter. These petitions are deemed to have been received and the texts of the petitions are printed in Hansard. A motion may be moved that a petition not be received (SO 69(3)). Petitions that are received are ordered to be published under standing order 167 and therefore attract parliamentary privilege.

There is no provision in the standing orders for petitions for private bills, which in some legislatures are founded upon a petition of the interested parties, but which are unknown in the Commonwealth Parliament (see Chapter 12, Legislation).

Senators often receive representations from citizens which do not qualify as petitions, such as petitioning letters or documents not properly addressed to the Senate or the Parliament. Such

documents may be presented as petitions if the President is satisfied that exceptional circumstances so warrant (SO 69(8)). Exceptional circumstances are, for example, that the subject matter of the petition is immediately before the Senate, that the petition refers to facts of which the Senate might not otherwise be aware, that the petition refers to a serious grievance or injustice to which the Senate should give immediate attention, or that there is no other way in which the document can be treated so as to bring it to notice. Circumstances which are not exceptional are, for example, that there are a lot of signatures attached to the petition, that a great deal of trouble has been taken to collect the signatures, or that the subject matter of the petition is an important public issue.

Some unusual petitions have been presented, including one relating to the textile, clothing and footwear industries written on a jacket and continued on a roll of cloth, which was presented on 2 April 1992.

A petition received in 1991 was from foreign nationals resident outside Australia. Some senators questioned the propriety of this, but the President ruled that there is nothing to prevent such petitions being presented (SD, 6/3/1991, p. 1234). There are many circumstances in which foreigners overseas could legitimately ask the Senate to take some action in relation to matters of concern to them.

Petitions presented to the Senate are brought to the notice of the appropriate legislative and general purpose standing committee. Committees have occasionally undertaken inquiries based on petitions relating to their standing references.

Other submissions to the Senate

A person who wishes to bring matters to the attention of the Senate other than by petition may write to the President or Clerk. The President may table the correspondence if it is considered that the Senate should be informed of it.

On 1 November 1988 and 28 February 1989 the President tabled submissions from a Deputy President of the Conciliation and Arbitration Commission concerning his position on the Commission (J.1050, 1385). These submissions led to the appointment of the Joint Select Committee on the Tenure of Appointees to Commonwealth Tribunals to inquire into the principles which should govern that tenure (report of the committee, 30 November 1989, PP 289/1989).

On 25 February 1992 a submission relating to proceedings in the Senate and in Estimates Committee A was tabled by the Deputy President. The claim was made in the submission that false evidence had been given to the committee and that false answers may have been given in respect of a question without notice. Another submission from the same citizen relating to alleged false evidence given to the committee was tabled on 4 May 1992 (J.2007, 2238). The matters raised in the submissions were examined in part by the Public Accounts Committee in the course of its inquiry into an Australian Customs Service investigation and prosecution case involving the Midford Paramount company. This matter had been referred to the committee by the Senate. In its report the committee "concluded that not only the minister, but also Midford, their Tariff Advisor, the Comptroller-General and the committee had been misled ... ". (Joint

Committee of Public Accounts, Report 325, the Midford Paramount Case and Related Matters, PP 491/1992, p. 206.) Questions raised by the submissions, together with allegations of improper interference with the submitter in his capacity as a witness before the Public Accounts Committee, were subsequently referred to the Senate Privileges Committee. That committee concluded that a contempt had been committed by a threat by an unknown person to the witness, and that misleading answers had not been intentionally given (50th report of the committee, December 1994, PP 322/1994). The person who made the submission was compensated by the government because of his treatment by the Customs Service.

Similarly, in its 71st and 72nd reports, in 1998, the Privileges Committee reported on matters which were raised in submissions made by persons to the Senate, the first involving alleged misleading evidence to a Senate committee and the second alleged interference with a person who provided information to a senator (PP 86/1998, 117/1998).

Other legislatures have occasionally submitted documents to the Senate. On 29 August 1962, the Legislative Council for the Northern Territory submitted a document entitled "The Remonstrance", the terms of which were in a resolution agreed to by the Council, and referred to grievances of the Council (J.129). Another remonstrance passed by the Legislative Assembly of that territory was presented on 28 October 1996, and a resolution of the Norfolk Island Assembly was presented on the same day (J.765). A resolution of the Northern Territory Legislative Assembly on East Timorese asylum seekers was presented on 9 December 2002 (J.1261). A resolution of the Queensland Legislative Assembly requesting an inquiry into a criminal prosecution was tabled on 24 November 2003 (J.2688).

Government documents — consideration

Documents presented by ministers are considered under a special procedure (SO 61, see Chapter 8, Conduct of Proceedings, under Consideration of government documents).

Committee reports — consideration

Special procedures for the consideration of committee reports are provided by standing order 62 (see Chapter 8, Conduct of Proceedings, and Chapter 16, Committees, under Consideration of committee reports).

Annual reports — scrutiny

Annual reports presented to the Senate by departments, statutory authorities, non-statutory bodies and companies are referred to the legislative and general purpose standing committees for inquiry and report (SO 25(20), which replaced an earlier order of 14 December 1989). This procedure provides those committees with an opportunity to inquire into the activities of government departments and agencies. The annual reports are referred to the committees in accordance with an allocation contained in a resolution. This allocation is also used to determine the allocation of references to the committees (SO 25(3)).

The committees are required to report in relation to each report whether it is apparently satisfactory, and to report on any which are not apparently satisfactory and on any which are

selected by the committees for detailed consideration. The committees are directed to report twice in each year, and draw to the attention of the Senate any significant matters relating to the operation and performance of the bodies furnishing the annual reports. The committees are also required to report on any lateness in the presentation of annual reports. Each committee must present each year a report indicating whether there are any bodies which do not present annual reports and which should do so.

The operation of these procedures is treated in more detail in Chapter 16, Committees.

Documents quoted in debate

A document quoted by a senator may be ordered to be laid on the table by motion without notice moved immediately on the conclusion of the speech of the senator who quoted the document (SO 168). Ministers may refuse to table a document under this procedure if it is stated to be of a confidential nature or if it should more properly be obtained by address. Such a refusal is subject to any subsequent order of the Senate that the document be produced.

In practice, senators usually ask other senators if they will table quoted documents. Ministers may table documents by right but may decline to table on the basis that the quoted document is confidential. A senator who is not a minister has no power to table documents under the standing orders, and must obtain the leave of the Senate to do so. It is more appropriate therefore for senators wanting documents quoted by private senators to follow the standing orders and move that the document be tabled. That motion is open to debate, subject to the rule of relevance, so that debate is confined to reasons for tabling the document.

The Standing Orders Committee recommended, in the light of contradictory precedents, that the standing order should be interpreted as applying only to a document actually in a senator's possession in the chamber (Second Report, 61st Session, 20 October 1983, PP 111/1983). This principle has since been followed.

The Standing Orders Committee also recommended (First Report, 62nd Session, 15 October 1985, PP 504/1985), that the terms of standing order 168 apply only to a document which is actually quoted by a senator and have no application to speech notes used by a senator. There have nevertheless been cases of senators tabling their speech notes.

The operation of these procedures is set out more fully in Chapter 10, Debate, under Quotation of documents.

Treaties

The texts of treaties entered into by Australia are tabled as government documents. This was to have been done at least 12 sitting days before ratification or accession, in accordance with an undertaking given by the government in 1961 (HRD, 10/5/1961, pp 1693-4).

Treaties may be considered in accordance with the same procedures as apply to other government documents.

Australian governments consider that the making of treaties is a matter for the executive government and does not require approval of the Parliament (see, for example, statement by the Minister for Veterans' Affairs, SD, 7/9/1983, pp 437-8). This contrasts with the situation in the United States of America, where the President requires the advice and consent of two-thirds of the Senate before making a treaty. In Britain treaties are not ratified until 21 days after the text is laid before Parliament, although the government may modify this procedure in cases of urgency or when other important considerations arise.

Treaties may be incorporated or referred to in legislation where their provisions are to be applied as part of the law of Australia.

Over many years efforts were made in the Senate to strengthen parliamentary scrutiny of treaties. These efforts bore some fruit in 1996.

A notice of motion was given in the Senate in 1983 by Senator Harradine (Independent) for the establishment of a Senate standing committee to consider and report in respect of treaties:

> (i) whether Australia should undertake to be bound by that treaty if that treaty is not already binding upon Australia, and
>
> (ii) the effect which Australia's being bound by that treaty has or would have upon the legislative powers and responsibilities of the Australian States. (23/8/1983, J.205-6)

This motion arose from concern about the scope of the external affairs power under section 51 of the Constitution, and the power of the Commonwealth Parliament to legislate to enforce treaties entered into by the government, as interpreted by the High Court in *Commonwealth v State of Tasmania* 1983 158 CLR 1. The motion to establish the committee was not moved, but a notice in the same terms was given in each session after 1983. The tabling of 36 treaties on 30 November 1994 led to a debate on the need for some more formal means of scrutiny of treaties by the Senate (SD, pp 3602-3). The establishment of a committee to scrutinise treaties was then under consideration by senators. The treaties tabled on that day included those under negotiation or active consideration for Australia.

Concern about the lack of parliamentary scrutiny and control of treaties culminated in a comprehensive examination of the subject and a report by the Legal and Constitutional References Committee in 1995 (PP 474/1995). After the 1996 general election, the incoming government responded favourably to the committee's report and agreed to table treaties in both Houses before ratification, establish a treaties council for consultation with the states, and move for the establishment of a joint committee for parliamentary scrutiny of treaties (SD, 2/5/1996, pp 217-247). The joint committee was subsequently established. These measures fell short of provision for parliamentary approval of treaties.

For a select committee on a treaty, see the Select Committee on the Free Trade Agreement between Australia and the United States, 12/2/2004, J.2997-8.

It has been suggested that the Parliament could legislate to provide that treaties not enter into force in respect of Australia until approved by each House. In 1994 Senator Bourne introduced the Parliamentary Approval of Treaties Bill which would provide for treaties to be approved in

the absence of any parliamentary action or, if raised for consideration in either House, by resolution of that House (a revised version of this bill was introduced in 1995).

The Senate Foreign Affairs, Defence and Trade References Committee, in its report Voting on Trade (PP 401/2003), suggested a scheme of parliamentary involvement in negotiation of trade agreements and procedures for approval by both Houses of such agreements.

Custody and alteration of documents

The custody of all documents laid before the Senate is in the Clerk and they may not be taken from the chamber or Senate offices without the permission of the Senate (SO 44). A resolution of 6 October 2005, on the recommendation of the Procedure Committee, authorises the storage of original tabled documents outside Parliament House (6/10/2005, J.1200). All documents tabled in the Senate since its first meeting in 1901 are registered and are stored in a document storage room in Parliament House. Indexes to the documents are published regularly, and those of 1901 to 2001 have been microfilmed.

If a senator tables a document and subsequently discovers that it includes material the senator did not intend to table, the material may be excluded from the tabled document at the request of the senator, provided that this does not create any disparity between the senator's description of the document to the Senate and the content of the document as amended.

A document ordered to be printed may not be altered without the approval of the Senate, except for corrections and amendments not affecting the substance of the document (SO 170).

Chapter 19

RELATIONS WITH THE EXECUTIVE GOVERNMENT

IN ANY SYSTEM OF GOVERNMENT conducted by elected representatives of the people, the relationship between the representative assembly holding the legislative power and the holders of the executive power is of great significance. In a parliamentary system, in which the executive is formed out of the legislative assembly, the relationship is of greater significance. In such a system the executive, the ministry, is supposed to be scrutinised and controlled by the legislature. In practice, in most systems inherited from the United Kingdom, the ministry has come to control the lower house of the legislature through control of disciplined and hierarchical parties. In this situation, as has been observed in Chapter 1, the role of a second chamber like the Senate is crucial, and its relationship with the executive must, if it can, compensate for the ministerial dominance of the lower house.

The Senate and the ministry

Section 1 of the Constitution provides that the Parliament consists of the monarch, the Senate and the House of Representatives. The titular head of the executive government is therefore also part of the legislature and joins in the exercise of the legislative power. The monarch's powers and functions are in effect delegated to the Governor-General (s. 2) whom the monarch appoints, usually for a term of five years, on the advice of the government; in practice the appointment is controlled by the prime minister.

Section 61 of the Constitution vests the executive power of the Commonwealth in the Governor-General representing the monarch, but in practice that power is exercised by ministers appointed by the Governor-General, who are members of the Federal Executive Council, an advisory body to the Governor-General, and who are required to be members of the Senate or the House of Representatives (ss 62 to 64). This latter requirement is the only reference in the Constitution to the practice of responsible or cabinet government, under which the ministry holds office so long as it retains the confidence of the House of Representatives. In practice this means that the prime minister is the leader of the party or coalition of parties which holds a majority in that House, and the other ministers are members of that party or coalition nominated by the prime minister or selected by the party or coalition. Through its party majority, the ministry controls the House of Representatives.

The tenure of office of the ministry is therefore not directly affected by the composition or actions of the Senate, and the party forming the ministry has not normally had a majority in the Senate. Ministers individually and the ministry collectively, however, are required by the Senate to be accountable to the Senate for their policies and their conduct of the executive government. This accountability to the Senate is provided for in the procedures of the Senate, and is imposed

through questioning of ministers, examination of government legislative proposals, and inquiries into government activities.

This chapter examines relations between the Senate and the executive government and the accountability of the executive generally. The scrutiny of legislation and inquiries into government activities are examined in Chapters 12 and 13 on Legislation and Chapters 16 and 17 on Committees and Witnesses.

The Governor-General and the Senate

The Governor-General as the representative of the monarch is a part of the legislature, but does not normally attend or participate in the proceedings of either House, with two exceptions. The Governor-General at the opening of each session of Parliament delivers an opening speech in the Senate chamber. The Governor-General also usually attends personally to swear in new senators, when there is no President in office. This is usually after the terms of senators have begun, but may occur on other occasions. For example, when Senator Douglas McClelland resigned as President and as a senator during the summer adjournment in February 1987, the Governor-General attended the Senate on the first sitting day to report the resignation and the appointment by the Parliament of New South Wales of a person to fill the vacancy, and to hear the affirmation of the new senator (17/2/1987, J.1591). Apart from these occasions communications between the Governor-General and the Houses consist of formal addresses and messages, and announcements by ministers. (There is also a custom of swearing in a new Governor-General in the Senate chamber, but this is not part of proceedings of the Senate.)

The principal constitutional powers and functions of the Governor-General as they directly affect the Senate include the appointment of times for the holding of sessions of Parliament and the proroguing of Parliament (s. 5), and the dissolution of both Houses simultaneously and the convening of a joint sitting (s. 57). The Governor-General may administer the oath or affirmation to senators or may commission deputies to do so (s. 42; on the election of a President the Governor-General issues a commission authorising the President to swear in new senators). The President's resignation is tendered to the Governor-General (s. 17), as are those of senators if there is no President or the President is absent from the Commonwealth (s. 19). In the event of a vacancy in the Senate when there is no President or the President is absent from the Commonwealth the Governor-General notifies the Governor of the relevant State (s. 21). When legislation has been passed by both Houses it is presented to the Governor-General for assent, and the Governor-General may also recommend amendments (s. 58; see Chapter 12, Legislation). Section 128 of the Constitution provides that where the Houses cannot agree on a proposed law to alter the Constitution the Governor-General may submit the proposal to the electors.

The *Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia* state that "a person appointed to be Governor-General shall take the Oath or Affirmation of Allegiance and the Oath or Affirmation of Office in the Presence of the Chief Justice or another Justice of the High Court of Australia" (II(b)). The oath or affirmation of allegiance is as set out in the schedule to the Constitution and the form of the oath or affirmation of office is specified in paragraph V of the Letters Patent. The venue for the swearing-in of a new

Governor-General is determined by the Government. Traditionally it takes place in the Senate chamber.

The Senate may formally communicate with the monarch or the Governor-General by way of an address, in accordance with provisions in standing orders 171 and 172. A motion for an address requires notice.

Addresses to the monarch were formerly used for various occasions; they are now very rare. Apart from the presentation of an address-in-reply to the Governor-General's speech at the opening of each new session of Parliament (see Chapter 7), there have been no addresses presented to the Governor-General since 1931.

Should the Senate request access to documents in the control of the Governor-General, such as correspondence between the Governor-General and the Prime Minister on a request for a dissolution, an address to the Governor-General may be employed (SO 165; see Chapter 18, Documents, under Addresses for documents).

Messages from the Governor-General are reported to the Senate as soon as practicable after receipt. A message may be presented by a minister at any time, but not during a debate, or so as to interrupt a senator speaking. The message may be at once taken into consideration, or ordered to be printed, or a future day may be fixed on motion for taking it into consideration (SO 173).

Messages from the Governor-General are received by the Senate on the following subjects:

- Address-in-reply, and other addresses from the Senate — the Governor-General's replies.

- With respect to bills:

  Returning any bill presented for assent, and enclosing any amendment which the Governor-General may recommend.

  Notifying assent to bills and the proclamation of commencement of Acts. (See Chapters 12 and 13 on Legislation).

The monarch, Governor-General and governors of the states are protected by the procedures of the Senate against offence in debate. Standing order 193(2) provides that a senator shall not refer to them "disrespectfully in debate, or for the purpose of influencing the Senate in its deliberations". It has been ruled that this order does not protect former Governors-General (SD, 19/12/1988, p. 4484) but may protect Governors-General designate (SD, 19/12/1988, p. 4496; see Chapter 10, Debate). (For a resolution calling on the Governor-General to resign, or, if he does not, for the Prime Minister to advise the withdrawal of his commission, see 15/5/2003, J.1818-20.)

Ministers in the Senate

The Constitution vests the executive power of the Commonwealth in the Governor-General as the monarch's representative (s. 61). In practice the Governor General acts only on the advice of the government, which is formally tendered through the Executive Council, of which all ministers are members. Parliamentary secretaries (see below) are also appointed to the Council.

Ministers are appointed by the Governor-General on the advice of the Prime Minister. The Constitution requires that no minister "shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives" (s. 64). The number of ministers and the maximum amount of funds that can be appropriated to cover their salaries is prescribed, under sections 65 and 66 of the Constitution, by the *Ministers of State Act 1952* as amended.

Traditionally the Prime Minister and the Treasurer are members of the House of Representatives. When Senator John Gorton became Prime Minister consequent upon his election to the position of leader of the Liberal Party on 10 January 1968 he sought to become a member of the House of Representatives as soon as practicable. He resigned from the Senate on 1 February 1968 and was elected as member of the House of Representatives on 24 February 1968.

Although there are no constitutional or statutory requirements that any ministers be members of the Senate, all governments since federation have appointed senators to the ministry. In recent decades senators have usually comprised approximately one quarter to one third of the ministry.

From time to time the proposition has been advanced that there should be no ministers in the Senate, the argument being that the Senate is not the House which determines the composition of the government, the Senate's role should be one of review and the presence of ministers inhibits that role. For example, on 22 February 1979 Senator Hamer moved:

> (1) That, in the opinion of the Senate —
>
> (a) Senators should no longer hold office as Ministers of State, with the exception of any Senator holding the office of Leader of the Government in the Senate, who, in order adequately to represent Government priorities to the Senate, should remain a member of the Cabinet; and
>
> (b) Chairmen of the Senate's Legislative and General Purpose Standing Committees should be granted allowances, staffs and other entitlements similar to those currently granted to Ministers other than Ministers in the Cabinet. ...

This motion was debated but not resolved (22/2/1979, J.571, SD, pp 229-40). Notice of a similar motion was given by Senator Rae. It remained on the Notice Paper until 16 December 1982 but it was not moved and not debated (22/3/1979, J.619; 4/12/1980, J.57). Such a change might well strengthen the Senate's role as the house of legislation and review, as distinct from the electoral college role of the House of Representatives of determining the party composition of the government. Unless the major parties agree not to appoint ministers in the Senate, which is unlikely, the change could come about only by a constitutional amendment.

The Senate's procedures give ministers certain exclusive powers, most of which are concerned with the management of government business. The standing orders provide that ministers may:

- arrange the order of their notices of motion and orders of the day on the Notice Paper as they think fit (SO 65)

- move a motion connected with the conduct of the business of the Senate at any time without notice (SO 56); for discussion of this power see the section on the rearrangement of business in Chapter 8, Conduct of Proceedings

- move that a bill be declared urgent and, if the motion is agreed to, move further motions concerning the time allocated for consideration of the bill (SO 142)

- move at any time that the Senate adjourn (SO 53(2))

- move for the adjournment of a debate after having spoken in that debate (SO 201(6))

- move that the question be now put on more than one occasion, and after having spoken in the debate (SO 199(3))

- present documents (SO 61 and 166)

- present a message from the Governor-General at any time, but not during a debate or so as to interrupt a senator speaking (SO 173).

Ministers may authorise senators who are not ministers to exercise these powers on their behalf.

Ministers may be asked questions relating to public affairs at question time (SO 72). Committees examining the estimates may ask ministers for explanations concerning items of proposed expenditure (SO 26).

A document relating to public affairs quoted by a minister may not be ordered to be laid on the table, if the minister states that the document is of a confidential nature or should more properly be obtained by address (SO 168(1); see Chapter 18, Documents).

Ministers in the Senate represent one or more ministers who are members of the House of Representatives for the purposes of answering questions without notice, tabling documents and taking charge of bills. Conversely, Senate ministers are represented in the House of Representatives by a minister who is a member of that House. These representational arrangements are determined by the government.

Parliamentary secretaries

Some members of the Senate are appointed by the government to assist ministers in their work. They are now referred to as parliamentary secretaries. In the past, persons who performed similar functions have been known by a variety of designations, including parliamentary under-secretary and assistant minister.

Parliamentary secretaries are now appointed under an amendment made in 2000 to the *Ministers of State Act 1952*, which prescribes the number of ministers under section 65 of the Constitution. The statutory provision provides for them to be appointed as ministers, but without that title or status. The purpose of this paradoxical provision is to allow them to be paid salary for the office without incurring disqualification under section 44(iv.) of the Constitution, which prevents members of either House holding an office of profit under the Crown, excepting only ministers. (For comments on the constitutional propriety of this provision, see the remarks by Senator Harradine, SD, 16/2/2000, pp 11926-7. This arrangement, however, was, in effect, upheld by the High Court: *In Re Patterson, ex parte Taylor* 2001 182 ALR 657.)

Before the 2000 provision, parliamentary secretaries were appointed under the *Parliamentary Secretaries Act 1980*, and were not paid any remuneration of office but were reimbursed for expenses.

Since 1990, when the practice of appointing parliamentary secretaries was resumed, at least one senator has always been included in their number.

The first assistant minister to be appointed in the Senate was Senator E J Russell, who held that office during 1914-16. As assistant minister, Senator Russell answered questions (without notice and upon notice), laid papers on the table, initiated and controlled the passage through the Senate of legislation, moved other motions, and generally did all those things which a minister representing another minister in the other House does in the Senate. No special resolution or changes in the standing orders were made to enable Senator Russell to discharge the functions of a minister.

The legal status of parliamentary secretaries and the extent of their powers was the subject of debate on a number of occasions in the past; for further details see the report of the Senate's Standing Committee on Constitutional and Legal Affairs on *The Constitutional Qualifications of Members of Parliament* (PP 131/1981).

A continuing order of the Senate authorises parliamentary secretaries to exercise the powers and perform the functions conferred upon ministers by the procedures of the Senate, but they may not be asked or answer questions which may be put to ministers under standing order 72(1), or represent a Senate minister in respect of that minister's responsibilities before a committee examining the estimates.

The history of this order is as follows. The *Parliamentary Secretaries Act 1980* did not define the powers or duties of a parliamentary secretary and thus did not settle the question of the extent to which senators appointed to such offices could exercise the powers and functions conferred upon ministers by the procedures of the Senate. In a statement to the Senate on this matter in June 1991, President Sibraa gave consideration to the question of whether secretaries could answer questions without notice on behalf of ministers and whether they could represent ministers at estimates committees (SD, 18/6/1991, pp 4778-9). On 3 September 1991 (J.1455-6) the Senate adopted the following sessional order:

> That any Senator appointed a parliamentary secretary under the *Parliamentary Secretaries Act 1980* may exercise the powers and perform the functions conferred upon ministers by the

> procedures of the Senate, but may not be asked or answer questions which may be put to ministers under standing order 72(1).

During his term as Parliamentary Secretary to the Treasurer, 4 April 1990 to 24 March 1993, Senator McMullan appeared before estimates committees in place of the Treasurer and the Minister for Finance. On 6 May 1993 (J.100) the Senate adopted a sessional order which contained, in addition to the provisions included in the order quoted above, a prohibition on parliamentary secretaries representing ministers before committees considering estimates. The order was made permanent on 11 November 1998 (J.54). This prohibition was subsequently relaxed to allow parliamentary secretaries to represent ministers other than Senate ministers in relation to the latter's own responsibilities (6/2/2001, J.3860).

Ministerial accountability and censure motions

As has been noted above, governments are formed by the party or coalition of parties which can command a majority of votes in the House of Representatives, and ministers are appointed by the Governor-General on the advice of the leader of that party or coalition. The termination of a minister's appointment is likewise effected by the Governor-General on the advice of the Prime Minister. While ministers are neither appointed nor removed by the Senate, however, they are accountable to it, that is, they are expected to account for their actions and policies by, for example, answering questions, providing documents, and appearing before committees. In 1984 the Senate demonstrated the importance placed on accountability when it censured a minister for, among other matters, "his refusal to explain his actions despite repeated questioning by the Senate" (13/9/1984, J.1125). Ministers have been censured for matters as varied as: misleading the Senate, failing to answer questions on notice within the stipulated time limit, maladministration of a department, attempting to interfere in the justice system of another country, failing to declare an interest in a matter, for "contemptuous abuse" of the Senate, and for refusing to produce documents in compliance with an order of the Senate. The Senate has insisted on ministers accepting full personal responsibility for answers given on behalf of others, and ministers have been censured on this basis (see, for example, 25/5/1989, J.1712; 10/5/1994, J.1641).

Although a resolution of the Senate censuring the government or a minister can have no direct constitutional or legal consequences, as an expression of the Senate's disapproval of the actions or policies of particular ministers, or of the government as a whole, censure resolutions may have a significant political impact and for this reason they have frequently been moved and carried in the Senate. They provide a substitute to the usual inability, because of ministerial control, of the House of Representatives to discipline a minister.

On 10 October 1996 (J.678) the Senate passed a resolution calling on the Assistant Treasurer, Senator Short, and the Parliamentary Secretary to the Treasurer, Senator Gibson, to explain apparent conflicts of interest arising from their shareholdings. Those two office-holders subsequently resigned. House of Representatives ministers said to be in the same situation, however, escaped unscathed, and the Prime Minister then indicated that the code of ministerial conduct would be reviewed as it was too restrictive of ministers' private interests. This incident provided evidence of the thesis that ministers are held accountable in the Senate but not in the House of Representatives to which the ministry is supposed to be responsible.

Almost all such motions have been expressed in terms of censuring either individual ministers or the government. There have been no motions proposing want of confidence in the government and very few expressing want of confidence in particular ministers, none of which was successful. No motion of want of confidence in a minister has been proposed since 1979 (24/5/1979, J.733-4) and the practice now is to frame such motions in terms of censure.

Two censure motions adopted by the Senate in the early 1970s called for the resignations of those to whom they were directed. One case involved a minister (18/9/1974, J.195-7), and in the other the government was called on to resign (8/4/1974, J.93). The government took no action in either case. Only two of the unsuccessful censure motions moved since that time have included calls for resignation (25/8/1982, J.1023-4; 16/2/1988, J.476-7).

The Senate has passed motions of censure on ministers in the House of Representatives (see the list of successful motions below). Following the adoption of a censure motion against the Prime Minister in 1992 the Senate passed a motion that the censure resolution be communicated by message to the House of Representatives (5/11/1992, J.2966). On the day after the Senate's censure of a Senate minister in 1973 the House of Representatives, on the motion of the government and voting on party lines, passed a motion affirming confidence in that minister (4/4/1973, J.91-2, 93-4; VP 1973-74/104-6).

While there are no special provisions in the Senate standing orders concerning censure motions, it is the usual practice for such motions to be accorded immediate precedence or for the debate to be adjourned to a later hour the same day (for an example of the latter practice see 25/8/1982, J.1023).

Censure motions are initiated either by giving notice of motion or, more commonly, a motion is moved pursuant to a contingent notice "that so much of standing orders be suspended as would prevent Senator (. . .) moving a motion to provide for the consideration of a matter, namely a motion to give precedence to a motion of censure of (. . .)". Upon the adoption of the suspension motion another motion is moved to the effect that "a motion of censure may be moved immediately and have precedence over all other business this day till determined". The censure motion is then moved. (See also Chapter 8, Conduct of Proceedings, under Suspension of standing orders.)

A censure motion specifies the minister or other senator towards whom it is directed and states the reason for the censure. The following is a typical example of the form:

> That the Senate censures the Minister for Resources and Energy (Senator Walsh) for his deliberate misleading of the Senate by selective tabling of documents and his refusal to explain his actions despite repeated questioning by the Senate (13/9/1984, J.1125).

If a censure motion contains a number of propositions the question may be divided. For precedent see 18/9/1974, J.195-7.

Motions of censure and want of confidence may be amended. For example, on 14 August 1968, in response to an Opposition motion "That the Minister for Repatriation lacks the confidence of the Senate", the Leader of the Government in the Senate moved an amendment which proposed that the words after "That" be omitted and the following be inserted: "the Senate affirms its

confidence in the integrity and propriety of the Minister for Repatriation in the discharge of his Ministerial duties. The Senate rejects the charge made against him of interference in decisions of a Repatriation Tribunal. Presentation of so serious a charge unsupported by acceptable evidence is a misuse of the forms of the Senate". The Opposition raised a point of order that the proposed amendment was a direct negative of the motion and was therefore not in order. The Acting Deputy President, Senator Wood, ruled that the amendment was in order (14/8/1968, J.158).

Censure motions have been directed at private senators (31/5/1989, J.1762-3; 4/10/1989, J.2083-5; 29/3/1995, J.3182-4; 2/10/1997, J.2618; 11/3/1998, J.3359-60; 19/3/2002, J.216-7 (a parliamentary secretary acting in a non-government capacity); see Chapter 6 Senators, under Conduct of senators).

It would not be proper for the Senate to seek to censure a private member of the other House. The Senate declared this principle in the context of a resolution granting permission for senators to appear before the House of Representatives Privileges Committee in an inquiry into unauthorised disclosure of joint committee documents (7/3/2001, J.4043). The President has declined to grant precedence to matters of privilege on the ground that the Senate may not inquire into the conduct of a member of the other House, and the same principle would apply to censure motions (17/5/1988, J.711; 19/9/1994, J.2151; 22/9/1994, J.2219; see also statement by Senator Chamarette, SD, 30/3/1995, pp 2490-1). This principle is apparently not observed in the House of Representatives (30/3/1995, VP 2011-2, 2013; 5/3/1998, VP 2772-4). Ministers as ministers, however, may be censured, on the principle that as ministers they are accountable to the Senate although they are members of the House of Representatives (see statement by President Reid, SD, 23/10/1997, pp 7901-2). (See report of the United Kingdom House of Commons Standards and Privileges Committee, HC 447 2003-04, for a contempt found against a minister (the Lord Chancellor) in the other House.)

Contingent notices have been given of censure motions directed at specified ministers (28/3/1985, J.140; 22/5/1985, J.291; 19/8/1986, J.1144-5; 14/9/1987, J.20; 20/12/1988, J.1351). Following the censure of a minister for failing to table certain documents in compliance with an order of the Senate contingent notice was given of a motion which would allow certain penalties to be imposed on the minister, including preventing him from introducing bills (9/6/1994, J.1791). These contingent notices were not used.

Censure motions are not the only weapon in the Senate's armoury of accountability. They are often accompanied by inquiries by the Senate into ministerial conduct (for inquiries generally see Chapter 16, Committees; Chapter 18, Documents, under Orders for the production of documents; and below for public interest immunity). A Senate inquiry into a matter of concern, or merely the prospect of one, can force a government to be more accountable. For example, following the resignation of the Minister for the Environment, Sport and Territories, Mrs Kelly, over the sports grants affair on 28 February 1994, the Opposition moved to establish a Senate select committee to inquire further into the affair and matters relating to government accountability. (Mrs Kelly resigned after an inquiry by the Auditor-General revealed that she had not kept records of $30m in sports grants made from her office, and after Opposition allegations of misuse of the grants for electoral manipulation.) An amendment was moved to substitute for the select committee references to a series of measures designed to ensure greater accountability. A further amendment called for measures to strengthen the independence and capacity of the Auditor-

General. Both sets of amendments and the main motion were negatived, the first amendment and the motion being negatived by equally divided votes. It was thought that a further motion for an inquiry would pass in the absence of some appropriate government action. The Leader of the Government in the Senate then made a ministerial statement outlining a number of measures which the government undertook to introduce, and to consider, to improve accountability mechanisms, including a replacement for the Audit Act (3/3/1994, J.1366-72).

Almost half of the censure motions proposed in the Senate since 1968 have been successful, and most of these have occurred since 1984. The following motions were adopted by the Senate.

- 4/4/1973, J.91-2; 5/4/1973, J.93-4. The motion was that the Attorney-General (Senator Murphy) did not deserve the confidence of the Senate because of certain actions connected with alleged Croatian terrorism in Australia and the Australian Security Intelligence Organisation.

- 8/4/1974, J.93. The motion stated, inter alia, that "the Government's attempt to assert that Senator Gair had vacated his seat under section 44 or 45 of the Constitution on either 14 or 21 March 1974, and did not need to resign as originally intended, deserves the gravest censure and the Government should resign".

- 18/9/1974, J.195-7. The motion stated that the Minister for Foreign Affairs (Senator Willesee) was deserving of censure and ought to resign because of certain matters relating to the departure from Australia of a Russian musician, the recognition of the Soviet incorporation of the Baltic States, and foreign policy alignments. The question was, by leave, divided, and the motion as it related to the Baltic States agreed to.

- 13/9/1984, J.1125. The Minister for Resources and Energy (Senator Walsh) was censured for his deliberate misleading of the Senate by selective tabling of documents and his refusal to explain his actions despite repeated questioning by the Senate.

- 24/9/1987, J.123-4. The motion censured the government for " (a) its attack on the Senate's determination to exercise its Constitutional responsibilities; (b) proposing to force through a Joint Sitting legislation which it has admitted needs amendment; and (c) wasting taxpayers' money by persisting with legislation which would abuse personal privacy beyond limits acceptable to the principle of democracy and individual rights sacred to the Australian community".

- 19/11/1987, J.306-7. The motion expressed "profound disapproval of the unparliamentary conduct" of the Minister for Finance (Senator Walsh) during the course of the debate on the appropriation bills.

- 24/2/1988, J.529. The motion condemned the government "for its failure to protect the privacy of Australian citizens".

- 7/4/1989, J.1510-1. The Minister for Resources (Senator Cook) was censured for improper alteration of the Hansard record of an answer he had given in response to a question without notice.

- 25/5/1989, J.1712. The Minister representing the Minister for Defence (Senator Richardson) and the Minister for Defence were censured for their joint failure to provide an answer to a question on notice within 30 days.

- 26/9/1989, J.2055. The government was censured for its mismanagement of an airline pilots' dispute.

- 4/10/1989, J.2083-5. The government and its whips were censured for their actions in discouraging the formation of a quorum in the Senate.

- 10/5/1990, J.54. The Minister for Justice (Senator Tate) was censured for failing to meet the required standards in the conduct of his office as a senior law officer of the Crown, by interfering in the administration of justice in another country.

- 4/6/1991, J.1096. Senator Richardson, in his former capacity as Minister for the Environment, was censured for his handling of the matter of payment of money under an agreement to a timber processing firm.

- 12/9/1991, J.1509. The government was censured for "its unjustified failure to comply with the Senate's resolution of 10 September 1991" to table a tape recording.

- 7/5/1992, J.2298. The Minister for Transport and Communications (Senator Richardson) was censured 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.

- 5/11/1992, J.2966. The Prime Minister was censured for remarks which he had made about the Senate, which were characterised as contemptuous abuse. The Senate also adopted a motion that the censure resolution be communicated by message to the House of Representatives (5/11/1992, J.2967).

- 16/12/1993, J.1055. The Leader of the Government in the Senate (Senator Evans) was censured for refusing to comply with an order of the Senate to produce a document. The minister had declined to produce the document on the grounds of confidentiality.

- 10/5/1994, J.1641. The Minister representing the Minister for Administrative Services, Senator McMullan, and the Minister for Administrative Services, Mr Walker MP, were censured for not complying with an order of the Senate to provide documents. The ministers had not provided the information requested on the grounds of commercial confidentiality. On 8 and 9 June 1994 (J.1775, 1791) contingent notices of motion were given which, noting that despite the censure the documents had still not been provided, allowed for the imposition of "penalties" on the Minister for Trade, Senator McMullan, including preventing him introducing bills.

- 12/10/1994, J.2262-3. The Minister for Transport, Mr Brereton MP, was censured for his negligent administration of air safety.

- 31/5/1995, J.3327-8. 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 for misleading statements about the intended application of Aboriginal land funds and entering into a secret agreement contrary to their public statements about the matter (see also the judgment of the Federal Court and other matters referred to in the report of the Select Committee on Certain Land Fund Matters, November 1995, PP 346/95).

- 22/6/1995, J.3497-8. The Minister for Communications and the Arts, Mr Lee, and his Senate representative, Senator McMullan, were censured for failure to produce a document in response to an order of the Senate (the document was produced on 27/6/1995, J.3545).

- 29/6/1995, J.3588-9. The Minister representing the Attorney-General, Senator Bolkus, was declared to be in contempt for failure to produce documents ordered by the Senate to be produced.

- 30/8/1995, J.3738. The Leader of the Government in the Senate, Senator Gareth Evans, was censured for remarks impugning the integrity of a Western Australian royal commissioner and the counsel assisting the commission.

- 27/6/1996, J.436-7. The Minister for Aboriginal Affairs, Senator Herron, was censured for giving misleading answers in relation to funding of Aboriginal programs.

- 24/3/1999, J.612-13. The Leader of the Government in the Senate, Senator Hill, was censured for not responding properly to an order for documents relating to the Jabiluka uranium mine.

- 24/8/1999, J.1545-6. The Minister for Forestry and Conservation, Mr Tuckey, was censured for inflaming rather than mitigating the conflict over Western Australia's regional forest agreement.

- 13/10/1999, J.1845-6. The Minister for Family and Community Services, Senator Newman, was censured for failing to produce a document on proposed welfare changes in response to an order of the Senate.

- 10/4/2000, J.2584-5. The Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, was censured for failure to fulfil his ministerial responsibilities and provide leadership in indigenous affairs.

- 19/3/2002, J.216-7. The Parliamentary Secretary to Cabinet, Senator Heffernan, was censured for recklessly making unsubstantiated allegations against a justice of the High Court, and the Prime Minister was censured for not preventing Senator Heffernan's actions.

- 5/2/2003, J.1447-50. The government was censured for deploying Australian troops to Iraq without United Nations authorisation and without revealing to the Australian people the commitments on which the deployment was based.

- 7/10/2003, J.2463-4. The Prime Minister was censured over the Iraq war and the lack of evidence of the claimed weapons of mass destruction in Iraq.

- 30/3/2004, J.3276-7. The Leader of the Government in the Senate, Senator Hill, was censured for failing to comply with an order for the production of documents relating to the pressure allegedly exerted upon the Commissioner of the Australian Federal Police, Mr Keelty, to change his statement on terrorism and the war in Iraq.

- 21/6/2004, J.3574-5. The Leader of the Government in the Senate, Senator Hill, was censured for failing to take seriously his responsibility in relation to the abuse of prisoners in Iraq and to correct serious communications problems in his office and the Defence Department contrary to assurances which were given after the "children overboard" affair of 2001-02.

- 11/5/2005, J.614-5. The Minister for Immigration and Multicultural and Indigenous Affairs, Senator Vanstone, was censured for her failure to take responsibility for the manifest failures of her department in relation to detained persons.

For a censure motion not proceeded with when the minister concerned apologised for her actions, see 28/3/1995, J.3166, SD, 29/3/1995, pp 2381-9.

In June 2000, in passing a bill which was regarded as essential to the public interest, the Senate adopted a resolution noting the persistent failure of the Minister for Regional Services, Territories and Local Government, Senator Ian Macdonald, to answer questions relevant to the bill. (19/6/2000, J.2802)

Although two of the motions listed above were not couched in terms of censure or want of confidence they had the same import as a censure motion. The motion passed on 19 November 1987 expressed "profound disapproval" of a minister's behaviour, and the motion passed on 24 February 1988 stated that the Senate "condemns" the government. For the same reason, an unsuccessful motion proposed that Senator Greenwood had "dishonoured the office of Attorney-General" (1/3/1972, J.887-8) has been included in the following list of unsuccessful censure motions.

Unsuccessful motions of censure or want of confidence have been moved on the following occasions: 15/8/1968, J.158-9; 19/8/1969 J.544; 20/8/1969, J.546; 1/3/1972, J.887-8; 13/5/1975, J.642; 30/5/1978, J.205-6; 8/5/1979, J.690; 24/5/1979, J.733-4; 14/11/1979, J.1038-9; 21/5/1980, J.1370; 9/4/1981, J.200; 25/8/1982, J.1023-4; 7/3/1984, J.717-8; 8/3/1984, J.723; 8/5/1984, J.833-4; 16/2/1988, J.476-7; 30/5/1988, J.775-6; 2/12/1988, J.123; 7/12/1988, J.1263; 31/5/1989, J.1762-3; 5/10/1989, J.2096-7; 9/12/1991, J.1885-6; 17/12/1992, J.3422-3; 8/12/1993, J.943; 8/2/1995, J.2909, 2911; 9/10/1996, J.662-3, 667.

On several occasions unsuccessful amendments have been proposed to the address-in-reply, seeking to include an expression of censure. See 20/5/1914, J.37; 3/6/1914, J.59-60; 20/3/1957, J.10-11; 28/3/1957, J.21-2; 25/11/1969, J.15.

If a censure motion is moved before or during question time, questions are usually called on or resumed in accordance with the routine of business. A minister may ask for questions to be placed on notice, but it is open to the Senate to order that questions continue (see below, under Questions to ministers; for examples: 16/2/1988, J.476-7; 9/12/1991, J.1885-6; 30, 31/8/1995, J.3738-9, 3760-1).

Claims by the executive of public interest immunity

The Senate has the power to require the giving of evidence and the production of documents. (See Chapter 2, Parliamentary Privilege and Chapter 17, Witnesses.) The executive government and ministers are frequently the subjects of the exercise of this power. On 16 July 1975 the Senate resolved:

> (1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by Section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.
>
> (2) That, subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.
>
> (3) That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.
>
> (4) That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim. (16/7/1975, J.831)

While the Senate undoubtedly possesses this power, it is acknowledged that there is some information held by government which ought not to be disclosed. This principle is the basis of a postulated immunity from disclosure which was formerly known as crown privilege or executive privilege and is now usually known as public interest immunity. While the Senate has not conceded that claims of public interest immunity by the executive are anything more than claims, and not established prerogatives, it has usually not sought to enforce demands for evidence or documents against a ministerial refusal to provide them but has adopted other remedies.

In 1976 the Royal Commission on Australian Government Administration observed that:

> Neither House of the Commonwealth Parliament has yet formally determined whether it accepts or does not accept that its investigatory authority is legally constrained by Crown privilege. It is apparent that they are at least prepared to entertain claims, and in some situations not to insist on answers being supplied, but this does not necessarily signify acquiescence in any limitation on the legal powers of the Houses. (Report of the Royal Commission on Australian Government Administration, 1976, PP 185/1976, p. 115.)

The Senate's acknowledgment that a claim to public interest immunity may be advanced is implied in the words "subject to the determination of all just and proper claims of privilege" and "a claim of privilege based on an established ground" in paragraphs (2) and (4) of the resolution of 16 July 1975 quoted above.

The Senate's resolutions on parliamentary privilege of 25 February 1988 (see Chapter 2, Parliamentary Privilege and Chapter 17, Witnesses), in providing that witnesses may raise objections to the giving of evidence (Resolution 1, paragraph (10)), implicitly acknowledge the right to make claims for public interest immunity.

Paragraph (4) of the resolution of 16 July 1975 makes it clear that while the Senate may permit claims for public interest immunity to be advanced it reserves the right to determine whether any particular claim will be accepted.

The existence of the claimed right of public interest immunity in respect of parliamentary proceedings has not been adjudicated by the courts and is not likely to be. Several Senate committees have considered the question but have not developed agreed procedures or criteria for determining whether a claim for public interest immunity should be granted. A common thread emerging from the deliberations of those committees is that the question is a political, and not a legal or procedural, one. There appears to be a consensus that the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically. In practice this means that whether, in any particular case, a government will release information which it would rather keep confidential depends on its political judgment as to whether disclosure of the information will be politically more damaging than not disclosing it, the latter course perhaps involving difficulty in the Senate or public disapprobation.

(See Supplement)

A paper entitled Grounds for Public Interest Immunity Claims, listing potentially acceptable and unacceptable grounds for claims of public interest immunity, based on cases in the Senate (many of which are set out below), was circulated to senators during the May 2005 estimates hearings, and was published by the Employment, Workplace Relations and Education Legislation Committee. The paper indicated that the following grounds had attracted some measure of acceptance in the Senate, subject to the circumstances of particular cases and without acceptance of distorted or exaggerated versions of the grounds:

- prejudice to legal proceedings
- prejudice to law enforcement investigations
- damage to commercial interests
- unreasonable invasion of privacy
- disclosure of Executive Council or cabinet deliberations
- prejudice to national security or defence
- prejudice to Australia's international relations
- prejudice to relations between the Commonwealth and the states.

The paper listed the following grounds not accepted by the Senate:

- a freedom of information request has been or could be refused

- legal professional privilege
- advice to government
- secrecy provisions in statutes
- working documents
- "confusing the public debate" and "prejudicing policy consideration".

Public interest immunity in the courts

While the Houses of the Parliament are not obliged to follow the criteria used by the courts in cases involving claims to public interest immunity, parliamentary thinking has been influenced by changing judicial practice.

For many years the view of the courts was that a certificate from a minister or an authorised senior public servant stating that certain information should not be disclosed to a court in the public interest was accepted as conclusive. Immunity could be claimed for a document either on the ground that it contained particular information (for example, secret defence or diplomatic material) whose disclosure would be against the public interest, or on the ground that it belonged to a specific class of documents, such as cabinet documents and advice from senior officials to ministers, which ought to be kept confidential irrespective of the contents of any one document within that class. This view was articulated in the judgment of Simon L.C. in the British case, *Duncan v Cammell, Laird and Co.* (1942), which included the following outline of the principles which should guide ministers in considering whether to claim privilege:

> In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the Minister adequate justification for objecting to production. It is not a sufficient ground that the documents are "State documents" or "official" or are marked "confidential". It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the Department open to claims for compensation. In a word, it is not enough that the Minister of the department does not want to have the documents produced. The Minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the Minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of oral evidence which, if given, would jeopardise the interest of the community. *(Duncan v Cammell, Laird and Co.* 1942 AC 624 at 642-3.)

The attitude of the courts changed in 1968 when the House of Lords held, in *Conway v Rimmer* AC 910, that the minister's certification was not conclusive in all cases and that it was for the court to decide whether the immunity should be granted. The High Court of Australia took a similar view in *Sankey v Whitlam and others* 1978 142 CLR 1, in which Stephen J. described crown privilege as involving:

> two principles which are of quite general importance to our system of government and of justice. Such is the vigour and breadth of these principles that each, given its fullest extent of operation, will at its margins encounter and conflict with the other. ... These principles, stated in their broadest form, each reflect different aspect of the public weal. Because disclosure to the world at large of some information concerning sensitive areas of government and administration may prejudice the national interest there exists a public interest in preventing the curial process from being made the means of any such disclosure. At the same time the proper administration of justice, of prime importance in the national interest, requires that evidence necessary if justice is to be done should be freely available to those who litigate in our courts. (48-9)

Gibbs A.C.J. acknowledged that "it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public". He noted, however, that the object of such protection from disclosure "is to ensure the proper working of government, and not to protect Ministers and other servants of the Crown from criticism, however intemperate or unfairly based" (40). He concluded: "It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld" (38). He further observed:

> It is impossible to accept that the public interest requires that all state papers should be kept secret for ever, or until they are only of historical interest. In some cases the legitimate need for secrecy will have ceased to exist after a short time has elapsed. (41-2)

> I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure forever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. (43)

Justice Stephen observed that:

> to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who might occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices. (56)

> If the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office. (47)

In 1984 the High Court ordered the production of Australian Security and Intelligence Organisation (ASIO) documents for its inspection in a criminal trial, *Alister v the Queen* 154 CLR 404. In *The Commonwealth v Northern Land Council* 1993 176 CLR 604, the High Court held that the Commonwealth should not have been ordered to produce notebooks containing records of cabinet deliberations to legal representatives of the Northern Land Council. The Court held that:

> The production to the court of documents recording cabinet deliberations should only be ordered in exceptional circumstances which give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of such documents.

> It is doubtful whether civil proceedings will ever warrant the production of documents recording cabinet deliberations upon a matter which remains current or controversial. In criminal proceedings exceptional circumstances may exist if withholding the documents would prevent a successful prosecution or impede the conduct of the defence. (605)

It had long been argued that one class of documents, those concerned with the policy-making process, should be absolutely protected from disclosure because without such protection public servants might not be willing to proffer advice fearlessly and candidly. In *The Commonwealth v Northern Land Council* the Court made the following observations on this argument:

> When immunity is claimed for Cabinet documents as a class and not in reliance upon the particular contents, it is generally upon the basis that disclosure would discourage candour on the part of public officials in their communications with those responsible for making policy decisions and would for that reason be against the public interest. The discouragement of candour on the part of public officials has been questioned as a sufficient, or even valid, basis upon which to claim immunity. On the other hand, Lord Wilberforce has expressed the view that, in recent years, this consideration has "received an excessive dose of cold water".(615)

In *INP Consortium and others v John Fairfax Holdings and others* (18/7/1994, not reported) the Federal Court ordered documents for which public interest immunity had been claimed by the Foreign Investment Review Board to be made available to the legal representatives of one party to the proceedings. The judge held that the balance between the need to keep certain documents confidential in the public interest and the public interest in the due administration of justice:

> can be properly accommodated by the not unusual course of ordering that the documents be kept confidential but made available on a limited basis for inspection by the applicants' legal representatives.

In *Canwest and others v Treasurer of the Commonwealth* (14/7/1997, not reported) the Federal Court rejected a claim that advice to government should be immune from production, and scorned the notion that advice would not be given freely unless given in secret. This the court called "secrecy for its own sake".

The claim often loosely made that "cabinet documents" are immune from production in the courts is not supported by recent judgments. Only documents which record or reveal the deliberations of cabinet are immune (*Commonwealth v Construction, Forestry, Mining and Energy Union* 2000 171 ALR 379; *NTEIU v the Commonwealth* 2001 111 FCR 583; see also *Secretary, Department of Infrastructure v Asher* 2007 VSCA 272).

It is clear that, in recent times, the courts have been less willing to accept claims that the admission into evidence or disclosure of material would be detrimental to the public interest, and have been unwilling to allow the executive government to act as judge in its own cause by determining that question. Governments have had to adjust to this approach by the courts and to accept that claims of public interest immunity may not be sustained.

The Senate and public interest immunity: early cases

In the face of executive claims of public interest immunity the Senate has not conceded its right ultimately to determine such claims. On the other hand the Senate has usually not taken steps to

enforce production of documents for which the executive has claimed immunity, other than exacting a political penalty. In some cases procedural penalties have been imposed and alternative methods of obtaining the required information, such as committee hearings, have been pursued.

In 1951 the government directed certain senior military officers and public servants not to appear before a Senate select committee inquiring into defence recruitment and comprising three opposition members. One official, however, did choose to attend and gave evidence. The committee reported that it took "a very grave view of the action of the Cabinet in flouting Parliamentary authority" and that "such action by the Cabinet is an interference with the freedom of prospective witnesses, and can only be construed as calculated to defeat, hamper and obstruct the purpose of the committee". Both Houses were dissolved before debate on the report was concluded. (Reports of the Select Committee on National Service in the Defence Force (PP S.2 and S.3 of 1950-51).)

On 19 November 1953 the Prime Minister wrote to the Joint Committee of Public Accounts concerning evidence relating to security issues and claims for public interest immunity. He stated, *inter alia*:

> The first thing to note about this is that it is not the privilege of the witness but of the Crown. If a witness attends to give evidence on any matter in which it appears that State secrets may be concerned, he should endeavour to obtain instructions from his Minister beforehand as to the questions, if any, which he should not answer. If a question arises unexpectedly in the course of an inquiry, the witness should request a postponement of the taking of his evidence to enable him to obtain the instructions of his Minister through his Permanent Head, and doubtless this postponement would be granted. In either event, if the Minister decides to claim privilege, he should furnish the witness with a certificate to that effect. It is possible that in some instances contractors to the Commonwealth might be asked questions on confidential matters. A similar course could be followed in these cases also, except that the witness should look for his instructions to the Permanent Head of the Department responsible for the particular contract.
>
> Where a witness, particularly a witness who is not an officer of the Commonwealth or is a comparatively junior officer, does not raise any question of privilege although the matter obviously concerns State secrets, it is, in my opinion, the duty of the Chairman of the Committee himself to stop the evidence being given until the Minister has been given an opportunity to consider whether privilege should be claimed or whether a request should be made that the evidence be heard in private. Moreover, if a witness were to supply to the Committee a certificate from the appropriate Minister to the effect that he regarded it as being injurious to the public interest to divulge information concerning particular matters, the Committee should accept the certificate and not continue further to question a witness on these matters.

On 14 September 1956 the Solicitor-General gave the following advice concerning public interest immunity in a letter to the Regulations and Ordinances Committee:

> The privilege claimed is, in fact, not the privilege of the witness but that of the Crown. Nowadays, however, the claim is made by the witness himself, and supported by the submission of a sworn statement from the responsible Minister, or, if the Minister is not available, the Permanent Head. A sworn statement of this kind, to the effect that the giving of the evidence concerned would, in the opinion of the Minister, be prejudicial to the public interest, is in practice accepted as conclusive by the civil courts [but see above]; and I conceive a similar rule would, and should, apply in a Standing Committee. . . .

> The Lord Chancellor made an important announcement in the House of Lords on 6 June 1956, regarding the practice proposed to be followed by the British Government in making claims of privilege. The Lord Chancellor said that the law enabled privilege to be claimed by the Crown on alternative grounds, namely:
>
> > (a) when the production of the contents of the particular document would injure the public interest; and
> >
> > (b) when, although there might be nothing in the contents of the particular document the production of which would injure the public interest, the document fell into a class which the public interest required to be withheld from production.
>
> The latter grounds he called "class grounds" and the reasons for claiming privilege in these cases were given in the following instructive extracts:
>
> > The reason why the law sanctions the claiming of Crown privilege on the "class" ground is the need to secure freedom and candour of communication with and within the public service, so that Government decisions can be taken on the best advice and with the fullest information. In order to secure this it is necessary that the class of documents to which privilege applies should be clearly settled, so that the person giving advice or information should know that he is doing so in confidence. Any system whereby a document falling within the class might, as a result of a later decision, be required to be produced in evidence, would destroy that confidence and undermine the whole basis of "class" privilege, because there would be no certainty at the time of writing that the document would not be disclosed.
> >
> > I come now to the category of departmental and inter-departmental minutes and memoranda containing advice and comment, and recording decisions — the documents by which the administrative machine thinks and works. Here we consider that Crown privilege must be maintained. An important type of case in which documents of this kind may be relevant is where the vires or legality of a Minister's decision is challenged and the plaintiff may seek to show that the Minister proceeded on wrong principles. In such a case, it is right that a Minister should be prepared to defend his decision, but if it became possible to challenge Government action, by reference to the opinions expressed by individual civil servants in the necessary process of discussion and advice prior to decision, the efficiency of Government administration would be gravely prejudiced.

It is clear that the government's views prior to 1968 were heavily influenced by the approach taken by the courts to public interest immunity, particularly in the assertion that some documents should be immune from production simply by belonging to a class of documents.

The Royal Commission on Australian Government Administration (1976) noted that although the letters from the Prime Minister and the Solicitor-General cited above had not been formally endorsed by Parliament "they appear to have been used as guidelines" (Report, PP 185/1976, p. 115). The Royal Commission suggested that the government should:

> prepare for the guidance of officials and for discussion, a statement of the principles and procedures it would wish to be followed when evidence from official witnesses is sought, and a set of instructions for the guidance of officials whose attendance before parliamentary committees might be requested or required. (p. 115)

The government's response to this suggestion is dealt with below.

In June 1969 the Senate Select Committee on the Canberra Abattoir (comprising three Labor opposition senators) was advised by the Treasurer that he had directed the Treasury that it should not respond to questions that called for an expression of opinion on government decisions in relation to the abattoir, nor provide confidential information on the issue that had not been released by the Government to the public. In its report (PP 99/1969), the committee said that it did not disagree with the first qualification. However, in relation to the second restriction, the committee advised the Treasurer that it reserved its position. The committee indicated that, should any circumstance arise where a Treasury or other official witness refused information which the committee considered necessary for the purposes of its inquiry, and which did not appear to be contrary to the public interest to disclose, in either closed or open session, the committee would seek to arrange to discuss the matter with the appropriate minister. The only refusal to supply information reported by the committee concerned a report furnished to the government by an inter-departmental committee on the future of the Canberra abattoir. The Minister for Health informed the committee that the report was prepared at the request of cabinet by senior officials for the purpose of assisting ministers in the formulation of government policy. He believed that to be an area in which the confidentiality of advice should be preserved.

In 1972 the Attorney-General, Senator Greenwood, and the Solicitor-General, Mr R.J. Ellicott, prepared a paper entitled *Parliamentary Committees: Powers Over and Protection Afforded to Witnesses* (PP 168/1972) which outlined the Government's views on public interest immunity. The paper was tabled in the Senate (26/10/1972, J.1206) but as there was no move to have the Senate endorse it the document remained merely a statement of the executive's views on this topic. The paper included the following observations:

> Because the power of Parliament to require the production of documents and the giving of evidence is, for practical purposes, unlimited, the extent to which a House requires the giving or production of executive information will necessarily rest on convention. Clearly enough, there could be no justification for Parliament requiring an unlimited disclosure of information by the executive, even in camera. (p. 38)
>
> ... against the background of a system which is based on party Government and the responsibility of Ministers to Parliament, we think the preferable course is to continue the practice of treating the Minister's certificate as conclusive. If a House thought that a minister was improperly exercising his power to grant a certificate it, could, of course, withdraw its confidence in him.
>
> . . .
> If, as we recommend, the matter remains with a Minister the decision he makes should, of course, be related to the two aspects of public interest involved, that is to say, the public interest in withholding certain information and the public interest in Parliament and its Houses being adequately informed in order to perform their legislative and advisory functions ... (p. 39)

The paper drew some support from the provision now in standing order 168(1) whereby a minister may resist a motion for the tabling of a document quoted by the minister on grounds of confidentiality. This provision, however, does not constitute a concession by the Senate to executive privilege, as it relates only to the particular circumstance of a motion moved without notice during debate in relation to a quoted document. The provision in the Senate's procedures

for orders for the production of documents, standing order 164, does not allow for such a ministerial claim (see also Chapter 18, Documents).

In 1973 a question arose as to the attendance of members of the Australian Security Intelligence Organisation (ASIO) as witnesses before the Senate Select Committee on Civil Rights of Migrant Australians. The government agreed to the giving of evidence by the Director-General of ASIO but not to the committee's request that the Director-General be accompanied by other officers of ASIO. The committee was advised that, taking into account the provisions of the Australian Security Intelligence Organisation Act, and the previous rulings of prime ministers, the Director-General would not be accompanied by any other ASIO officer, and that the Director-General would observe the practice that questions seeking information, whether positive or negative, as to the affairs of the Organisation would not be answered. The Director-General attended the committee and gave evidence, but the committee did not pursue its request for the attendance of other officers of ASIO.

Public interest immunity was claimed by the Prime Minister, Mr Whitlam, and certain ministers in 1975 in connection with the summoning of public servants to the bar of the Senate to answer questions and produce documents relating to the government's overseas loan negotiations. Formal summonses were served on the witnesses to appear before the Senate on 15 July 1975. When the Senate met on 15 July 1975, President O'Byrne reported that he had received a letter from the Prime Minister in which he stated:

> I wish to inform you, however, that each officer will be instructed by his Minister to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.

The three ministers involved, the Minister for Minerals and Energy, the Treasurer, and the Attorney-General, wrote letters to the President of the Senate which stated:

> In accordance with long-established principles, I have directed officers of my Department who have been summoned to appear before the Senate to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.
>
> I certify that the answering of any questions upon the matters contained in the Resolution of the Senate and the production of any documents, files or papers relevant to those matters by officers of my Department would be detrimental to the proper functioning of the Public Service and its relationship to government and would be injurious to the public interest.

The Solicitor-General (Mr Byers), who was among those summoned, wrote to the President claiming public interest immunity:

> The Crown has claimed its privilege. As one of its Law Officers, I may not consistently with my constitutional duty intentionally act in opposition to its claim.

For the full text of the letters see SD, 15/7/1975, pp 2729-30.

On the following day, 16 July, the Senate responded to these claims for immunity with a resolution which affirmed that it had the power to require persons to answer questions and

produce documents and that if privilege was claimed the matter was to be determined by the Senate. The text of the substantive part of the resolution is quoted above.

On 16 July, the three ministers wrote again to the President advising that they had further instructed their officers as follows:

> In case there should be any misunderstanding of the position that I have directed you to take as a witness before the Senate, I direct that, if the Senate rejects the general claim of privilege made by you, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate and to decline to produce any documents, files or papers relevant to those matters.

For the full text of the letter see SD, 16/7/1975, p. 2762.

On 16 July the witnesses were, in turn, called before the Senate, when on ministerial direction they declined to answer questions, other than of a formal nature. The Solicitor-General responded to questions relating to his reasons for declining to answer questions concerning the matters under inquiry by the Senate. The witnesses were discharged from further attendance on Thursday, 17 July 1975. The Senate then resolved, on the motion of the Leader of the Opposition (Senator Withers), to refer the matter to the Committee of Privileges (17/7/1975, J.836-7).

The Privileges Committee presented its report (PP 215/1975) on 7 October 1975. The committee divided on party lines. The four government members of the committee were of the opinion that the ministerial directions were valid and lawful. In a dissenting report, the three opposition members of the committee reported that a minister's certificate of privilege for evidence, oral or documentary, sought from public servants has evidentiary value but is not conclusive; they found that the ultimate decision as to whether a question must be answered or a document produced is for the Senate and not for the executive. On 17 February 1977, Senator R.C. Wright moved that the Senate endorse the opinions expressed in certain paragraphs of the dissenting report, but the motion lapsed on prorogation (SD, 17/2/1977, p. 175-9).

As mentioned above, the report of the Royal Commission on Australian Government Administration recommended that the government develop a set of guidelines concerning the giving of evidence by public servants to parliamentary committees. On 28 September 1978 the government tabled a paper 'Proposed guidelines for official witnesses appearing before Parliamentary committees'. Revised versions of the guidelines were tabled in 1984 and 1989. The guidelines list the categories of information which could form the basis of a claim of public interest immunity (many of these are similar to the exemptions under the Freedom of Information Act) and specify that such claims should be made only by ministers. The guidelines remain a statement of the executive's views on this topic and have not been endorsed by either House. For texts of the guidelines, see SD, 23/8/1984, pp 309-14; SD, 30/11/1989, pp 3693-702.

On 22 November 1978 President Laucke made a statement in response to a question from Senator Tate concerning any impact the judgment of the High Court in the Case of *Sankey v Whitlam and others* (see above) might have on the procedures of the Senate and its committees. The President stated that:

> the questions involve matters which are ultimately for the Senate to decide in the regulation of its own proceedings. I go no further than to express the view that the Senate would no doubt take

> the recent High Court judgment into consideration in reaching any decisions. (SD, 22/11/1978, p. 2358.)

In 1982 the Senate passed three resolutions ordering that certain documents relating to tax evasion schemes be tabled after being edited by an independent party to exclude material which might prejudice the conduct of legal proceedings against those involved in tax evasion and avoidance schemes (23/9/1982, J.1105-7; 14/10/1982, J.1125; 25/11/1982, J.1258-9). The government maintained its position that the disclosure of the documents would be harmful to the administration of justice and stated that:

> In the event that a Senate majority seeks to enforce the directions contained in the resolution of 25 November 1982, the Government intends to put the basic legal and constitutional questions in relation to the Senate's powers before the High Court of Australia. (SD, 15/12/1982, pp 3581)

Before the matter could be resolved both Houses were dissolved on 4 February 1983 and the subsequent election resulted in a change of government. The matter was not further pursued in the next Parliament by the Senate or by the new government.

The final report of the Joint Select Committee on Parliamentary Privilege presented in October 1984 (PP 219/1984), observed that, since *Sankey v Whitlam*:

> it is evident that the trend has been away from ready recognition of claims for Crown privilege and towards examining these claims closely and carefully weighing competing "public interest" considerations. It seems at least possible that an analogous evolution in thinking may develop in Parliament to help resolve cases where disputes arise between committees requesting information and Executives resisting their requests. But we cannot presume this will happen. We are faced with two options. Firstly, to allow matters to stand as they are; secondly, to propose means for the resolution of future clashes. (p. 153)

> ... But we do not think ... any procedures involving concessions to Executive authority should be adopted. Such a course would amount to a concession the Commonwealth Parliament has never made — namely, that any authority other than the Houses ought to be the ultimate judge of whether or not a document should be produced or information given. (p. 154)

The committee commented that the development of guidelines might prove helpful, but concluded that, ultimately, claims of public interest immunity can only be solved politically:

> However ingenious, guidelines can only reduce the areas of contention: they can never be eliminated. This follows from the different functions, the inherent characteristics, and the differing interests of Parliament and the Executive. In the nature of things it is impossible to devise any means of eliminating contention between the two without one making major and unacceptable concessions to the other. It is theoretically possible that some third body could be appointed to adjudicate between the two. But the political reality is that neither would find this acceptable. We therefore think that the wiser course is to leave to Parliament and the Executive the resolution of clashes in this quintessentially political field. (p.154)

Later cases in the Senate

In more recent cases in the Senate, governments have exhibited a tendency to abandon reasoned claims of public interest immunity based on principles advanced in court proceedings, probably because the development of the law by the courts does not support

large claims of executive secrecy. Instead ministers have sought to rely on more generalised claims of confidentiality. There has been a corresponding fall in the tolerance in the Senate of such claims.

In 1992 the government refused to produce a document in response to an order for the production of a note on a Treasury file. The government claimed that to produce the document would be contrary to the public interest in that it might damage Australia's relationships with other countries. A letter of refusal was tabled and debated (9/12/1992, J.3262) but any further action by the Senate was forestalled by the 1993 prorogation and general election.

On 3 June 1992 the Senate requested the Procedure Committee to report on whether the exemption provisions of the Freedom of Information Act provide grounds for not producing documents to a House of Parliament. This followed remarks by the Leader of the Government in the Senate which appeared to suggest that the exemption provisions of the Freedom of Information Act provided grounds for refusal to provide documents to the Senate, a suggestion which the Senate by resolution repudiated (J.2404-5). On 15 October 1992 the committee reported that the Act does not apply as a matter of law to the production of documents to a House, and went on to observe that:

> If a minister were to regard all of the exemption provisions of the Act as providing grounds on which to claim a privilege against disclosure of information to a House, this would considerably expand the grounds of executive privilege hitherto claimed by ministers; for example, the exemption provisions include reference to cabinet documents, Executive Council documents, internal working documents and documents relating to research, none of which has been regarded in the past as documents which may be withheld from Parliament by reason only that they fall into those categories.

The committee concluded that while a minister may use the provisions of the Freedom of Information Act as a checklist of grounds for non-disclosure, this practice:

> does not relieve a minister of the responsibility of carefully considering whether the minister should seek to withhold documents from a House, or from considering the question in the context of the importance of the matters under examination in the House.... Ministers will no doubt continue to take seriously their obligation to give account to the Houses of the conduct of government and to consider seriously the requests or requirements of a House for the production of documents. (Procedure Committee, Third Report of 1992, PP 510/1992, p. 6)

The committee noted that during the debate on the resolution referring this matter to it for consideration, reference was made to the resolutions of the Senate in 1982 which required the production of documents to a person appointed to act as the Senate's agent to delete from the documents any material which should not be disclosed, particularly on the ground of risk of prejudice to legal proceedings (see above). The committee observed that these resolutions "may be regarded as indicating acceptance by the Senate of the principle that there are some grounds on which documents may be withheld, but there was at that time no general expression of the Senate's view on the matter" (*ibid*., p. 4).

In late 1992 the Senate Select Committee on the Functions, Powers and Operation of the Australian Loan Council invited the Treasurer, the Hon J S Dawkins, to give evidence to the committee. The committee reported that it was disappointed that the Treasurer "had not appeared

before the committee at its hearing on 15 December 1992, and was concerned at a statement made by Prime Minister Keating on 4 November 1992 that he would 'forbid' the Treasurer from appearing before it" (PP 78/1993, p. 58). The committee sought advice from the Clerk of the Senate who observed that:

> If there were such an instruction by the Prime Minister to the Treasurer, it could be interpreted as an exercise of executive authority or a (premature) claim of executive privilege, or public interest immunity, in relation to a parliamentary inquiry (it would be premature in the sense that the committee presumably has made no demand for the Treasurer to give evidence). (Report, p. 91)

On the Clerk's advice the committee wrote to the Prime Minister and the Treasurer asking each of them if the Prime Minister had issued any instruction to Mr Dawkins not to make a submission to, or appear before the committee, but no answer was forthcoming and the committee took no further action.

In February 1994 the Treasurer, the Hon. Ralph Willis, made a claim of public interest immunity in respect of certain classes of documents requested by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media. The Treasurer also stated that he had instructed a number of official witnesses due to give evidence not to provide the committee with certain information or documents. In response to a request from the committee, the Clerk of the Senate advised that the existence of the claimed right to public interest immunity in respect of parliamentary proceedings has not been adjudicated by the courts, and observed:

> The Senate has not conceded the existence of the claimed right, but, on the contrary, has asserted that it is for the Senate itself to determine whether any claim of privilege (i.e., a claim of immunity from a parliamentary demand) should be allowed (see the resolution of the Senate of 16 July 1975, no. 24 at page 122 of the standing orders volume).
>
> The question of the existence of executive privilege in relation to parliamentary inquiries has not been settled. Unless it is adjudicated by the courts, which is unlikely, it will continue to be dealt with case by case as a matter of political dispute and contest between the Senate and a government.
>
> Your letter asks whether members and former members of the Foreign Investment Review Board may be compelled to give evidence before the committee. Undoubtedly such persons, if in the jurisdiction, are subject to the parliamentary power to compel witnesses. The question implicitly raised by your letter and the correspondence attached to it is whether persons who are not officers of the executive government, but who are statutory office-holders or advisers to the executive government, are subject to direction by the executive government in relation to their response to a parliamentary demand, or may be covered, as it were, by a claim of executive privilege in relation to parliamentary inquiries.
>
> During the "overseas loans case", which was the occasion of the passage of the resolution of the Senate to which I have referred, the then Solicitor-General, who is a statutory office-holder and legal adviser to the executive government, in effect informed the Senate that, while he was not subject to direction by the executive government and not bound by a claim of executive privilege, he had a duty, in his view, to have regard to such a claim and not to act in such a way as to undermine it. On that basis he declined to answer questions. The Senate took no action against him, nor against the public service officers who were directed by the Prime Minister not to answer questions, but passed the resolution to which I have referred and pursued the matter as a political contest with the ministry of the day.

> This question is therefore also not settled, and also has not been adjudicated by the courts.

The Clerk advised that in the first instance a person who is the subject of a parliamentary demand determines whether to have regard to or conform with an executive government direction to refuse a parliamentary demand.

> If such a person decides to have regard to or conform with such a direction, it is for the committee or the House concerned to determine whether action should be taken against the person by way of proceedings for contempt or against the individual minister concerned or the ministry collectively as a political matter.
>
> A committee met with a refusal by a person to comply with an order to attend, give evidence or produce documents cannot take any action against the person, but can only report the matter to the relevant House, which may then proceed against the person for contempt.
>
> It is for a committee to which the power has been delegated to determine whether it should in a particular case make a formal demand (i.e., issue a summons) for a witness to attend, give evidence or produce documents. In my view a Senate committee should not make a formal demand unless the committee intends, in case of refusal, to ask the Senate to enforce the demand, and has some grounds to believe that the Senate will support the demand.

The committee also sought opinions from senior legal counsel concerning the constitutional aspects of public interest immunity claims, legal precedents and court practice. The advice of the Clerk and the opinions of counsel are included as appendices to the committee's first report (PP 114/1994).

In response to these developments, Senator Kernot (Leader of the Australian Democrats, Queensland), on 23 March 1994, presented a bill to amend significantly the law of parliamentary privilege. On 12 May 1994 Senator Kernot successfully moved that the bill, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, be referred to the Committee of Privileges for examination. The preamble to the motion of referral noted that:

> (a) on several recent occasions the government has failed to comply with orders and requests of the Senate and its committees for documents and information, in particular:
>
> (i) the order of the Senate of 16 December 1993 concerning communications between ministers on woodchip export licences,
>
> (ii) requests by the Select Committee on the Australian Loan Council for evidence, and
>
> (iii) requests by the Select Committee on Foreign Ownership Decisions in Relation to the Print Media for documents and evidence;
>
> (b) the government has, explicitly or implicitly, claimed executive privilege or public interest immunity in not providing the information and documents sought by the Senate and its committees;
>
> (c) the grounds for these claims have not been established, but merely asserted by the government;

> (d) the Senate has no remedy against these refusals to provide information and documents, except its power to impose penalties for contempt;
>
> (e) the Senate probably cannot impose such penalties on a minister who is a member of another House;
>
> (f) it would be unjust for the Senate to impose a penalty on a public servant who, in declining to provide information or documents, acts on the directions of a minister;
>
> (g) there is no mechanism for having claims of executive privilege or public interest immunity adjudicated and determined by an impartial tribunal ... (J.1683-4)

The bill provided that failure to comply with a lawful order of either House or a committee would be a criminal offence prosecuted in the Federal Court. If an offence were proved, the Court would make orders to ensure future compliance with the lawful order of the House or committee; in the case in question the order would be for the production of the documents. If a public servant committed an offence as a result of an instruction by a minister, the Court would make the necessary orders but not impose a penalty. It would be a defence to a prosecution that compliance with an order to give evidence or produce documents would involve substantial prejudice to the public interest not outweighed by the public interest in the free conduct of parliamentary inquiries. In order to determine whether the defence was established, the Court would examine the disputed evidence or documents in camera. By this provision the Court would be empowered to determine any government claim of executive privilege. A House would not be able to use its power to punish contempts in respect of an offence for which it had initiated a prosecution, and only the Houses would be able to commence prosecutions.

In its 49th report presented on 19 September 1994 (PP 171/1994) the Privileges Committee recommended that the bill not be proceeded with, citing evidence by virtually all its witnesses that it would be unwise for the Parliament to allow the courts to adjudicate claims of executive privilege or public interest immunity in relation to a House or its committees. The committee considered that such claims should continue to be dealt with by the House concerned. (See also 52nd report of the committee, PP 21/1995.)

The committee acknowledged, as did all witnesses, that while there is some information held by the executive which should not be disclosed, "There was general agreement among witnesses that, in the words of the Leader of the Government in the Senate, Senator Evans, a claim of executive privilege or public interest immunity was 'ultimately one for the house of parliament to determine'". The committee noted, however:

> ... that the exercise of the power of one House to enforce an order against a member of another House, particularly a minister who claims executive privilege, is circumscribed by parliamentary rules. It was therefore well understood that any attempt by a House of the Parliament to impose the extreme penalties of either gaol or a fine upon a public servant who obeyed a ministerial instruction not to comply with an order of that House or a committee, while the minister concerned was immune from its contempt powers, was untenable. As Senator Kernot's second reading speech noted, the powers of a House of Parliament under these circumstances 'while extensive, are widely seen as inappropriate for use in such a situation'.

The committee acknowledged that "it is open to the Senate to take such action within its powers as it considers necessary to force a government to comply with an order, recognising that it

would be only in extreme circumstances that such measures would be considered and even then may not universally be regarded as justifiable".

Following presentation of the committee's report, Senator Kernot gave notice of a motion to establish another mechanism for dealing with the claim of public interest immunity in relation to the documents not provided to the Select Committee on Foreign Ownership Decisions in Relation to the Print Media (19/9/1994, J.2160-5). The motion would have established a committee of party leaders to examine the documents in camera and determine whether the publication of the documents would be sufficiently prejudicial to the public interest as to outweigh the public interest in the free and effective conduct of Senate inquiries. A preamble to the motion referred to evidence to the Privileges Committee by the Leader of the Government in the Senate, Senator Gareth Evans, conceding that the Senate has the power to order the production of documents. This motion was not considered.

During the hearing of the Privileges Committee, the Leader of the Government in the Senate acknowledged the power of the Senate to require the production of documents and to punish defaults, and indicated that the government would think carefully before making a decision to refuse information or documents in response to a parliamentary requirement. Responses by ministers to Senate orders for the production of documents immediately subsequent to the report of the Privileges Committee indicated that ministers were perhaps not as ready to resort to claims of confidentiality or public interest immunity as they had been in the recent past. To that extent, Senator Kernot's bill and the inquiry by the Privileges Committee may have had a salutary effect.

In *Canwest and others v Treasurer of the Commonwealth* (14/7/1997, not reported) the Federal Court rejected the argument that advice to government by the Foreign Investment Review Board should remain secret.

In its 52nd report in 1995 the Privileges Committee recommended the procedure of the appointment of a neutral third party to examine material claimed to be confidential and to report to the Senate on the content of such material. The committee pointed out that this, in effect, was what was done with the matter examined in that report, when the Senate asked the Auditor-General to report on material claimed by the government to be subject to commercial confidentiality (PP 21/1995).

The Finance and Public Administration References Committee, in a report in May 1998 on contracting out of government services, referred to the increasing resort to commercial confidentiality as a ground for withholding information, and observed that genuine commercially confidential matters are likely to be limited in scope and the onus is on the person claiming confidentiality to argue the case for it. The committee also recommended the use of an independent arbiter such as the Auditor-General to examine material on behalf of the Senate (PP 52/1998, p. 71).

In response to an order for production of documents relating to the waterfront dispute in 1998, the government refused to produce the documents on the ground that the documents were relevant to actions pending in the Federal Court between the parties to the dispute (SD, 28/5/1998, p. 3378-9). Advice by the Clerk of the Senate suggested that this apparent

invocation of the sub judice convention was not well founded (Economics Legislation Committee, estimates hearing Hansard, 2/6/1998, pp E124-8). In this case there appeared to be a claim of public interest immunity (although not made explicitly) loosely based on an asserted danger to legal proceedings.

In 1999-2001 there were indications that the government had abandoned a policy of restraint in making public interest immunity claims, and was resorting more readily to such claims in attempts to keep information secret.

The Leader of the Government in the Senate, Senator Hill, was censured by the Senate for not responding properly to an order for documents relating to the Jabiluka uranium mine. The minister had tabled some documents and listed others which were withheld on stated grounds, but subsequently stated that only "key documents" had been produced. (24/3/1999, J.612-13)

The Minister for Family and Community Services, Senator Newman, refused to produce in response to a Senate order a draft document on changes to the welfare system which she had earlier said she would release at a Press Club address. Instead she produced substitute documents, including, eventually, the stated final version of the required document. Among the grounds for refusal to produce the required document were that its disclosure would "confuse the public debate" and "prejudice policy consideration". Advice from the Clerk of the Senate suggested that these were novel grounds of unclear meaning. The minister was censured by the Senate (13/10/1999, J.1845-6). The Senate also adopted measures to penalise the government and to gain access to the content of the required document. Question time was extended (19/10/1999, J.1931-2), the Community Affairs References Committee was ordered to hold a hearing on the matter, and officers of the relevant department were ordered to give evidence before the committee (21/10/1999, J.1966). Officers duly appeared and gave evidence, although under an instruction from the minister not to answer some kinds of questions. When the committee reported the Senate carried a resolution rejecting the minister's claim of public interest immunity and the grounds on which it was based (Report of the committee, including Clerk's advices, PP 364/1999; 22/11/1999, J.2007, 25/11/1999, J.2077).

The government refused to produce documents relating to higher education funding, the stated grounds being commercial confidentiality, cabinet confidentiality and possibly confidentiality of advice. An advice from the Clerk of the Senate suggested that these grounds were over-extended and confused in the claim. Questions about the matter were, however, answered at an estimates hearing. (20/10/1999, J.1953-4; 21/10/1999, J.1988; Employment, Workplace Relations, Small Business and Education Legislation Committee, estimates Hansard, 2/12/1999, pp 74-5)

The government also refused to produce documents relating to purchases of magnetic resonance imaging machines. The principal grounds were risk of prejudice to administrative inquiries and the confidentiality of the government's relationship with the medical profession. Advices from the Clerk of the Senate suggested that these grounds were novel and lacking in cogency. The matter was extensively explored at an estimates hearing, and the advices were released. Subsequently, a report by the Health Insurance Commission was produced, with an indication that cases had been referred to the Director of Public Prosecutions. The Senate directed a further committee hearing on the matter, at which officers were closely questioned. An Auditor-

General's report was obtained. Both the Senate committee and the Auditor-General found evidence of serious administrative deficiencies. Finally, a large volume of documents was tabled. (21/10/1999, J.1967; 29/11/1999, J.2123; Community Affairs Legislation Committee, estimates Hansard, 1/12/1999, pp 51-3; 15/2/2000, J.2280; 10/4/2000, J.2582-3, 2585; 10/5/2000, J.2682, 2689)

The government did not produce a draft report of the Bureau of Air Safety on an air safety trial. The order for the document was made in the context of suggestions that the report had been unduly delayed and interfered with. The government relied principally on the inappropriateness of producing a draft report. The final report was soon produced, probably prompted by the Senate's order. (21/10/1999, J.1968; 22/11/1999, J.2008; 23/11/1999, J.2013)

The government's new tax system, introduced in 1999-2000, gave rise to several demands for information by the Senate and relevant committees, most of which were met. In response to an order of 29 June 2000, however, the government declined to provide details of an economic model used to predict movements in petrol prices, on the ground that it was a working document, a ground in the Freedom of Information Act but not accepted by the Senate. (27/6/2000, J.2908; 29/6/2000, J.2992) Similarly, a refusal to produce documents relating to tax minimisation schemes was based on the protection of investigations, although the documents had apparently been offered in response to a freedom of information request upon the payment of a large fee (4/10/2000, J.3298-9; 6/2/2001, J.3840; 5/3/2001, J.4016; 7/3/2001, J.4046). In this case a recognition in the Senate's order that there might be grounds for withholding some documents led to a government claim that the grounds applied to all of the documents.

An order for documents relating to the collapse of the HIH Insurance company, which was met by a government refusal, was not pursued largely on the basis that a royal commission into the matter was appointed (23/5/2001, J.4264-5; 24/5/2001, J.4289).

Frequent claims of commercial confidentiality in relation to government contracts led to a continuing order of the Senate for lists of contracts to the value of $100 000 or more to be published on the Internet with statements of reasons for any confidentiality clauses or claims (20/6/2001, J.4358-9). A claim by the government that the order was beyond the power of the Senate was rejected and later tacitly abandoned (26/9/2001, J.4976; 27/9/2001, J.4994-5; report of the Finance and Public Administration References Committee on accountability to the Senate in relation to government contracts, PP 212/2001, and advice from the Clerk of the Senate in that report, opinion by the Australian Government Solicitor's Office and comments by the Clerk on that opinion, published by the committee; report by the Auditor-General, 18/9/2002, PP 367/2002; further report by the Finance and Public Administration References Committee, 12/12/2002, PP 610/2002; reports by Auditor-General, 5/3/2003, PP 23/2003; 11/9/2003, PP 183/2003, and subsequent reports; order amended 18/6/2003, J.1881-2; 26/6/2003, J.2011-13; 4/12/2003, J.2851).

A resolution of 30 October 2003 declared that the Senate and its committees would not entertain claims of commercial confidentiality unless made by a minister and accompanied by a ministerial statement of the basis of the claim, including a statement of the commercial harm which might result from the disclosure of the information (30/10/2003, J.2654). If a committee is satisfied that a statutory authority has such a degree of independence from

ministerial direction that it would be inappropriate to have a minister make the claim, the committee may receive the claim from officers of the authority. For a ministerial claim in accordance with the resolution, see Legal and Constitutional Legislation Committee, estimates hearings 3/11/2003, additional information, vol. 2, p. 1.

The collapse of Ansett Australia led to two orders for documents on 19 and 20 September 2001 relating to the government's approval of the takeover of Ansett by Air New Zealand. The government refused to produce the documents on 24 September 2001 on various grounds, including confidentiality of advice and a claim that producing the documents would distract departmental officers from the task of attempting to save Ansett, but it was indicated that the orders would be attended to later. The mover of the motions, Senator O'Brien, indicated that the matter would be pursued by way of hearings of the Rural and Regional Affairs and Transport References Committee, which was given a reference on the Ansett collapse on 19 September 2001. In accordance with an authorisation of the Senate, the committee held hearings accordingly on 27 September 2001. Departmental officers were then questioned, without the government attempting to prevent the hearing (19/9/2001, J.4875, 4879; 20/9/2001, J.4896; 24/9/2001, J.4922; 25/9/2001, J.4943; 27/9/2001, J.4996).

An order on 21 August 2002 relating to information on the financial situations of higher education institutions was met with a claim of commercial confidentiality and a statement that revealing the information would undermine confidence in the higher education sector. It was pointed out that the latter excuse is virtually an admission that the information would disclose serious difficulties which have been kept secret. The mover of the motion, Senator Carr, responded on 28 August with a notice of motion for an extensive committee inquiry into the subject. The notice was expressed to be contingent on the information not being provided before the motion was moved. Another government statement on 16 September gave some ground by indicating that the vice chancellors of various institutions would be asked for their permission to release information gathered from them. This concession did not satisfy the majority of the Senate, and the motion for the committee inquiry into the matter was passed on 18 September. The committee reported that universities had raised no objections to the disclosure of the information, and that it had obtained some of the information through its inquiry. (21/8/2002, J.626-7; 26/8/2002, J.652; 28/8/2002, J.688; 16/9/2002, J.723; 18/9/2002, J.760; 15/10/2003, J.2573)

On 12 August 2003 the Senate deferred consideration of two customs and excise tariff bills to give effect to an ethanol subsidy scheme until the government produced documents required by various Senate orders relating to the scheme. The documents were not produced and the bills were not passed. (12/8/2003, J.2089-90) (These bills were subsequently brought on and passed as a result of an agreement between the government and some senators as to amendments of other legislation and the tabling of some documents: 1/4/2004, J.3324.)

In February 2004 the government refused to comply with an order of 29 October 2003 for the production of statements giving details of government advertising contracts, the major ground of the refusal being that the information could be obtained by other means. The information was subsequently pursued in estimates hearings (29/10/2003, J.2641; SD, 12/2/2004, pp 20168-9; Finance and Public Administration Legislation Committee transcript,

16/2/2004, p. 154ff; Finance and Public Administration Committee, report on annual reports 2008, PP 231/2008: this report recommended compliance with the order).

An order in March 2004 relating to the alleged pressure exerted upon the Commissioner of the Australian Federal Police, Mr Keelty, to change his statements on terrorism and the war in Iraq, was met with a refusal to produce the required documents. The Leader of the Government in the Senate, Senator Hill, was censured after lengthy debate for failing to produce the documents. (24/3/2004, J.3216; 30/3/2004, J.3276-7)

The war in Iraq in 2003-04 produced several orders for documents and two government refusals to produce relevant documents (22/6/2004, J.3613; 23/6/2004, J.3658, SD, 23/6/2004, pp 24779-80; 24/6/2004, pp 24952-6).

In 2006 the government instructed some officers not to answer questions in estimates hearings on matters which were before the commission of inquiry (the Cole commission) into the AWB Iraq wheat bribery affair. Some questions about the matter were answered. There was no claim of public interest immunity. Because the then government had a party majority of one in the Senate, no remedial action was taken in this matter, except that senators kept asking questions, with some success. This was one of several unsupported government refusals to provide information during that period (July 2005-2007).

For debates on the then government's record in responding to orders for documents, see SD, 19/11/2002, pp 6755-7, 2/12/2002, pp 6853-4, 26/3/2003, pp 10227-30, 16/6/2003, pp 11394-5, 17/6/2003, pp 11562-3. For a senator's letter to the Leader of the Government on the matter, see letter tabled 14/5/2003, J.1803; debate on the letter: 22/6/2005, J.787. For a refusal by a minister to answer a question without stating any ground, see the reservation attached to the report of the Foreign Affairs, Defence and Trade Legislation Committee on the additional estimates 2004-05, PP 64/2005, pp 149-50; SD, 14/3/2005, pp 65-70.
(See Supplement)
Although governments have generally abandoned claims that documents should not be produced simply because they belong to a class of documents, this claim has continued in residual forms.

At various times governments have claimed that they should not be obliged to disclose legal fees paid or levied by the Commonwealth, on grounds of commercial confidentiality, client confidentiality or privacy. The Senate, however, has asserted its right to inquire into such fees (18/9/1980, J.1563). The claim has not been consistently made. (For a consideration of this question, see Legal and Constitutional Legislation Committee, Report on Budget Estimates 2002-2003, PP 328/2002, pp 3-5. For an inquiry by the Senate specifically into Commonwealth legal fees, see the report by the Legal and Constitutional Affairs Committee on fees paid by the Aboriginal Development Commission, PP 451/1991.)

Governments have also claimed that there is a long-established practice of not disclosing their advice, or of not doing so except in exceptional circumstances; see, eg., report by the Finance and Public Administration References Committee, PP 228/2005, pp xxii-xxiv. These claims are refuted by the occasions on which advice is voluntarily disclosed when it supports a government position; eg., 4/9/2006, J.2553. The actual position was stated in a letter

produced in 2008 by the Secretary of the Department of Prime Minister and Cabinet: the government discloses its legal advice when it chooses to do so (see advices attached to the report of the Legal and Constitutional Affairs Committee on additional estimates for 2007-08, PP 230/2008; report on budget estimates 2008-09, PP 309/2008). **(See Supplement)**
(See Supplement)
Similarly, immunity is often claimed for documents on the basis that they are cabinet documents. The cabinet confidentiality ground, however, is properly claimed only for documents which would reveal the deliberations of cabinet. The courts have made this clear in relation to such claims in court proceedings (see above, under Public interest immunity in the courts).

Statutory authorities and public interest immunity

As noted in the Clerk's advice to the Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media in September 1994 (see above), it has not been settled whether the executive government may seek to make a claim of public interest immunity in respect of, or on behalf of, statutory authorities or statutory office-holders.

On several occasions the Senate has, by resolution, asserted the principle that, while statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds and have no discretion to withhold from the Senate information concerning their activities (9/12/1971, J.846; 23/10/1974, J.283, 18/9/1980, J.1563; 4/6/1984, J.902; 19/11/1986, J.1424; 29/5/1997, J.2042; see also report of the Standing Committee on Finance and Government Operations on ABC Employment Contracts and their Confidentiality, 3 December 1986, PP 432/1986, and the government's response, SD, 17/11/1987, pp 1840-4; Privileges Committee, 64th report, PP 40/1997, 29/5/1997, J.2042).

Officers of statutory authorities, therefore, so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees.

Remedies against executive refusal of information

As has been noted in the analysis above, the principal remedy which the Senate may seek against an executive refusal to provide information or documents in response to a requirement of the Senate or a committee is to use its power to impose a penalty of imprisonment or a fine for contempt, in accordance with the *Parliamentary Privileges Act 1987* (see Chapter 2, Parliamentary Privilege). As has also been noted, there are practical difficulties involved in the use of this power, particularly the probable inability of the Senate to punish a minister who is a member of the House of Representatives, and the unfairness of imposing a penalty on a public servant who acts on the directions of a minister. A penalty imposed for contempt may be contested in the courts under the Parliamentary Privileges Act (see Chapter 2, Parliamentary Privilege). It is possible, but unlikely, that the courts in such a challenge could determine a claim of public interest immunity (see *Egan v Chadwick and others* 1999 46 NSWLR 563).

The Senate may impose a range of procedural penalties on a government for a refusal to provide information or documents, ranging from a motion to censure a minister (see above) to a refusal to pass government legislation. The Senate has, however, usually been reluctant to resort to the more drastic of these kinds of measures.

In some cases procedural penalties have been imposed and alternative methods of obtaining the required information, such as committee hearings, have been pursued.

On 12 August 2003 the Senate deferred consideration of two customs and excise tariff bills to give effect to an ethanol subsidy scheme until the government produced documents required by various Senate orders relating to the scheme. The documents were initially not produced and the bills were not passed until documents were subsequently tabled. (12/8/2003, J.2089-90; 1/4/2004, J.3324-5)

A remedy against government refusal was included in an order for documents made on 1 November 2000. It provided that, should the required documents not be produced, the responsible Senate minister would be obliged to make a statement and a debate could then take place. Documents were produced in response to the order. (1/11/2000, J.3462; 2/11/2000, J.3479; 27/11/2000, J.3586)

(See Supplement)

As has also been noted above, the Senate may seek to impose a political penalty on a government for refusing to cooperate with a Senate inquiry. This, in effect, is what happened in relation to the overseas loans affair in 1975 and the taxation avoidance affair in 1982: the government's refusal to cooperate with inquiries was made the subject of unrelenting political attack. In both cases, the perception that the governments were concealing their own mistakes and misdeeds probably significantly contributed to their defeat at subsequent general elections. As was suggested in evidence before the Privileges Committee, however, an electoral remedy is uncertain of application, depending as it does on the relative electoral strengths of parties at the time.

Other jurisdictions

Other jurisdictions have not resolved the problem of determining executive government claims of public interest immunity so as to avoid the defect of the government being the judge in its own cause.

In most jurisdictions with "Westminster" systems of government, the executive government controls the lower house and the question arises only occasionally in second chambers not under government control, so that there has been no regular solution found.

In 1998 and 1999 the New South Wales Legislative Council succeeded in extracting information from the government by suspending the Treasurer, a member of the Council, from service in the Council, its power to do so having been upheld by the Court of Appeal: *Egan v Willis and Cahill* 1998 158 ALR 527; *Egan v Chadwick and others* 1999 46 NSWLR 563. Following this case the Council adopted the procedure of appointing an independent arbiter to assess any claims of public interest immunity arising from orders for documents. This procedure has worked successfully in several cases.

The Houses of the United States Congress, which operate independently of the executive, have not found a satisfactory remedy, although they are usually successful in practice in extracting evidence from reluctant administrations. As noted in Chapter 2, the US Houses possess inherent powers to require the attendance of witnesses, the giving of evidence and the production of documents, and to punish contempts. They have enacted a statutory criminal offence of refusal to give evidence. They may also seek to have their requirements enforced through the courts by civil process. In serious cases of conflict between the Houses and the administration over the production of documents, administration officers are "cited" for contempt, but these matters usually end in some compromise and with documents handed over. In some cases, presidents have successfully withheld documents from the Houses. The courts, while suggesting some constitutional basis for executive privilege, and accepting jurisdiction in particular cases, have not become involved in determining specific claims of executive privilege. (*Senate Select Committee v Nixon* 1974 498 F 2d 725; *US v Nixon* 1974 418 US 683; *US v AT&T* 1977 567 F 2d 121; *US v House of Representatives* 1983 556 F Supp. 150; *In re Sealed Case* 1997 121 F 3d 729; *Committee on the Judiciary, US House of Representatives v Miers*, 31/7/2008, not reported). Contests between Congress and administration are generally left to "the ebb and flow of political power" (Archibald Cox, quoted in report of Committee of Privileges, PP 215/1975, p. 47).

While the public interest and the rights of individuals may be harmed by the enforced disclosure of information, it may well be considered that, in a free state, the greater danger lies in the executive government acting as the judge in its own cause, and having the capacity to conceal its activities, and, potentially, misgovernment from public scrutiny. It may also be considered that a representative House of the Parliament is the best judge of the balance of public interests.

Questions to ministers

(See Supplement) At the time specified in the routine of business, questions without notice may be put to ministers relating to public affairs, and to other senators relating to any matter connected with the business on the Notice Paper of which such senators have charge (SO 72(1)). Provision is also made for questions on notice, that is, questions put and answered in writing (SO 74). Although questions may be put to senators other than ministers, they are mainly used to obtain information from the ministry, and are therefore dealt with in this chapter.
(See Supplement)

Questions without notice: question time

Question time for questions without notice occurs at 2 pm on each sitting day.

Time limits are imposed on questions and answers at question time. Standing order 72(3) provides that:

> (a) the asking of each question not exceed 1 minute and the answering of each question not exceed 4 minutes;
>
> (b) the asking of each supplementary question not exceed 1 minute and the answering of each supplementary question not exceed 1 minute.

While standing orders give senators the right to ask questions of ministers and certain other senators there is no corresponding obligation on those questioned to give an answer. President Baker ruled on 26 August 1902 that there was "no obligation on a minister or other member to answer a question", and in 1905 he ruled: "It is a matter of policy whether the Government will answer a question or not. There are no standing orders which can force a minister or other senator to answer a question" (SD, 26/8/1902, p. 15311 and 20/10/1905, p. 3858). Other presidents have stated that answers are "optional" or "discretionary" and that, "There is no obligation on a minister to answer: he does so merely as a matter of courtesy". (For rulings that ministers cannot be required to answer questions see SD, 26/8/1902, p. 15311; 1/6/1904, p. 1736; 20/10/1905, p. 3858; 22/5/1914, p. 1428; 16/7/1919, p. 10718; 1/10/1952, p. 2373; 2/6/1955, p. 592; 5/10/1961, p. 891; 10/9/1963, p. 372; 22/8/1973, p. 40; 19/10/1983, p. 1717; 3/11/1983, p. 2186; 6/12/1990, p. 5131.) These rulings relate to the conduct of question time and do not preclude the Senate taking some separate action to obtain the required information.

The standing orders prescribe no limit to the duration of questions without notice. In practice, about one hour is usually occupied by questions without notice, at the expiration of which time the Leader of the Government in the Senate or the minister at the table asks senators to put any further questions on the Notice Paper. As ministers are not obliged to answer questions without notice (see above), this effectively terminates question time for that day.

Except for the period 26 September 1967 to 27 March 1973, it has been the practice for question time to be ended by a minister asking that any further questions be placed on the notice paper.

On 26 September 1967 the Leader of the Government in the Senate moved that further questions be placed upon the Notice Paper. The President stated that it was the practice of the Senate that a minister had the right to ask that further questions be placed on the Notice Paper, without proposing a motion. A motion, proposed by an Opposition senator, was agreed to that questions without notice be proceeded with. Ministers answered further questions, although they were not obliged to. (The President had ruled that such a motion could not be moved without notice. This ruling, though undoubtedly correct, was dissented from by the Senate.)

For some years after the 1967 proceedings no minister attempted to terminate question time by means of asking that further questions be placed upon the Notice Paper, and the duration of question time increased markedly, from about 45 minutes prior to 1967 to 80 minutes at the end of 1972 and 110 minutes during the early part of the 1973 session. Question time was curtailed for a brief period at the end of 1972, however. Faced with a large amount of business to be dealt with in the remaining days of the session, the government moved

> That, unless otherwise ordered, question time including questions on notice, for the remainder of the present period of sittings, shall not exceed 45 minutes.

The motion was passed on October 25 1972 (J.1193) and for the remaining four days of the 27th Parliament question time was limited accordingly.

A general election was held in December 1972 and when the Senate resumed in February 1973 the practice which had been followed since 1967 (with the exception of the four days in October 1972) was briefly resumed before being replaced on 27 March 1973 by the practice which had obtained prior to 1967. President Cormack then made a statement concerning questions in which

he outlined the practice which prevailed until 26 September 1967 and noted that since that time no minister had attempted to terminate question time as long as senators wished to ask questions. He stated:

> Notwithstanding the September 1967 proceedings there is still no obligation upon a minister to answer questions, and if the minister in charge asks after a certain time that further questions without notice be placed on the notice paper I believe that I have no alternative but to call the next business. (SD, 27/3/1973, p. 567.)

The rationale for the restoration of the earlier practice was that the decision of 26 September 1967 to extend question time applied to that day only and the fact that for the next five years the government had chosen not exercise the right to terminate question time at the request of the minister at the table did not affect the validity of this practice. Consequently, on the next occasion after 1967 that the minister at the table asked that further questions be placed on the Notice Paper, the President ruled in accordance with traditional practice.

Following the President's ruling (which he later repeated, SD, 17/5/1973, p. 1688), the Senate proceeded to the next business, but the Leader of the Opposition intended that the practice should be reviewed. On 29 March 1973 the Leader of the Opposition moved:

> That, in the absence of any Standing Order on the matter, honourable Senators' right to question Ministers is limited only by the judgment of the Senate, and that Ministers who seek recognition from the Senate are obliged to answer questions with a promptness and accuracy appropriate to ministerial responsibility.

The motion was debated but not voted upon (29/3/1973, J.82).

On 10 April 1973, the Leader of the Opposition gave notice that, contingent upon any minister asking, on any day of sitting during question time, that further questions without notice be placed on the Notice Paper, he might move: That questions without notice be further proceeded with. A similar notice of motion was given in the 1974 session. These notices were not used.

President O'Byrne confirmed the restoration of the traditional practice when, on 11 July 1974 (SD, p. 81), he stated that after the minister in charge "asks that further questions without notice be placed on the notice paper the Chair regards itself as bound by practice to call on the next business". The question of a minister's right to terminate question time was raised next in 1979, when President Laucke stated that the practice of question time being terminated by the Leader of the Government requesting that further questions be placed on the Notice Paper was well established and had been recognised by successive Presidents (SD, 22/3/1979, p. 879).

The practice was considered in 1980 by the Standing Orders Committee, which confirmed in its report to the Senate (PP 50/1980) that it was a long-established practice for question time to be terminated by the Leader of the Government in the Senate asking that further questions be placed on notice. The basis of the practice, the committee reported, is that it is competent for ministers to ask that any questions be placed on the Notice Paper and that ministers, in any case, are not bound to answer questions. The committee did not consider that it ought to recommend any change in the practice.

On 25 June 1992 the Opposition successfully moved a motion, for which the Opposition Leader had on the Notice Paper a special contingent notice of motion to suspend standing orders, to extend question time that day. Time was extended to enable five further questions to be put to ministers by Opposition senators (25/6/1992, J.2614-5).

On 19 October 1999 question time was extended on several days in response to a refusal by a minister to produce a document in accordance with an order of the Senate (19/10/1999 J.1931-2).

Although the government can end question time by asking that further questions be placed on notice, question time is an item in the Senate's routine of business, and, as such, cannot be dispensed with except by a decision of the Senate to alter the routine of business which explicitly or implicitly has that effect.

For the effect of censure motions on the duration of question time, see above, under Ministerial accountability and censure motions.

The history of the time limits on questions and answers is of interest. On the initiative of the Opposition, a special order was agreed to on 14 September 1992 (J.2745) to limit the asking of questions to one minute and the answering of questions to two minutes during question time. The motion also limited the asking of supplementary questions to one minute and answers to them to two minutes. The motion further specified that time taken to make and determine points of order should not be regarded as part of the time for questions and answers. 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 1992 (J.2816) 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 (3/11/1992, J.2931) for the first two sitting weeks of November with the limits to answers to questions and supplementary questions reduced to three minutes and one minute respectively. On 24 November 1992 (J.3076) these procedures, together with those concerning motions to take note of answers after question time (see the section on motions to take note of answers below), were renewed as sessional orders. The procedures were incorporated into standing order 72 in February 1997.

The chair seeks to call senators to ask questions so as to achieve an appropriate allocation of questions among parties and independent senators. By custom the chair observes an order for the allocation of questions agreed to by senators. In its second report of 1995, the Procedure Committee endorsed the principle of proportionality, that is, that the allocation of questions between the various parties, groups and independent senators should be as nearly as practicable in proportion to their numbers in the Senate (PP 284/1995). The allocation of questions, however, is not governed by any rule of the Senate. For an unsuccessful attempt to change the allocation and specify it in an order of the Senate, see 5/3/2003, J.1539.

The Leader of the Opposition, when seeking to ask a question, is accorded priority over all other non-government senators (ruling of President Mattner, SD, 26/9/1951, p. 5). The call is given to

senators who have not asked questions before calling any senator for a second time (SD, 24/10/1951, p. 1035; 3/5/1973, p. 1276).

Supplementary questions

Following a minister's reply, the questioner or any other senator may, in the discretion of the chair, be called to ask a supplementary question in order to elucidate the reply. Usually there is only one supplementary question by the questioner, but the number and the questioner is in the discretion of the chair.

Supplementary questions must relate to or arise from the answer. It is not in order to ask a supplementary question to another minister. A supplementary question must be directed to the minister initially answering the question and when a minister has asked that a question be put on notice a supplementary question may not be asked. (SD, 9/10/1973, p. 1060; 13/12/1973, p. 2778; 6/3/1974, p. 51; 22/5/1979, p. 1895; 22/8/1979, p. 101; 6/5/1982, p. 1913.)

Supplementary questions were introduced in the Senate on the initiative of the chair. In 1973 President Cormack decided that, within reasonable limits, he would allow supplementary questions to elucidate an answer already given.

In 1980 the Standing Orders Committee considered the question of whether senators ought to be allowed to ask supplementary questions in relation to answers which are given by ministers after the termination of question time. It was recommended that, if senators wish to ask further questions in relation to these deferred answers, they should do so either by asking leave to do so, when the answer is given, or by asking their questions in the normal way at question time on a subsequent day. The Standing Orders Committee's report was noted by the Senate (26/2/1981, J.109).

On 14 April 1986 President McClelland made a statement concerning the use of supplementary questions. After noting that supplementary questions began in 1973, the President stated:

> Since that time successive Presidents have consistently ruled that supplementary questions are appropriate only for the purposes of elucidating information arising from the original question and answer. They are not appropriate for the purpose of introducing additional or new material or proposing a new question, even though such a question might be related to the subject matter of the original question.
>
> It is my impression that recently attempts have been made to extend the scope of supplementary questions by the use of what I would call double-barrelled questions; the second, the supplementary question, being held back for asking, virtually irrespective of the answer to the original. I do not believe that is a proper use of the supplementary question procedure which I remind senators is completely within the control of the chair. (SD, p. 1633)

Questions on notice

Questions at question time are supposed to be without notice. The Standing Orders Committee, in a 1980 report (PP 50/1980), reviewed the long-established practice of senators giving ministers informal advice prior to question time of the subject on which they proposed to ask questions, so that ministers might obtain information on those subjects. The committee

considered that this was an acceptable practice, particularly in a chamber where ministers represent several ministries in addition to their own, and that it leads to a more satisfactory question time. The committee noted, however, that there was a distinction between this practice of giving informal advice of the subject of a question to be asked and the giving of written notice of the precise terms of a question calling for a detailed answer as provided for in the standing order dealing with questions on notice.

A question may be submitted on notice by a senator signing and delivering it to the Clerk, fairly written, printed, or typed. Notice may be given by one senator on behalf of another (SO 74(1)). The Clerk is required to place notices of questions on the Notice Paper in the order in which they are received (SO 74(2)).

Each question on notice is allocated a number and the text of the question is published in the Notice Paper. All questions which remain unanswered appear in the full Internet version of the Notice Paper and those that have remained unanswered for 30 or more days are noted.

A reply to a question on notice is given by delivering it to the Clerk, and a copy is supplied to the senator who asked the question. The question and reply is printed in Hansard (SO 74(3)). A senator who has received a copy of a reply pursuant to this standing order may, by leave, immediately after questions without notice, ask the question and have the reply read in the Senate (SO 74(4)), but this procedure is seldom used. The publication of the reply is authorised on its provision to the senator (SO 74(3)).

A senator who asks a question on notice and does not receive an answer within 30 days may seek an explanation and take certain other actions (SO 74(5)).

This provision, first adopted on 28 September 1988 (J.952), on the motion of Senator Macklin, provides:

> If a minister does not answer a question on notice asked by a senator within 30 days of the asking of that question, and does not, within that period, provide to the senator who asked the question an explanation satisfactory to that senator of why an answer has not yet been provided:
>
> (a) at the conclusion of question time on any day after that period, the senator may ask the relevant minister for such an explanation; and
>
> (b) the senator may, at the conclusion of the explanation, move without notice 'That the Senate take note of the explanation'; or
>
> (c) in the event that the minister does not provide an explanation, the senator may, without notice, move a motion with regard to the minister's failure to provide either an answer or an explanation.

If an explanation of the failure to answer questions within 30 days is not forthcoming when requested at the end of question time, the motion which is moved may be for any purpose, but is often a motion for an order for the answers and explanations to be tabled by a specified date. The procedure was first used by Senator Macklin on 23 November 1988 and has been frequently used since. The government has complied with orders made under this procedure to table answers by a

specified date (23/11/1988, J.1144; 28/11/1990, J.485; 21/2/1991, J.785; 14/3/1991, J.875; 17/4/1991, J.951; 16/6/1992, J.2443; 11/5/1995, J.3289; 12/8/1999, J.1489-90). On one occasion (25/5/1989, J.1712) a minister was censured for the delay in answering.

A statement by a minister that an answer is being prepared, or that a question is under consideration, is not regarded as an explanation of failure to answer the question (rulings and statement by President Reid, SD, 28/5/1998, pp 3377-8).

The practice of ministers leaving the chamber immediately at the end of question time has meant that on several occasions the relevant minister has not been present to give an explanation, despite prior warning being given by the senator who asked the overdue question on notice. Despite requests from the President (see SD, 21/2/1991, p. 1034) the practice continued and on 17 April 1991 the Senate passed a motion expressing its "continuing concern at the lack of courtesy by Ministers in failing to attend the Chamber and to provide adequate reasons for failure to answer questions" (17/4/1991, J.951-2).

If in response to a senator having asked for an explanation of failure to answer a question, an answer is immediately produced by a minister, it is not open to a senator to move the motions otherwise authorised by the order. 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. (SD, 2/12/1992, pp 4044-8; 8/12/1992, pp 4391-4; 2/12/1992, J.3190; 8/12/1992, J.3252; ruling of President Calvert, SD, 16/10/2003, p. 16629)

On 16 June 1992, a senator took the unusual step of tabling by leave answers to questions on notice of which he had received copies, and then by leave moving a motion to take note of the answers and debating them (SD, 16/6/1992, pp 3661-2, 3664-6).

Under standing order 74(5), the procedure applies also to questions on notice lodged during estimates hearings. (See Chapter 16, Committees, under Estimates committees.)

When final answers to questions on notice have not been given before the Senate adjourns, government departments and agencies furnish replies in the usual manner to the Department of the Senate which forwards them to the senators concerned. On the resumption of the next sittings, the replies are incorporated in Hansard.

One of the consequences of a prorogation of the Parliament is that all business on the Notice Paper lapses on the day before the next sitting. Thus, questions submitted before the prorogation and not answered before the next sitting need to be resubmitted in order to appear on the Notice Paper in the next session. The Department of the Senate writes to senators whose questions had not been answered, inquiring whether they wish to renew the questions when the Senate resumes. Ministerial departments are advised to answer questions outstanding at prorogation. If the Senate were to meet after a prorogation (see below) a Notice Paper would be issued containing the business before the Senate at the prorogation.

Questions on notice submitted after the prorogation and for which answers have not been received before the Senate sits again appear on the first Notice Paper of the new session with the annotation that notice was given on the first sitting day. For such questions the 30 days, within

which ministers must provide an answer or explain why none has been given, is deemed to begin with the first day of the new session.

Rules for questions and answers

The basic requirements of questions and answers were stated by President Laucke to be:

- questions must relate to matters for which a minister is responsible
- questions and answers should be brief
- requests for statistical information should be placed on the Notice Paper and should not be sought on the floor of the chamber on any occasion
- quoting should be avoided, except to the degree necessary to make a question clear
- replies should be confined to giving information, and no debate should be entered into (SD, 21/10/1976, p. 1370).

The following rules for questions are contained in standing order 73:

> Questions shall not contain:
>
> (a) statements of fact or names of persons unless they are strictly necessary to render the question intelligible and can be authenticated;
> (b) arguments;
> (c) inferences;
> (d) imputations;
> (e) epithets;
> (f) ironical expressions; or
> (g) hypothetical matter.
>
> Questions shall not ask:
>
> (a) for an expression of opinion;
> (b) for a statement of the Government's policy; or
> (c) for legal opinion.
>
> Questions shall not refer to:
>
> (a) debates in the current session; or
> (b) proceedings in committee not reported to the Senate.
>
> Questions shall not anticipate discussion upon an order of the day or other matter which appears on the Notice Paper.
>
> The President may direct that the language of a question be changed if it is not in conformity with the standing orders.

These rules apply also to answers. For example, if a question may not ask for a legal opinion, it follows that an answer may not give one.

The rule concerning anticipation is not interpreted narrowly because, if it were, it could block questions on a wide variety of subjects. The practice is to allow questions seeking information regarding matters on the Notice Paper but which do not necessarily amount to anticipating discussion (statements by President Reid, SD, 24/6/1999, p. 6307; 20/6/2002, p. 2312; by President Calvert, SD, 17/10/2006, p. 36).

The rule that questions shall not refer to proceedings in committee which have not been reported to the Senate strictly refers to proceedings in committee of the whole, although the same principle has been applied to other committees. The prohibition, however, is not interpreted narrowly because, if it were, the rule might block questions on a wide variety of subjects under consideration by committees. The working rule is that senators should not be restricted from asking questions on subjects which may be under examination by a committee, provided that they do not refer to non-public committee proceedings which have not been reported to the Senate (rulings of President Laucke, SD, 26/8/1976, p.354; of Deputy President West, 22/9/1999, p.8654; of President Calvert, SD, 17/10/2006, p. 36). President Laucke stated:

> The rules have never been so interpreted as to prevent from being answered a question about a particular area which may or may not have a direct bearing on an inquiry currently proceeding. Otherwise no questions could be asked in the Senate. An interpretation which is not too rigid has to be made in a situation like this. (ibid.)

The conduct of members of either House should not be reflected on in a question (rulings of President McMullin, SD, 12/11/1968, p. 1865; 25/8/1970, p. 154).

It is within the discretion of the President to direct that long and involved questions be placed on the Notice Paper (rulings of President O'Byrne, SD, 11/6/1975, p. 2488; of President Laucke, 22/3/1979, p. 876). See also the section on Questions involving orders for returns, below.

In applying the rule that a question shall not ask for a statement of government policy, in most cases the chair leaves it to the minister to say whether a question involves a statement of government policy. However, it has been ruled that it is in order for a question:

- to seek an explanation of government policy (SD, 5/12/1989, p. 3879);
- to ask a minister about the effects of a proposal on the minister's portfolio (SD, 4/10/1984, p. 1206);
- to ask about the government's intentions and the reasons for those intentions (SD, 30/3/1987, p. 1438);
- to seek clarification of a statement made by a minister (18/2/1991, J.755; SD, 18/2/1991, p. 690).

A question which invites a minister to comment on the policies or actions of non-government parties is out of order unless the question seeks an expression of the government's intentions in some matter of ministerial responsibility (rulings of President Sibraa, SD, 17/2/1987, p. 73; 30/3/1987, p. 1438; 17/5/1990, p. 554; 26/11/1991, p. 3296; of President Reid, SD, 9/9/1996,

p. 3018; of President Calvert, SD, 10/9/2003, p. 14834; 1/3/2004, pp 20291-2; 26/3/2007, pp 34-5).

On 16 February 1956, a senator asked a question without notice in which he made reference to the President of Indonesia and to the government of that country. President McMullin held that the remarks of the senator were not in order, and he ruled that, in the future, such questions must be expressed in terms of appropriate dignity and courtesy (SD, p. 23). This ruling was consistent with the practice in the British House of Commons. On 19 March 1974 President Cormack disallowed a question without notice on the ground that questions may not be asked, or terms used in debate, which reflect on a head of state of a friendly country (SD, 19/3/1974, p. 361). These rulings have no basis in the standing orders, have not been applied since that time, and do not reflect current practice.

The attachment of the names of persons to circumstances in questions, when only the circumstances need be mentioned, is not in accordance with the standing order (statement by President Calvert, SD, 21/8/2002, p. 3467).

The President may direct that the language of a question be changed if it is not in conformity with the standing orders (SO 73(3)).

With respect to questions on notice, the practice is as outlined to the Senate by President Givens on 25 September 1918 (SD, p. 6300): before questions are permitted to be placed upon the Notice Paper, they are examined by officers of the Senate, and anything which, in their opinion, is doubtful is referred to the President for decision. The President may direct the Clerk to alter any question so as to conform with the standing orders. If a question contains material which does not conform to the standing orders current practice is for an officer of the Senate to discuss the matter with the senator who submitted it. The problem is usually resolved at this point by the rephrasing or withdrawal of the question.

A question which does not comply with the rules may not be placed on the Notice Paper (SD, 1/8/1917, p. 625; 10/4/1918, p. 3694; 26/6/1919, p. 10093; 16/7/1919, p. 10718). On 10 April 1918, President Givens disallowed a proposed question upon notice by Senator McDougall because it contained statements and assertions and, in the opinion of the President, was not asked solely for the purpose of eliciting information. The President refused to allow the question to go on the Notice Paper. Soon after the meeting of the Senate, Senator McDougall moved dissent from the ruling of the President. The motion was negatived. During the debate, President Givens held that it was the duty of the President to protect the privileges of senators by preventing the asking of improper questions (SD, 10/4/1918, p. 3694-5).

On 11 May 1950 President Brown ruled that "it is not permissible to quote from newspapers, books or periodicals when asking questions" (SD, 11/5/1950, p. 2419). During the debate on an unsuccessful motion of dissent from this ruling the President stated: "At the moment it is competent for an honourable senator to ask a question based upon a newspaper article, but not to read an extract from the newspaper" (p. 2587). On 15 May 1969 (SD, p. 1270) President McMullin re-affirmed that questions may be based on newspaper reports, but that quotations are not in order. In 1971 President Cormack ruled:

> I remind the Senate that it has been ruled on many occasions that, while questions may be based on newspaper or other reports, quotations are not in order. The purpose of questions is to obtain information. Questions should be brief so that as many as possible may be asked within the time allotted. I therefore reaffirm that Senators must frame their questions in such a way as not to contain quotations. (SD, 26/10/1971, p. 1444)

See also SD, 27/10/1971, p. 1472; 25/11/1971, p. 2106-7; 28/9/1972, p. 1310. In practice the chair exercises a discretion and may allow a senator to make a quotation to the extent necessary to make the question clear.

Senators may amend their questions on the Notice Paper to clarify their terms (ruling of President Givens, SD, 28/9/1922, p. 2788).

Questions with or without notice are permissible only for the purpose of obtaining information, and answers are subject to the same limitation, that is, they are limited to supplying the information asked for by the questions (rulings of President Givens, SD, 17/5/1916, p. 7920; and of President Cormack, 1/3/1973, p. 90). Questions would not only be in conformity with the standing orders, but would be more effective and telling, if they were confined to properly framed questions, and did not contain statements, assertions, allegations, insinuations and other extraneous material (statement by President Calvert, SD, 6/12/2004, pp 36-7). In answering a question, a senator must not debate it (SO 73(4)). Thus an answer should be confined to giving the information asked for, and should not contain any argument or comments. An answer must also be relevant to the question. On 22 August 1973 President Cormack ruled that in answering a question:

> the Minister should confine himself to points contained in the question with such explanation only as will render the answer intelligible. In all cases the answer must be relevant to the question. (SD, p. 40)

However, should the Senate seek a full statement of a case, latitude is allowed to a minister in answering a question; but if it is desired to debate the matter, this should be done only on a specific motion (ruling of President Gould, SD, 10/12/1908, pp 2985-6).

In relation to relevance, the Procedure Committee in 1994 observed as follows:

> It is clear that, in answering a question, a minister must be relevant to the question. It is for the President to make a judgment whether an answer is relevant to a question. If the answer is not relevant, the President requires the minister to be relevant. (Second Report of 1994, 10 November 1994, PP 223/1994, p. 3; see also statement by President Beahan, SD, 23/10/1995, pp 2249-50)

Questions may be put to a minister relating to the public affairs with which the minister is officially connected, to proceedings pending in Parliament, or to any matter of administration for which the minister is responsible in a personal or representative capacity (ruling of President Sibraa, SD, 30/8/1988, pp 466-7). This is an overriding rule: that a question must seek information, or press for action within a minister's responsibility. The chair will disallow any question where it is clear that it is not within a minister's responsibility. On 18 March 1976, President Laucke ruled that questions must relate to matters within ministerial responsibility. He allowed a question to be put to a minister on the understanding that the minister might reply only in so far as he considered it his responsibility in any area covered by the question (SD,

18/3/1976, p. 621). There are occasions, however, when it is difficult for the chair to decide whether a matter comes within ministerial responsibility; in such cases, according to President Young, "It is the right and responsibility of ministers in this chamber to decide who will answer questions and in whose area of responsibility a particular question lies" (SD, 12/11/1981, p. 2081). It has been ruled that if no minister rises to answer a question it should be placed on the Notice Paper (SD, 2/12/1965, pp 1979-80).

While questions may be asked about ministers' conduct as ministers, questions relating only to the affairs of ministers' spouses or relatives are not in order (statement by President Calvert, SD, 4/12/2002, p. 7154).

A minister may reply to a question relating to matters for which the minister is officially responsible in a personal or representative capacity (ruling of President McClelland, SD, 19/2/1986, p. 603) and replies must be confined to those areas of responsibility (rulings of Deputy President Hamer, SD, 3/10/1984, p. 1110; of President McClelland, 17/2/1986, p. 409; and of President Sibraa, 17/5/1990, p. 554). As has been noted, ministers must accept full personal responsibility for answers given on behalf of others, and ministers have been censured by the Senate on this basis (25/5/1989, J.1712; 10/5/1994, J.1641). It has been ruled that it is not in order for a minister "to comment on how a State public servant administers the affairs of a State department" (SD, 23/10/1986, p. 1812). President Sibraa ruled that if the Chair cannot detect any Commonwealth responsibility in an answer it is out of order (SD, 3/10/1989, p. 1590-1).

It is not the responsibility of the chair to tell ministers how they should respond to questions: "That is purely a matter for Ministers, provided their answers are within the standing orders" (ruling of President McClelland, SD, 11/9/1985, p. 449). It is in order for a minister to answer part of a question without notice and ask that the remainder be placed on the Notice Paper (ruling of President McMullin, SD, 15/10/1953, p. 559). During question time on 18 March 1980, a senator moved that so much of the standing orders be suspended as would prevent a minister from giving the Senate a complete answer to a question. President Laucke ruled (SD, 18/3/1980, p. 715) the motion not in order as at question time it was the prerogative of the minister to determine the manner in which he replied to a question. Later, and after question time had been concluded, a motion was proposed that so much of the standing orders be suspended as would prevent the moving of a motion that the minister request the Prime Minister for real and complete answers to certain questions; the motion was negatived.

It is also not for the chair to determine whether an answer is correct (SD, 27/9/1988, p. 758; 4/12/1991, p. 4111; 11/12/1991, p. 4615). Challenges to the accuracy of an answer should not take the form of a point of order (SD, 2/12/1991, p. 3742).

Questions may not be directed to, or answered by, a parliamentary secretary in that capacity (order first adopted 3/9/1991, J.1455-6).

Declaration of interest

Neither the questioner nor a minister answering a question is required to declare an interest. Following a challenge to a minister to declare his interest in a matter on which he was providing

an answer to a question without notice, President Sibraa ruled that senators do not need to declare an interest (SD, 28/5/1992, pp 2900-3; for declarations of interests in debate, see Chapter 10, Debate).

Sub judice matters

For an analysis of the principles which apply to questions concerning sub judice matters, see Chapter 10, Debate, under Sub judice convention.

Questions concerning statutory authorities

As has been noted, one of the fundamental rules of questions is that a minister may be asked only about matters for which the minister is officially responsible. As statutory authorities frequently operate with considerable autonomy, the question arises of the extent to which a minister can be expected to answer questions of detail concerning their activities, especially in relation to those authorities operating commercially (SD, 28/8/1968, p. 367; 30/3/1971, p. 604). No ruling has been given from the chair, nor pronouncement of policy made by government, regarding questions relating to statutory authorities. It is now the practice for questions about such bodies to be directed to the relevant minister or the minister representing the relevant minister. The information sought is usually supplied.

For declarations by the Senate concerning accountability of statutory bodies, see above, under Statutory authorities and public interest immunity.

Questions concerning security matters

It has been the policy of successive governments that questions seeking information concerning the activities of the Australian Security Intelligence Organisation (ASIO) or the Australian Secret Intelligence Service (ASIS) will not be answered. On 15 July 1975, in reply to a question on notice, the minister representing the Attorney-General stated that it is not the practice to give information relating to ASIO operations (SD, 15/7/1975, p. 2733). In the debate on the Supply Bill (No. 1) 1976-77, a minister stated that it was the practice of governments not to answer questions on the appropriation of funds for the Australian Security Intelligence Organisation (SD, 4/6/1976, pp 2423). Officers of ASIO, however, now appear at estimates hearings and answer questions.

Questions involving orders for returns

It has been ruled that detailed information requiring considerable preparation should be sought by motion for a return under standing order 164, rather than by question upon notice (SD, 7/7/1905, p. 140; 1/8/1930, p. 5109; 19/3/1931, p. 373; 15/5/1931, p. 1975; 28/7/1931, p. 4408). The rationale for these rulings is that because an order for a return must be approved by the Senate this procedure enables the Senate to consider whether the cost of preparing the information is justified.

See also the material on unanswered questions on notice, above, and Chapter 18, Documents, under Orders for the production of documents.

Additional responses to questions without notice

It is established practice for ministers at the end of question time to make additional responses to questions without notice. They then provide orally, or by incorporation in Hansard, information which they were unable to provide at the time the question was asked. Supplementary questions are not permitted in relation to such answers. (See ruling of Deputy President West, 21/10/1999, J.1985.)

Motions to take note of answers

A motion may be moved without notice or leave at the conclusion of question time to take note of answers (SO 72(4)). A motion may relate to one or more of any answers given that day and a senator may speak for not more than five minutes on it. The total time for debate on all such motions on any day must not exceed 30 minutes, not including any time taken in raising and determining any points of order during the debate. (See statements by President Beahan, SD, 1/3/1994, p. 1163; SD, 7/6/1995, p. 925.) Motions to take note of answers provide the Senate with an opportunity to debate answers which are regarded as unsatisfactory or which raise issues requiring debate.

A relevant amendment may be moved to a motion to take note of an answer, but an amendment to take note of a different answer is not a relevant amendment (ruling of Deputy President West, 24/3/1998, SD pp 1152-3).

The history of this procedure is as follows. During 1992 the Opposition began to make increasing use of the device of moving by leave after question time motions to take note of answers given by ministers. On 14 September 1992 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 with 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, 15 September 1992, the Manager of Government Business moved a special motion (J.2760-1) 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 1992 (J.2775-7). This motion was expressed to operate for the remainder of the week. It appeared 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 (J.2817-9; J.2931) for the two sitting weeks in October and the first two sitting weeks of November. On 24 November 1992 (J.3076) the procedures, together with those concerning time limits to questions and answers at question time (see above) were renewed as sessional orders, and in February 1997 incorporated into the standing orders.

Effect of prorogation and of the dissolution of the House of Representatives on the Senate

Each House of the Parliament is empowered by the Constitution (sections 49, 50) to regulate its own proceedings, including the times at which it meets during a session of Parliament. While the annual program of sittings is normally decided in consultation with the other House, each may independently determine the pattern of its meetings during a session, which commences, as noted in Chapter 7, with the opening of Parliament by the Governor-General. The days on which a House meets, the times of meeting on a sitting day, including any suspensions, and the time and duration of adjournments during a session are matters to be determined by that House alone.

The commencement and termination of sessions of Parliament, however, are matters determined not by the Houses themselves but by the executive branch of government. Parliament as a collective entity, consisting of the monarch, the Senate and the House of Representatives, comes into being when the Governor-General, under section 5 of the Constitution, appoints the time for a session to begin. Except when a session of Parliament ends as a result of the expiration of the three-year term of the House of Representatives, sessions are terminated by the Governor-General on the advice of the government. The following actions by the Governor-General under the Constitution bring a session to an end: the dissolution of the House of Representatives (s. 5), the simultaneous dissolution of both Houses (s. 57), or the prorogation of the Parliament (s. 5). The period between the end of a session of Parliament and its next meeting at the commencement of the subsequent session is termed a "recess".

This power of prorogation is inherited from the unwritten British constitution, and is closely associated with the monarchy. The monarch determines when the Parliament meets and may terminate its meeting by prorogation, which puts it out of session until summoned again, and quashes all legislative business pending before it. The historical rationale behind the power is that Parliament is only an advisory council to the monarch and meets only when the monarch requires advice. Much used by Stuart kings to dispense with rebellious parliaments, the power is now normally exercised on the advice of the prime minister. As with other royal powers it is generally accepted that there are circumstances in which advice could be refused. For example, if a prime minister were to lose a party majority in the lower house and were to advise a prorogation simply as a means of avoiding a no-confidence motion and of clinging to power, the sovereign would be entitled to decline to act on the advice. Leaving aside such circumstances, prorogation provides the executive government, the ministry, with a handy weapon to use against troublesome upper houses. A government can normally use its compliant party majority in the lower house to adjourn that house, but where such a majority is lacking in the second chamber prorogation may be the only means of avoiding embarrassing parliamentary debate or inquiry. It is, however, something of a two-edged sword so far as governments are concerned, as it terminates all pending government legislation, which must then be revived when the Parliament is called to meet again. The potential for misuse of the power adds significance to the question whether prorogation prevents the Senate meeting.

In its first decades the Parliament was invariably prorogued before a dissolution of the House of Representatives, and it was the usual practice for a Parliament to be prorogued one or more times during its term, thus dividing it into two or more sessions. The Parliament was prorogued before the dissolution of the House in 1925 but the practice was then discontinued until 1993. During

the period 1928-1990 proclamations dissolving the House of Representatives included a phrase purporting to discharge senators from attendance. This phrase had no constitutional basis and arose from a misunderstanding of the procedures and previous proclamations. (The confusion of the wording of the proclamations is more fully set out in 'The discharge of senators from attendance on the Senate upon a dissolution of the House of Representatives', by J. Vander Wyk, Clerk Assistant of the Senate, in *Papers on Parliament*, No. 2, Department of the Senate, July 1988.) In 1990 the Clerk of the Senate drew this fact to the attention of the Official Secretary to the Governor-General. Papers relating to this matter, including an opinion by the Solicitor-General, were tabled in the Senate on 14 August 1991. On the next occasion on which the House was dissolved, 8 February 1993, the Governor-General first prorogued the Parliament by proclamation, and on the same day issued another proclamation dissolving the House of Representatives. The practice of proroguing the Parliament before dissolving the House was also followed in 1996, but the dissolution proclamation did not contain the paragraph discharging senators from attendance. In 1998 the prorogation and the dissolution were combined in one proclamation, and the proclamations of 2001 and 2004 followed this form. In 2007 separate instruments were signed, with the prorogation and the dissolution on different days.

Questions arise as to whether the Senate or its committees may meet after a prorogation or a dissolution of the House of Representatives and before the Parliament is summoned to meet again. As will be seen, these questions have been only partly resolved.

The principal argument advanced against the Senate continuing to meet or exercise any of its powers after a prorogation or a dissolution of the House of Representatives is based on the concept that the Parliament is an organic whole which in some sense exists prior to its constituent parts. This view would have some validity if the Parliament was elected as a whole and then divided itself into two chambers (as was the case until 1991 in the Icelandic parliament). In such a case the dissolution of the Parliament would necessarily entail that its subordinate parts cease to exist. Under the Australian Constitution, however, the three parts of the Parliament are constituted independently of each other by separate parts of the Constitution and a Parliament is formed from these basic constituents on the initiation of the Governor-General under section 5. In so far as prorogation prevents the Parliament as whole from operating it has the effect of temporarily suspending those powers and functions of the Parliament that require the coordinate actions of its constituent parts. A dissolution of the House of Representatives means that, for a period of time, one of the components of the Parliament ceases to exist and thus the Parliament cannot perform those functions for which all three parts are required, principally the enactment of legislation. There is no constitutional provision or doctrine, however, which would prevent the Senate from meeting for non-legislative purposes. Similarly, should an election for half the Senate be held when the House of Representatives is still in session there is no reason why the House could not meet. In the absence of one of the Houses, or of the Governor-General, the remaining parts of the Parliament may continue to exercise those powers and perform those functions which do not require the coordinate action of the other parts.

In support of this view, it is to be noted that it has been held that the Governor-General may exercise legislative powers after a prorogation. On 1 December 1910 the Governor-General assented to bills which had been passed prior to a prorogation on 29 November 1910. In opinion No. 3 of 1952, dated 23 May 1952, the Solicitor-General took the view that the royal assent may

be given after prorogation. In an opinion dated 9 October 1984 (see below) the Solicitor-General stated:

> I do incline to the view that the Constitution does not require that the Royal assent to Bills passed by both Houses be declared and given before the Parliament is prorogued, or the House of Representatives dissolved. Certainly this is not specifically required by section 58. Moreover, section 60, which provides for a proposed law reserved pursuant to section 58 for the Queen's pleasure, clearly embraces the situation that the Queen's assent may be furnished after the end of the session at which the proposed law is passed. The requirement that the Queen's assent be made known within two years is inconsistent with any inference that assent may be given only during a session of the Parliament. The decision of the New Zealand Court of Appeal in *Simpson v Attorney-General* (1955) N.Z.L.R. 271, 283, also is confirmatory of this view of the Crown function. It was held that section 56 of the *New Zealand Constitution Act* 1852 (which, together with section 59, is in analogous terms to sections 58 and 60 of our Constitution) enabled the Governor-General to assent to a Bill after the House of Representatives was dissolved; and there was no requirement for the House of Representatives to be in session at the time of the Royal assent.

Among the powers which the Senate may exercise and the functions which it may perform during recess or following a dissolution of the House are those of debating public affairs, inquiring (principally through its committees) into matters of concern, the presentation, publication and consideration of documents, and the disallowance of statutory instruments. In the absence of a House of Representatives to receive any bills initiated and passed by the Senate, the Senate could originate legislation for subsequent consideration and could consider and vote on legislation already passed by the House of Representatives.

An important argument in support of the Senate's powers in relation to meeting during recess and following a dissolution of the House of Representatives is that concerning the continuing nature of the Senate. The six-year terms of senators and the retirement of half the Senate every three years means that the Senate is a continuing body except on those occasions when it is dissolved simultaneously with the House of Representatives under section 57 of the Constitution. The continuing nature of the Senate is reflected in the standing orders and other orders of continuing effect.

Senate standing committees are appointed at the commencement of each Parliament and continue in existence until the eve of the opening of a new Parliament.

The Senate has not asserted its right to meet after a prorogation, but has regularly authorised its committees to do so and they have met accordingly. The Senate has asserted that it and its committees may meet after a dissolution of the House of Representatives.

(a) prorogation

As mentioned in Chapter 7, the generally accepted view is that a prorogation, as well as terminating a session, prevents the Houses of Parliament meeting until they are summoned to meet by the Governor-General under section 5 of the Constitution, or they meet in accordance with the proclamation of prorogation. According to this view, orders and resolutions which are not of continuing effect cease to have force and all business on the Notice Paper lapses and must be recommenced in the new session. Standing order 136 provides that bills which have lapsed as result of a prorogation may be revived in the following session provided that a periodical election

for the Senate or general election for either House has not taken place between the two sessions (see Chapter 12, Legislation, Revival of bills).

While the Senate has not met at any time during which the House of Representatives was dissolved nor in the recess following a prorogation, Senate committees have often done so. The standing orders empower most standing committees of the Senate to meet during recess and some of the relevant provisions refer explicitly to the period of a dissolution of the House of Representatives. It is usual for Senate select committees to be given power to meet during recess and following dissolution of the House.

The Senate has asserted since 1901 the right to empower committees to meet during the recess which follows a prorogation. On 6 June 1901 (J.25) the standing orders of the South Australian House of Assembly were adopted by the Senate on a temporary basis until it had drafted its own. These standing orders contained no specific mention of this matter but it appears to have been the practice for sessional committees of the Assembly that "deal with matters which require attention during the Recess" to be "appointed to act during the Recess" (E.G. Blackmore, *Manual of the Practice, Procedure, and Usage of the House of Assembly of the Province of South Australia*, Adelaide, 1885, p. 88). Accordingly, on 6 June 1901 the Senate resolved to appoint a Library and a House Committee with the "power to act in the recess" (J.26). The Senate's own standing orders, adopted in 1903, provided the Library, Standing Orders and House Committees with "power to act during Recess". The standing orders continued to grant these committees, and certain others, power to act during recess. Upon its establishment in 1932 the Standing Committee on Regulations and Ordinances was also given this power.

The power of the Senate to authorise committees to meet during recess may be regarded as deriving from section 49 of the Constitution, which provides that the powers, privileges and immunities each House, its members and committees shall, until Parliament declares otherwise, be those of the House of Commons in 1901. In an opinion dated 9 October 1984 and tabled in the Senate on 19 October, the Solicitor-General concluded that the "House of Commons in 1901 was empowered to authorise its committees to sit during a period of its prorogation". This and related opinions are further considered below. Procedural matters concerning committees fall within the scope of section 50(ii), which empowers each House to make rules and orders with respect to "The order and conduct of its business and proceedings either separately or jointly with the other House". Opinion is divided as to whether this section also empowers the Senate to authorise committees to sit during recess. See, for example, the opinion by Professor Colin Howard, dated March 1973, and that of the Solicitor-General, dated 9 October 1984, referred to below.

In 1957 the Joint Committee on Constitutional Review, at the request of the Senate, was given power to sit during recess. The Leader of the House of Representatives, Mr Harold Holt, stated that the government had decided that:

> ... henceforth we shall have a session of the Parliament annually, and it being the desire, I think, of all members of the Parliament that committees such as the Constitutional Review Committee, which has a valuable public service to perform, should continue to function in any period of recess between the prorogation of one session of the Parliament and the formal opening of another, there is sound practical sense in the suggestion that these committees be enabled to continue during any such recess.

The minister observed that while committees of the House of Commons ceased to exist following prorogation, the situation in Australia required a different approach:

> Although we follow quite regularly the rulings and practices of the House of Commons where they appear to accord with the needs of our situation in Australia, each Parliament, of course, has its own way to make and its own problems to resolve. ... We live in a practical and swiftly moving world, and although the prorogation may legally bring to an end a session of the Parliament, it is assumed that if we are to have a session annually the Parliament will go on and resume in a new session shortly after the New Year according to the kind of program that I outlined last week. (HRD, 28/3/1957, pp 339-40.)

The House's accession to the Senate's request that the joint committee be granted power to meet during recess was in accordance with the spirit of the standing orders of the House of Representatives which provide certain standing committees of that House with such power.

The seven legislative and general purpose standing committees appointed by the Senate for the first time on 11 June 1970 were empowered by resolution "to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament" (11/6/1970, J.187). By then there was no doubt about the ability of the Senate to make such a provision. Senate committees have since then regularly met during prorogations, for private meetings and public hearings.

(b) dissolution of the House

As has already been noted, Senate standing committees are empowered to meet during recess, and this includes the period of a dissolution of the House of Representatives. The empowering provisions for some committees explicitly refer to the period of a dissolution of the House. This form of words was first adopted in 1973 in respect of the legislative and general purpose standing committees, to make it clear that "recess" includes a period of dissolution of the House. This positive assertion by the Senate of the right to have its committees meet during the period of a dissolution of the House reflected a need for the newly-expanded committee system of the Senate to continue to function in an election period.

In the 1970s the standing committees frequently held meetings, including public hearings, after the dissolution of the House of Representatives.

On 19 October 1984 Senator Tate, the Chairman of the Senate Select Committee on Allegations Concerning a Judge, tabled papers relating to the power of the Senate or its committees to meet after a dissolution of the House of Representatives or a prorogation of the Parliament, and the publication of a committee report when the Senate is not sitting. The circumstances were that the dissolution of the House of Representatives was scheduled for 26 October 1984 and the committee's report was not expected to be completed by that date. The papers tabled on 19 October 1984 (J.1270) were:

> In the matter of the Power of the Senate or its Committees to sit after Dissolution or Prorogation — Opinion by the Solicitor-General, Dr G. Griffith, dated 9 October 1984.

> The Power of the Senate or its Committees to meet after a Dissolution of the House of Representatives or a Prorogation of the Parliament, and the publication of a Committee Report when the Senate is not sitting — Paper by the Clerk-Assistant (Committees), Mr Harry Evans.

Attached to the documents was a brief summary of the opinions, which read:

SUMMARY OF PAPERS

1. Opinion dated 9 October 1984 of the Solicitor-General:
This opinion concludes that —

   (a) the Senate may not meet after a prorogation, which has the effect of terminating a session and preventing Parliament, as an organic whole, from functioning;

   (b) the Senate likewise may not meet after a dissolution of the House of Representatives, which also has the effect of preventing the Parliament from functioning;

   but concludes that —

   (c) the Senate has the power to authorise its committees to meet after a prorogation or dissolution of the House of Representatives, because this is one of the powers of the House of Commons adhering to the Senate by virtue of section 49 of the Constitution.

2. Paper dated 18 October 1984 by Mr Harry Evans, the Clerk-Assistant (Committees):

   This paper concludes that —

   (a) it is wrong to equate a dissolution of the House of Representatives with a prorogation, and the Senate and its committees may meet after a such dissolution;

   (b) in any case, the Senate and its committees may meet after a prorogation;

   (c) it is not tenable to maintain that the Senate committees may meet during a period during which it is claimed that the Senate may not meet: if Senate committees may meet after prorogation, the Senate also may meet; and

   (d) the Senate may authorise, in advance of their receipt, the publication with absolute privilege of reports of its committees, because —

      (i) this is in accordance with the Parliamentary Papers Act; and

      (ii) the power to authorise the publication of any document with absolute privilege is one of the powers of the House of Commons adhering to the Senate by virtue of section 49 of the Constitution.

Each of these documents supported the conclusion that the publication of the report of the Select Committee on Allegations Concerning a Judge in accordance with the resolution appointing the committee would be absolutely privileged. The report was subsequently published and there was no challenge of any sort to its absolutely privileged nature.

Following the tabling of the papers, Senator Georges requested the tabling by the President of any further opinions received on this matter, either by the President or by any other committee of the Senate. In response to the request, the President (Senator Douglas McClelland) tabled the following papers (22/10/1984, J.1275):

> Senate and its Committees: — Powers to meet after prorogation or dissolution —
>
> Letter from the Attorney-General (Senator Greenwood) to the President of the Senate (Senator Cormack), dated 24 October 1972. Opinion concludes that Senate committees cannot lawfully continue to meet and transact business during the period from a dissolution of the House of Representatives to the re-assembly of Parliament in the next session. Also clear, in the Attorney's view, that the Senate itself cannot sit during that period.
>
> Opinion by Mr R.J. Ellicott, when Commonwealth Solicitor-General. Opinion concludes that, on dissolution by proclamation of the House of Representatives, neither the Senate nor its committees have power to meet until Parliament is called together following the general election.
>
> Opinion by Professor Colin Howard, University of Melbourne, dated March 1973. General conclusion that the Senate and its committees may sit and function during the period from a dissolution of the House of Representatives to the meeting of Parliament in the next session and during periods of prorogation of Parliament.
>
> Opinion by Professor G Sawer, Australian National University, dated approximately 1969. Opinion contends that once the House of Representatives is dissolved under section 5 of the Constitution, the "Parliament" ceases to exist and so does the possibility of the Senate continuing to function as an independent and separate entity until a "Parliament" is again in session pursuant to the appointment of a time by the Governor-General under section 5.

On the next sitting day, 22 October 1984, the Deputy Leader of the Opposition in the Senate (Senator Durack) moved:

> That the Senate declares that where the Senate, or a committee of the Senate which is empowered to do so, meets following a dissolution of the House of Representatives and prior to the next meeting of that House, the powers, privileges and immunities of the Senate, of its members and of its committees, as provided by section 49 of the Constitution, are in force in respect of such meeting and all proceedings thereof. (22/10/1984, J.1276)

The motion was agreed to after debate, and without division (SD, 22/10/1984, p. 2129-36). The Attorney-General (Senator Gareth Evans) argued that there were very strong legal doubts whether the Senate can in fact meet after a dissolution of the House of Representatives and continue, while so meeting, to enjoy the powers, privileges and protections normally available to it.

The Senate did not meet following the dissolution of the House of Representatives on 26 October 1984 but between that time and the opening of the next session of Parliament on 21 February 1985, there were private meetings and public hearings of several Senate committees.

Since that time the Senate has not met after a dissolution of the House, but Senate committees have regularly done so for the purposes of private meetings and public hearings.

Chapter 20

RELATIONS WITH THE JUDICIARY

A SIGNIFICANT FEATURE of the Australian Constitution, and one which is essential for good government, is that the judicial function is separated from the legislative and executive functions, and the judicial power is vested in independent judges with security of tenure.

The Constitution provides for federal courts not only to interpret and apply the law in determining issues between governments and persons and between persons, but, by interpreting and applying the Constitution to such issues, thereby to determine the lawfulness of the actions of the legislative and executive branches of government. It is therefore doubly important that the judges have complete independence from the other two branches. The Constitution seeks to safeguard that independence by its provisions for the appointment and removal of federal judges.

Appointment and removal of judges

The Constitution, section 71, vests the judicial power of the Commonwealth in the High Court, which is established by the provisions of the Constitution, such other federal courts as the Parliament by legislation creates, and such other courts as the Parliament vests with federal jurisdiction.

Section 72 of the Constitution provides:

> The Justices of the High Court and of the other courts created by the Parliament —
>
> (i.) Shall be appointed by the Governor-General in Council:
> (ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:
> (iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.
>
> The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.
>
> The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

The appointment of federal judges is therefore a matter for the executive government alone. There is no provision, as there is in the United States of America and some other countries, for

appointment or approval of appointment by the Houses of the legislature. In this the Constitution follows the British pattern of appointment of judges by the Crown.

Once appointed, however, judges are completely independent in that they may not be removed from office except by the special procedure set out in section 72.

As this procedure involves the two Houses of the Parliament, as well as the executive government, in the constitutionally highly significant process of removing a judge, this chapter considers some questions arising in the interpretation of section 72. The dearth of precedent for action under section 72 may make this consideration more useful. (For a more detailed treatment of the interpretation of section 72, with citations of authorities, see 'Parliament and the Judges: the removal of federal judges under section 72 of the Constitution', by Harry Evans, *Legislative Studies*, Spring 1987. This chapter draws upon that article.) The chapter then proceeds to an examination of the only case in which the Houses have investigated the conduct of a judge to determine whether action should be taken under section 72, the case of Mr Justice Murphy of the High Court in 1984-86, in the course of which two Senate select committees and a statutory parliamentary commission of inquiry were appointed.

CONSTITUTIONAL QUESTIONS

Section 72 and other provisions

The provisions in section 72 for the removal of federal judges are quite different from the equivalent provisions in other relevant jurisdictions, although the interpretation of those other provisions throws some light on the interpretation of section 72.

In the United Kingdom the Act of Settlement of 1701 provides for judges to hold office during good behaviour, but for their removal upon an address by both Houses of the Parliament. This provision has been the subject of differing interpretations. It has been contended that the provision for the removal of judges upon the address of both Houses abolished earlier methods of removal, including termination of appointment on the application of the Crown for misbehaviour. The generally accepted view, however, is that the Act preserved the earlier methods of removal while adding the new mechanism of address by both Houses, which mechanism is not limited to any specific ground such as misbehaviour. In other words, judges may be removed for misbehaviour but may also be removed on any other ground upon the address of both Houses.

In the United States the constitution provides that federal judges hold office during good behaviour and may be removed by means of impeachment by the House of Representatives and trial and conviction by the Senate, the stated grounds of removal being "Treason, Bribery or other high Crimes and Misdemeanours".

In providing in section 72 of the Constitution that federal judges could be removed only upon an address by both Houses on the ground of proved misbehaviour or incapacity, the Australian constitution-makers deliberately sought to depart from the Act of Settlement and to provide greater security of tenure for the judges, by restricting the method and ground of removal. This is

made clear by proceedings in the constitutional conventions. (National Australasian Convention, *Debates*, Adelaide, 1897, pp 946ff.)

The meaning of misbehaviour

The most important question arising under section 72 is the scope of the word misbehaviour, and this is also the question which has been most discussed. Five opinions have been given: of the Commonwealth Solicitor-General, 24 February 1984, of the counsel to the Senate Select Committee on the Conduct of a Judge (both reproduced in the report of that committee: PP 168/1984), and of each of the three Commissioners of the Parliamentary Commission of Inquiry appointed under the Act of 1986 establishing that Commission, those three opinions having been presented to each House of the Parliament on 21 August 1986 (PP 443/1986).

There is a line of authoritative statements indicating that under the common law misbehaviour in respect of an office held during good behaviour meant misbehaviour in relation to the performance of the duties of that office, such as neglect or refusal to perform those duties, and conviction for infamous offences not connected with the duties of the office. The authorities for this definition are extremely old: they consist of the 17th century treatise by Sir Edward Coke, *Institutes of the Laws of England*, the case of the Earl of Shrewsbury, 1610, and the judgment in *R. v Richardson*, 1758 97 ER 426. The two cases were not concerned with judges. Relying principally on these authorities, the Solicitor-General in 1984 concluded that the scope of misbehaviour within the meaning of section 72 is similarly restricted.

All of the other opinions conclude that misbehaviour under section 72 has no such restricted meaning, but extends to any behaviour indicating unfitness for judicial office.

In the United Kingdom it has been assumed that, whatever the technical legal situation, the provision for the removal of judges upon the address of both Houses made obsolete other methods of removal, that that mechanism is, as a matter of practice, the only available method for removal of a judge, and that, as a matter of practice, the British Parliament would not make an address for the removal of a judge except on the ground of misbehaviour. If these assumptions are correct, then it is clear that in Britain misbehaviour is not thought to be confined as indicated by the old authorities. The established grounds for an address have been stated to include misconduct involving moral turpitude, partisanship and partiality, and misconduct in private life. These grounds have been taken to be no more than different forms of misbehaviour.

Article III, section 1 of the constitution of the United States provides that federal judges "hold their offices during good Behaviour". Article II, section 4 provides that "all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanours". It was explicitly stated by the framers of the constitution that the latter section applies to judges.

These provisions have been interpreted as meaning that:

- the judicial tenure provision implies a power to remove judges for breach of good behaviour, either by some implied procedure or by a procedure provided by Congress by legislation

- judges may be impeached for misbehaviour.

Both of these interpretations hold that judges are removable for breach of the condition of good behaviour. Statements by American authorities on the question of what constitutes misbehaviour are therefore relevant to Australia despite the different method by which US federal judges may be removed. The American authorities are very well aware of the old English law as to what constitutes breach of the condition of good behaviour, but none of them have concluded that the English law exhaustively defines the categories of misbehaviour as postulated by the Australian Solicitor-General.

And whatever the correct interpretation of the US constitution, in the various cases in which US federal judges have been impeached, the Congress has assumed that it has the power to impeach them for misbehaviour, that impeachment is not restricted to high crimes and misdemeanours, and that misbehaviour extends to any conduct indicating unfitness for office.

In 1980 the US Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act (Public Law 96-458). This empowers federal judicial councils, which consist of certain judges, to investigate complaints that any federal judge or magistrate "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts". The councils may not remove a judge, but may send to a coordinating body called the Judicial Conference, which may forward to the House of Representatives, any information indicating that a judge has engaged in conduct which might constitute ground for impeachment. The judicial councils may impose sanctions short of removal; a challenge to their power to do so was rejected by the Supreme Court (*McBryde v Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference*, US Court of Appeals, 2001 264 F 3d 52; Supreme Court declined to hear appeal, 7/10/2002). A report in 2006 of a review of this system, commissioned by the Supreme Court, found that it had worked well.

Thus the American law supports the majority of the Australian opinions in viewing the concept of judicial misbehaviour as extending to any conduct indicating unfitness for office.

Review of removals on address

It is not settled whether the removal of a judge upon an address would be subject to judicial review.

The constitutional provision strongly indicates that the two Houses are the only judges of misbehaviour and that their address and the action of the Governor-General upon it would not be reviewable by the High Court. This appears to have been the clear intention of the constitution-makers, as expressed in the convention debates. The convention delegates who most strongly favoured a provision similar to the Act of Settlement accepted the more restrictive provision on the basis that the Houses of the Parliament would be the only judges of proved misbehaviour or incapacity. (National Australasian Convention, *Debates*, Adelaide, 1897, pp 952-3; 959. Australasian Federal Convention, *Debates*, Melbourne, 1898, p. 318; see the exchange between Mr Isaacs and Mr Barton, *Debates*, Adelaide, p. 952.)

The earliest commentators on the Constitution were in no doubt:

> It will be noted that proved misbehaviour or incapacity is laid down as the ground of removal, but it is clear that it would still have rested on the Parliament to decide what proof it would ask of such incapacity or misbehaviour. Accordingly the direction amounted to no more than that the Parliament should satisfy itself before passing addresses that the incapacity or misbehaviour clearly existed. (A B Keith, *Responsible Government in the Dominions*, 1912, vol. III, pp 1339-40.)

> The Ministry of the day and the two Houses of The Parliament would, it cannot be doubted, be the sole judges of what constituted misbehaviour or incapacity, and when or how such misbehaviour or incapacity was 'proved'; their action would not be subject to review in any court of law. (W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 1902, p. 279.)

Two of the Parliamentary Commissioners, however, in the opinions referred to above, expressed the view that the High Court could review a removal and quash it where the evidence did not disclose matters which could amount to misbehaviour.

In *Nixon v US* 1993 508 US 927 the US Supreme Court held that the removal of a judge by impeachment is not judicially reviewable.

Discretion of the Governor-General

It is also not settled whether the Governor-General in Council would be bound to act in accordance with an address by both Houses. It is generally thought that, because the Australian Houses act on proved grounds, their address should be binding.

One of the Parliamentary Commissioners, however, took the view that section 72 preserves the Crown's discretion to act upon an address.

The question is somewhat academic, because for the House of Representatives to agree to an address the agreement of the ministry would be required, that House being controlled by the ministry, and therefore the Governor-General, advised by the ministry, would probably accept an address on ministerial advice.

As in relation to many other matters, therefore, the power would in practice be possessed by the ministry alone, but for the Senate.

Advice on misbehaviour

If it is for the two Houses to determine whether particular conduct amounts to misbehaviour, the question arises whether it is proper for the Houses to ask some other body to advise them on that question.

The Houses have assumed that such a course is open to them. Each of the two Senate committees appointed in 1984 and the statutory Parliamentary Commission of Inquiry appointed in 1986 to inquire into the conduct of a High Court justice were asked to advise whether particular conduct constituted misbehaviour, as well as finding facts.

It would appear to be legitimate for the Houses to seek advice in this way, provided that they do not delegate the actual determination of the question of whether misbehaviour has occurred.

Procedural requirements

The question of the procedural requirements imposed upon the Houses by the presence of the word "proved" in the relevant part of section 72 has not been much examined.

It has been assumed that the procedures adopted must, because of the terms of section 72, be judicial in character, with a definite formulation of charges and a full inquiry with the opportunity for the accused judge to be heard by the Houses themselves and to answer the charges.

It is also generally assumed that the process would begin with an inquiry by way of evidence- and fact-finding and finding whether there is a prima facie case of misbehaviour, followed by a formal hearing of evidence. It is presumed that a matter may not be proved except by such a hearing of evidence broadly following the procedures of a trial before the courts. The Houses might adopt some other procedures, perhaps in an inquisitorial mode. It is likely, however, that they would use a hearing of evidence at least partly following the form of a trial, for reasons of familiarity.

It may be questioned whether a hearing of evidence is necessary at all if facts have already been proved outside of the consideration by the Houses, for example, by some other inquiry or by conviction for an offence in a court. The Houses might then confine themselves to determining whether the proved facts constitute misbehaviour.

It is generally assumed that when allegations of misbehaviour on the part of a judge come to the attention of a House, it would use the device of a select committee to commence an investigation. This was done on both occasions on which it was suggested that a House of the Parliament inquire whether there were grounds for some action under section 72. On 29 April 1980 a joint select committee was proposed in the Senate to inquire into the business transactions of the Chief Justice of the High Court (J.1291-3). Two successive Senate select committees were appointed in 1984 to inquire into the conduct of Mr Justice Murphy of the High Court. In the first case the proposal was for a joint committee of both Houses, but it remained nothing more than a proposal. In the case of the inquiry into the conduct of Mr Justice Murphy, select committees were appointed.

These committees were committees of the Senate only, and the reason for this was political: the ministry in control of the House of Representatives did not wish to have any inquiry. It may be thought that an inquiry on behalf of both Houses would have something to commend it, but a strong argument could be made out that any inquiry should always be initiated and followed up by one House, and that the other House should not become involved at all until it receives a message requesting its concurrence in an address. The two Houses proceeding separately in this way would give the judge who was the subject of the inquiry the safeguard of two hearings, which is probably what the framers of section 72 intended. Any joint action by the two Houses may remove this safeguard.

At first sight it is not clear why it should be thought necessary to have a select committee to conduct the initial inquiry. A House could appoint counsel or expert investigators to gather evidence and take statements from potential witnesses, and to advise the House whether to proceed further. In fact, a select committee is unsuited to this task; select committees are designed to hear evidence rather than to gather evidence.

A select committee, however, has one significant advantage over other vehicles for an initial inquiry: it can be given the power to compel evidence, that is, to summon witnesses and to require the production of documents, with the Senate having the power to punish as a contempt any failure to comply. It may be thought that, for an effective initial inquiry, this power should always be conferred.

A select committee may be the *only* available vehicle where a House wishes the initial inquiring body to have the power to compel evidence. It is doubtful whether a House acting alone may lawfully confer that power on persons other than its own members, in spite of certain precedents suggesting that the House of Commons has not regarded itself as restricted to its own members in delegating its powers of inquiry, and has thought itself able to make such delegation to other persons.

A body which is merely gathering evidence probably does not require any elaborate procedures or safeguards. A body which has the power to compel evidence, however, should have some restraints imposed upon it. Where it is also formally to hear evidence and come to a judgment on it, procedures and safeguards are essential.

It is suggested that it may be best to separate the functions of locating and hearing evidence. Then for the initial inquiry some investigative body other than a select committee may be properly considered, and the questions of the power to compel evidence and of safeguards may be more readily considered at the later stage.

It would appear that insufficient consideration was given to any of the foregoing questions when the Act of the Parliament was passed in 1986 to establish the Parliamentary Commission of Inquiry (see the account of this case below). That body also combined the functions of locating evidence, conducting a formal hearing of evidence and advising the Houses on the judgment of the evidence. It was given power to compel evidence. It was, in effect, a joint body, reporting to both Houses. It was also virtually required to meet in closed session, which may be appropriate for an initial inquiry but is inappropriate for the hearing of evidence. Because the Commission met in private and did not complete its task, it is not possible to assess how well it performed all those roles, but if similar circumstances arise again it is to be expected that greater thought will be given to whether all these features should be combined in one body.

It has generally been assumed that a formal hearing of evidence, following the procedures of a trial, would take place before a House agreed to an address under section 72. As with the initial inquiry, the major question which arises in relation to the hearing of evidence is whether the Houses may delegate this task to some other body.

In the past it was presumed that it would be necessary to have a hearing of evidence actually in the presence of the Houses, presumably with each House hearing the evidence separately. This

procedure has been followed in impeachment trials before the House of Lords and, until recently, the US Senate.

In the one instance of the removal of a British judge under the Act of Settlement, in 1830, the House of Commons relied on a report of a select committee, but the House of Lords heard evidence before agreeing to the address.

In 1986 the US Senate adopted the practice, in the impeachment of a federal judge, of delegating the hearing of evidence to a committee. This procedure was unsuccessfully challenged before the Supreme Court (*Nixon v US* 1993 508 US 927).

The Australian Houses, in making provisions already referred to, have assumed that they can delegate the hearing of evidence. The second Senate committee, the Select Committee on Allegations Concerning a Judge, was appointed explicitly to hold a formal hearing of evidence and to report findings to the Senate. The Parliamentary Commission of Inquiry established by statute also was to undertake the task of hearing the evidence and, even more remarkably, was virtually directed to hear that evidence in private session and not to report all of it to the Houses. As the Senate refrained from taking any action following the report of the committee when the judge was prosecuted on the basis of the evidence heard by the committee, and the Parliamentary Commission of Inquiry did not complete its work, it is not known how the Houses would have acted on the reports of those two bodies or whether rehearings of the evidence would have taken place.

It is therefore an unresolved question whether the Houses can act on a hearing of evidence conducted elsewhere. It may still be argued that, even where the evidence has been formally heard elsewhere, it is necessary for the Houses to rehear the evidence, and separately, in which case the removal of a judge under section 72 would be a protracted and difficult process. It is more likely, however, that the Houses would accept evidence heard in a committee.

As to the standard of proof required for the Houses to reach a finding of misbehaviour against a judge, presumably this is a matter for the Houses themselves to determine. It may depend on what interpretation is adopted of the meaning of misbehaviour. The restricted interpretation adopted by the Solicitor-General in 1984 would seem virtually to entail the criminal standard, proof beyond reasonable doubt. Apart from this, it may be argued that the removal of a judge is such a grave step that the most stringent standard of proof should be required.

It is possible, however, to make out a strong argument that the civil standard, proof on the balance of probabilities, is more appropriate. It may be thought to be irresponsible for the Houses to leave a judge on the bench when it is probable that the judge has engaged in acts constituting grave misbehaviour simply because proof beyond reasonable doubt is lacking. Moreover, removal under section 72 may be seen as a remedy to protect the state rather than a penalty imposed upon the judge. This is the view which is taken of impeachment proceedings in the United States, where the penalty is constitutionally limited to removal from and disqualification for office. The importance of keeping separate removal from office and any subsequent criminal proceedings was urged in relation to impeachment proceedings by the framers of the American constitution. Indeed, it may be argued that the civil standard of proof for removal is an essential safeguard for the accused judge. Misbehaviour which consists of acts which may constitute

offences may well be the subject of criminal charges after removal from office. It would be highly prejudicial to have a judge on trial for acts which had already been found beyond reasonable doubt by the Houses to have been committed. Different standards of proof in the removal proceedings and the criminal proceedings may be seen as favourable to the judge. If the trial precedes the parliamentary action, an acquittal may unduly inhibit the Houses in acting even where the evidence discloses misbehaviour but not proof sufficient for conviction.

The second Senate committee was required by the Senate to make findings by both standards of proof, as well as on both interpretations of the meaning of misbehaviour. This was because the Senate had not made up its mind on those questions. The Parliamentary Commission of Inquiry was not statutorily directed to adopt either standard of proof.

It is also an open question whether the Houses should make findings under section 72 only in accordance with evidence admissible under the rules of evidence.

The first Senate committee was not bound by the rules of evidence, and accepted as evidence a written statement from the judge which was subsequently regarded as inadmissible by the second Senate committee. The latter heard only evidence admissible under the rules of evidence, though some matters otherwise not admissible were brought out at its hearings as a result of cross-examination. The Parliamentary Commission of Inquiry similarly was enjoined to hear only evidence admissible in court proceedings.

The rules of evidence are not necessarily followed by royal commissions and other forms of inquiry which may result in findings highly damaging to individuals, and presumably those rules have been regarded as unduly restrictive of the diligent pursuit of the truth, notwithstanding that the findings may lead to criminal charges.

It may well be argued that the public would be outraged by a judge remaining on the bench simply because what would otherwise be regarded as significant adverse evidence is technically inadmissible. In this context also it may be contended that removal from office is a protection for the state and not a penalty, and that the adoption of rules of evidence for removal less technical than those of any subsequent criminal proceedings is appropriate.

Compellability of judges as witnesses

A significant question, going beyond procedural requirements, is whether it is proper, or within the power, of the Houses to compel a judge to give evidence, either in the course of an inquiry or in the course of a hearing of evidence.

As to the question of power, it may be asked whether the Houses possess any power to require a judge to give evidence in any circumstances.

Among the undoubted powers of the Australian Houses is the power to order the attendance of witnesses and the production of documents. Witnesses may be summoned, or may be ordered to be taken into custody and brought before either House for the purpose of examination. (See Chapter 2, Parliamentary Privilege.) This power applies to all persons within the jurisdiction. The only definite exception to this is that if a House wishes to secure the attendance of a member

of the other House, it requests that House to order the attendance of that member. This restriction follows from the power of each House to order the attendance of its own members: the only way in which the attendance of a member may be enforced is by the agreement of the member's House. (See also Chapter 2, Parliamentary Privilege, under Power to conduct inquiries.) It is also well established that the power to summon witnesses may be delegated by the Houses to their committees. The refusal by witnesses to answer the summonses of committees or to cooperate with committees in their inquiries is another well established category of contempt, for which the Houses may commit the persons concerned. Committees, of course, have no power to punish or coerce recalcitrant witnesses.

There are no precedents of the Australian Houses or their committees summoning judges to appear before them. There are several precedents, however, which indicate that the power of the House of Commons, which is conferred upon the Australian Houses by section 49 of the Constitution, extends to judges. Judges have been summoned by the House of Commons, both before and after the enactment of the Act of Settlement of 1701, which allowed judges to be removed upon an address by both Houses, and judges have appeared before the House in answer to its summonses. That these precedents are old no doubt reflects the fact that there have been relatively few inquiries into the conduct of judges since the enactment of the Act of Settlement, and no inquiries in contemporary times, due to the great integrity of the judiciary. The House of Commons has not only summoned judges but has committed judges of superior courts.

An argument may be developed that the constitutional situation in Australia is different from that in the United Kingdom, and that this constitutional situation imposes an implied limitation on the use in relation to judges of the powers of the Houses. It might be urged that because of the constitutional separation of the legislative and judicial powers in Australia, the Australian Houses do not or should not have the power to summon a judge.

This argument might gain plausibility from the fact that the British Parliament long regarded itself as a court, and the House of Lords exercised a judicial function. It is to be noted, however, that the British precedents referred to relate to inquiries apparently unconnected with this conception of Parliament as a court, and the post-1701 precedents may be safely accepted as arising under the power contained in the Act of Settlement. The precedents were also not dependent upon the power of impeachment, a power which the Australian Houses do not possess.

Even if the separation of powers argument had general validity, it probably could have no application to inquiries into the conduct of judges and hearings of evidence for the purposes of determining whether action is warranted under section 72. Such inquiries and hearings may be effective only if the Houses have the power to compel witnesses, including judges. If this were not so, a judge could prevent a proper inquiry and hearing preceding an address by refusing to appear. Even if the accused judge is not to be a compellable witness, a matter which will be further mentioned below, other judges may be essential witnesses, especially in the case of alleged misbehaviour on the bench.

The rights of the accused judge

The first Senate committee was not restrained from summoning Mr Justice Murphy, but did not do so. Instead it invited him to give evidence and received a written statement in response. The second Senate committee was explicitly denied the power to compel the judge to give evidence, but was required to invite him to do so after all other evidence had been heard. This invitation was issued and declined, and a statement of reasons for his not giving evidence was offered. The Parliamentary Commission of Inquiry was empowered to require the judge to give evidence, but only where it formed the opinion that it had before it evidence of misbehaviour within the meaning of section 72 sufficient to require an answer. Presumably all of these bodies could have summoned other judges if that had been necessary.

Mr Justice Murphy, in submissions made on his behalf to the first Senate committee, claimed that in any inquiry and hearing of evidence under section 72 the judge in question should be given all the rights of an accused person in a criminal trial, particularly the right not to be compelled to give evidence. This claim was virtually acceded to by the Senate in establishing the second select committee. Before that committee the judge was treated as an accused in a criminal trial, with one significant exception, namely, that if he chose to give evidence he could be cross-examined by counsel representing other witnesses in relation to matters affecting the interests of those witnesses as well as by counsel assisting the committee, who performed the task imposed upon a prosecutor in a trial. Mr Justice Murphy objected to this feature of the committee, but it was deliberately provided by the Senate for the protection of witnesses before the committee. Apart from this, the proceedings of the committee closely followed those of a court in a criminal trial.

It may be argued that a judge accused of misbehaviour should *not* enjoy all the rights of an accused in a criminal matter. The rights to have specific charges or allegations formulated, to be present at the hearing of evidence and to cross-examine witnesses may not be disputed, and were granted in respect of the second Senate committee and the Parliamentary Commission of Inquiry. The right not to be compelled to give evidence and to make an unsworn non-examinable statement, which Mr Justice Murphy, in effect, exercised before the second Senate committee, is more controversial and has been questioned even in relation to persons accused of offences. It may well be contended that, as a holder of high office in whom the public must have confidence, a judge should be obliged to answer any case reasonably made against him. This view seems to have been taken by the government in drafting the Parliamentary Commission of Inquiry Act and inserting the provision concerning the giving of evidence by the judge, to which reference has already been made.

Interested senators

During the various debates leading up to the establishment of the first and second Senate committees, senators expressed views, favourable and unfavourable, about Mr Justice Murphy's conduct. The question arises whether, in subsequent proceedings for an address, those senators should have disqualified themselves from participating or voting. This question was raised by counsel for Mr Justice Murphy before the second Senate committee, when an unsuccessful

attempt was made to have those members of the committee who had also served on the first committee disqualify themselves.

The possibility of members of the legislature having formed views on matters which may subsequently come before them in proceedings under section 72 would appear to be inherent in the use of the legislature as the tribunal of removal. If all of those who had expressed views favourable or unfavourable of Mr Justice Murphy had subsequently been unable to take part in proceedings for an address, the principal members of all parties in both Houses would have had to absent themselves. This would have been highly anomalous, because they would have left behind all those members and senators who had listened to the debates and could have been unduly influenced thereby even if they did not express any views.

Any action under section 72, such as the establishment of an inquiry or a decision to hear evidence, must start with a motion in either House, and such a motion must be open to debate. It is difficult to see how any debate about whether such action is warranted could take place without all members present running the risk of disqualifying themselves, if members were to be regarded as being subject to the same rules as jurors.

There is also the problem of members and senators being acquainted with the judge under inquiry. Disregarding the fact that Mr Justice Murphy was a former senator and minister and well known to many senators, there is still the problem that federal judges tend to be known to federal legislators, before or after assuming the bench.

The same questions arise in relation to impeachments in the United States, and senators known and even related to the accused have sat in impeachment trials.

It would appear that, so long as the Houses have the responsibility for removing judges, reliance must be placed on the members being enjoined to act properly and make findings in accordance with the evidence before them. Under the United States constitution (article I, section 3) the senators make an oath or affirmation before sitting as a court of impeachment, and perhaps this could be introduced as a procedural matter for the Australian Houses.

This raises the question of whether some other method of removing federal judges should be adopted.

Should section 72 be changed?

It may be thought that the framers of section 72 took too optimistic a view of the capabilities of the Parliament, or a view which may have been justified by Parliament as it was then, but which sits ill with the party-bound Parliament of today. It may therefore be thought that section 72 should be changed to impose the primary responsibility for the removal of judges on some other body.

If the Houses and the executive government are regarded as unfit to exercise the power of removal, only the judiciary itself remains to be the repository of the power.

The Constitutional Commission of 1988 recommended that the Constitution be amended to provide that the Houses of Parliament would be empowered to remove a judge only on the recommendation of a tribunal consisting of senior chief justices. The main rationale of this proposal was that it would prevent the removal of a judge by the Houses for political reasons. It is presumed in this argument that political reasons are improper reasons. It may be thought that political considerations, in the best sense of those words, the sense of considerations relating to the health of the polity, may legitimately be taken into account in assessing what constitutes misbehaviour.

Such a proposal as suggested by the Commission would mean that the judiciary would be given the responsibility for removing judges, because the Houses could not act without a report from the proposed tribunal and probably would not feel able to refrain from acting in accordance with a recommendation of the tribunal. It is one thing to have judges or former judges advising the Houses, but quite another to give them the effective power of determination.

There is no historical basis for the assertion that the Parliament might remove a judge for (improper) political reasons. There is no Australian example of such a thing occurring, no such example in Britain since the Houses were given the power to remove judges by the Act of Settlement in 1701, and no such example in the United States, where several judges have been removed. There is no basis for an assumption that the Houses would exercise their powers under section 72 of the Constitution in anything other than a responsible manner. It is simply an assumption that the elected Houses are incapable.

The other stated rationale for the proposal is that it would maintain the separation of powers principle. In reality, the proposal would involve the clearest and most fundamental violation of the principle of the separation of powers, which is the main rationale of giving to the Parliament the sole power to remove judges. To have judges sitting in judgment on their fellow judges would be the clearest instance of a body, the judiciary, being a judge in its own cause. The proposal ignores the obvious fact that members of the judiciary have an interest in maintaining the current highly favourable public perception of judges. This interest may lead to bias towards undue leniency or undue harshness. The proposal also ignores the likelihood of personal friendships or animosities between persons performing the same work as members of a relatively small functional group, and the greater danger of a small body, such as three judges as proposed, making improper or erroneous decisions than a more numerous body of persons such as the two Houses.

The American constitution-makers gave careful consideration to the question of which method for the removal of judges would be most consistent with constitutional principles, and, in particular, to the proposal that the judiciary itself should be responsible for administering sanctions against incapable or corrupt judges. They determined that the removal of judges by action in the Congress was the only appropriate method. Their reasons may be summarised as follows:

(a) the removal of judges is a high national responsibility appropriate to the elected and politically responsible national legislature;

(b) the requirement for the two Houses of the legislature to act separately is an important safeguard;

(c) being numerous in membership, the legislature is fit to perform a function analogous to that of a jury (a two-thirds majority of the Senate is required for an impeachment to succeed);

(d) judges are not normally entrusted with the fact-finding function of a jury; and

(e) the removed judge may subsequently have to stand trial, and it would be undesirable to have the courts performing both functions.

These kinds of arguments rest upon a conception of the legislature as a body of elected representatives with a high degree of independence from the other branches of the government, a devotion to constitutional principles and a willingness to perform their constitutional duties without allowing their activities to be distorted by partisan considerations. The recommendations of the Constitutional Commission of 1988 are based upon a presumption that the intense party discipline and extreme partisanship of an Australian Parliament would effectively prevent the proper exercise of the high constitutional responsibility imposed by section 72.

The debilitating effect of party discipline and partisanship upon the Australian Parliament is not, however, a sound reason for transferring the power contained in section 72 to the judiciary. Party discipline and partisanship may be destructive of every organ of the Constitution and of every constitutional principle, and it may prevent the judiciary from operating in a proper constitutional manner just as effectively as it may hinder the Parliament. Partisanship will bear upon the operation of section 72 only if judges are seen as partisans. If partisan appointments are made to the bench the judiciary will be destroyed regardless of any action under section 72, and will be just as incapable as the Parliament is supposed to be of properly exercising the function of removing judges. The answer to party control, therefore, is to seek to lessen its stranglehold over the Parliament rather than to write off the Parliament as an institution because of it. One of the ways of mitigating its influence is to ensure that the Parliament retains its high constitutional responsibilities and is reminded of the need to exercise them properly.

Apart from these considerations, the proposal of the Constitutional Commission in any case may involve a significant inroad upon the independence of the judiciary, the very principle which it is supposed it would uphold, by making judges in effect regularly accountable for their performance of their duties to a permanent tribunal of higher judges.

It is clear that the framers of section 72 aimed to achieve a high degree of independence of the judiciary from the other branches of government, and they had the task of achieving this aim while providing a mechanism for the removal of unfit judges. It may well be concluded that they succeeded in reconciling these two goals and that, as the American constitution-makers claimed, they provided the only mechanism consistent with judicial independence. They provided that the removal of judges must involve a deliberate decision on the part of all parts of the other two branches of government, the two Houses of the Parliament and the Crown represented by the Governor-General in Council. They thereby involved all the other high authorities of the state. The fact that the Houses are politically responsible bodies which deliberate in public may be

regarded as additional safeguards for the proper exercise of the power. The removal of a judge under section 72 probably would be a protracted and difficult process, which would make great impositions upon the operations of the legislature and the executive government. The likely difficulty and length of any proceedings may well be regarded as the best safeguard for the proper use of the power.

In August 1993 a National Commission on Judicial Discipline and Removal, which was formed after a series of troublesome impeachments of judges, reported on the procedures for the removal of judges under the constitution of the United States. The Commission, consisting of members of both Houses of Congress, judges, academics and lawyers, recommended that the existing mechanism of impeachment by the House of Representatives and trial by the Senate be retained as the sole appropriate means for the removal of judges. The Commission concluded that the constitutional standard for impeachment, as interpreted over the years, had been adequate to its purpose and should not be changed.

INQUIRIES INTO CONDUCT OF A JUDGE

As was mentioned above, apart from an unsuccessful motion in the Senate in 1980 to establish a joint select committee to examine certain business interests of the Chief Justice of the High Court, the only precedent for the Houses contemplating action under section 72 of the Constitution is provided by two Senate select committees in 1984 and a statutory parliamentary commission of inquiry established in 1986 to inquire into the conduct of Mr Justice Murphy of the High Court.

The first Senate committee

Late in 1983 and early in 1984 two newspapers published what they claimed were transcripts of tape recordings of telephone conversations which had been illegally intercepted and recorded by members of the New South Wales Police Force. The newspapers claimed that the transcripts revealed the activities of persons associated with organised crime. Most of the parties to the conversations were not identified by name, but one of them was referred to as "a senior judge". Included in the published transcripts were conversations between the judge and "a Sydney solicitor" who was alleged to be associated with leaders of organised crime. The judge was subsequently identified as Mr Justice Murphy, a justice of the High Court, former senator, Leader of the Labor Party in the Senate and Attorney-General in the Labor Government of Mr Whitlam.

Demands for an inquiry into the matters revealed in the alleged transcripts were immediately made by the Opposition. The Labor Government took the view that no inquiry was necessary, on the basis that the transcripts had not been authenticated and the conduct of the judge revealed by the transcripts could not amount to misbehaviour within the restricted meaning expounded by the Solicitor-General and adhered to by the government (see above). The Opposition Liberal-National parties and the Australian Democrats, who together held a majority in the Senate, took the view that an inquiry should be held into the conduct of the judge. Their preference was for a royal commission or other non-partisan quasi-judicial tribunal to conduct the inquiry, but the government refused to appoint such a body, and it is very doubtful whether it could constitutionally do so except by statute. Against the wishes of the government, the Senate

therefore appointed on 28 March 1984 a select committee, which was called the Select Committee on the Conduct of a Judge.

The committee was required to report upon the authenticity of the alleged transcripts which, together with some tape recordings, had been provided by one of the newspapers to the Attorney-General, and upon whether the conduct of the judge as revealed in the materials constituted misbehaviour which could amount to sufficient grounds for his removal.

The resolution appointing the committee contained a number of unusual features. The committee was enjoined to take care to protect the privacy, rights and reputations of individuals, and to protect from disclosure the operational methods and investigations of law enforcement agencies (there were police investigations on foot into the tapes and transcripts). Witnesses before the committee were to be given notice of the matters proposed to be dealt with during their appearance and an opportunity to make submission in writing before appearing, and were entitled to be assisted by counsel.

The committee determined for itself guidelines for proceedings, which elaborated upon and supplemented the matters contained in the resolution of appointment. These guidelines contained the following major provisions.

(1) The committee was to meet in private unless it made a determination that it was necessary to meet in public, and evidence given in private session and material submitted to the committee were not to be published except to persons associated with the inquiry.

(2) Witnesses were to be notified of their rights under the Senate resolution, and were to be informed in writing of the nature of any allegations made against them and of particulars of the matters on which they were to be heard.

(3) Witnesses were to be allowed to consult counsel during their appearance and counsel could make submissions to the committee.

(4) The committee would accede to any request by a witness for evidence to be heard in private, unless it made a definite determination that it was necessary to hear the evidence in public.

(5) Witnesses were given the right and the opportunity to object to any questions, on grounds including irrelevance and self-incrimination, and procedures were laid down for the committee to consider and determine such objections.

The committee appointed, with the approval of the President of the Senate, counsel to assist it. The committee's counsel advised the committee, participated in its deliberations and attended during the questioning of some witnesses, but did not put questions to witnesses. All of the hearings of the committee were held in private session.

When it had taken evidence in relation to the tapes and transcripts and matters purportedly recorded in them, the committee indicated to Mr Justice Murphy that it wished to hear evidence from him on a number of matters, and invited him to appear before it. He was not summoned.

The question of whether the Senate or its committees could summon a High Court or any judge (see above) had been the subject of some discussion, without any conclusion being reached on the matter.

The judge's response to the invitation raised the major procedural difficulty of the committee's inquiry. The judge claimed all of the rights of an accused person in a criminal trial, including the right to be notified of a specific charge, the right not to give evidence if he so chose, and the right, before making that decision, to have all the evidence heard in the presence of his counsel and to have his counsel cross-examine witnesses. It was not within the power of the committee to allow the cross-examination of witnesses by the judge's counsel, or, indeed, to allow the examination of witnesses by any counsel. The standing orders of the Senate provide that witnesses before Senate committees are to be examined by the members of the committee; witnesses could not be examined by counsel except with the explicit authorisation of the Senate, and the Senate had not given that authorisation in the resolution appointing the committee. Had the committee wished to accede to the judge's demands, it would have had to go back to the Senate for an enlargement of its powers.

As it turned out, this was not necessary. The committee took the view that it was engaged in an investigatory inquiry, analogous to the inquiries undertaken by a prosecuting authority to determine whether a prosecution will be commenced. The committee considered that only if it determined that the evidence so warranted should it recommend to the Senate that there be a formal hearing of the evidence, with the rights of an accused person extended to the judge.

The judge declined to give evidence, but gave the committee a written statement on the evidence which it had received. His counsel made submissions to the committee on its evidence and on matters of law.

Report of the first committee

In its report (PP 168/1984) the committee concluded that it could not be satisfied of the authenticity of the tapes and transcripts, and that therefore no facts had been established which amounted to proved misbehaviour, whatever view of misbehaviour was accepted. The committee was divided, however, on another matter which did not relate to the conduct of the judge as revealed by the tapes and transcripts, but which arose from the evidence taken by the committee in its attempts to determine the authenticity of the materials.

One of the persons mentioned in the conversations purportedly recorded in the transcripts was Mr C R Briese, the Chairman of the Bench of Stipendiary Magistrates of New South Wales. Mr Briese was invited to appear before the committee to see if he could throw some light on the matters referred to in the conversations. In the course of his appearance he gave evidence of conversations he had had with Mr Justice Murphy which could be interpreted as an attempt on the part of the judge to influence committal proceedings in the Magistrates Court. Those proceedings related to charges laid against Mr Morgan Ryan, the "Sydney solicitor" whose conversations with the judge were purportedly recorded in the transcripts. This raised the possibility that the judge had been guilty of the criminal offence of attempting to pervert the course of justice, which would amount to misbehaviour whatever view of the meaning of misbehaviour was accepted.

The three government senators on the committee, who held the majority with the chairman's casting vote, did not consider that the evidence of Mr Briese established a prima facie case against the judge of attempting to pervert the course of justice, and therefore did not recommend any further action. The two Oppositions senators, in a dissenting report, found that the evidence of Mr Briese did establish a prima facie case, and the one Australian Democrat senator considered that the evidence ought to be examined in a formal hearing.

The second Senate committee

With the Opposition and the Democrats holding the majority in the Senate, and able to make their views prevail there, it was inevitable that a further inquiry would take place.

It was expected that the second inquiry would be conducted as a formal hearing of the evidence relating to the matter raised by Mr Briese. The idea that there should be some non-partisan and independent body to conduct the inquiry was again mooted. The government was adamant that it would not appoint a royal commission, but proposed that the Director of Public Prosecutions consider the evidence. Attention was directed to the possibility of the Senate appointing some non-political person, such as a former judge, or a panel of former judges, to conduct the inquiry. The term "parliamentary commission" came into use to describe such a tribunal. There was a discussion on the question of whether the Senate had the power to appoint someone other than a committee of its own members to conduct an inquiry on its behalf, the crucial component of this question being the ability to confer upon someone other than a committee the power to compel evidence (see Chapter 2, Parliamentary Privilege, under Power to conduct inquiries). There are virtually no precedents or authorities on this matter, and the debate largely rested on reasoning from first principle. It was argued that there was nothing to prevent the Senate from delegating its powers to someone other than its own members, but if the powers of the proposed tribunal were challenged before the High Court no-one could be certain of the result. For this reason another idea came to the fore, that of a non-political tribunal operating under the "umbrella" of a Senate committee. In other words, the Senate would delegate its powers to a committee, but the committee would have attached to it independent commissioners, who would make their own findings on the evidence and communicate those findings to the Senate through the committee. This concept originated in a paper on the question of the appointment of commissioners by the Senate, and was the one which was eventually adopted.

The Senate therefore established on 6 September 1984 a second select committee, again on an Opposition motion and against the wishes of the government.

The Senate also agreed, by the Democrats voting with the Government, to the suggestion of the Government that the evidence be referred to the Director of Public Prosecutions. That independent statutory officer, however, declined to consider the matter until the second committee had reported. The Senate therefore was compelled to rescind the resolution referring the evidence to him.

The second committee was to inquire only into the matters raised by Mr Briese. It was called the Select Committee on Allegations Concerning a Judge, and it was designed to conduct a formal hearing of the evidence relating to that matter. The resolution appointing the committee was

complex, amounting to some 23 substantial paragraphs. The most interesting features of the resolution were as follows.

(1) The committee was to make findings of fact upon the allegations of Mr Briese, but was also to report on whether Mr Justice Murphy engaged in conduct which could justify his removal. Initially it was suggested that the committee should simply pass on the findings of the commissioners without comment, but this was thought to be unnecessarily risky of challenge in the courts, so the committee was empowered to make its own report.

(2) The committee was to report whether there was misbehaviour in accordance with the two different interpretations of misbehaviour, and whether the misbehaviour was proved in accordance with the two different standards of proof.

(3) Two commissioners were to be appointed by the Senate to assist the committee. Two retired Supreme Court judges were appointed by subsequent resolution. The commissioners had the right to participate in the committee's deliberations, to examine witnesses and to recommend to the committee that particular witnesses be summoned. The commissioners were to provide the committee with their written advices on the matters upon which the committee was to report, and the committee was required to include the commissioners' advices in its report to the Senate.

(4) The committee was required to appoint counsel to assist it.

(5) Witnesses before the committee were to be examined by counsel assisting the committee, counsel for Mr Justice Murphy and counsel for other witnesses.

(6) Hearings of the committee were to be held in public unless the committee by absolute majority determined otherwise.

(7) The committee was to determine rules and procedures for the examination of witnesses before it, having regard to those followed by the courts.

(8) Mr Justice Murphy was given the rights of an accused person in a criminal trial, with one modification. All evidence was to be taken in the presence of his counsel, and he was not to be summoned to give evidence but was to be invited to do so when all the other evidence had been heard. If he chose to give evidence, however, he was to be subject to examination by counsel for the committee and counsel for other witnesses. This raised the possibility of his being cross-examined by more than one party if he gave evidence, and his counsel objected to this. The committee, while in the process of determining its procedures for the examination of witnesses, asked the Senate to abandon this rule, but the Senate declined to do so. It was clear that Mr Briese and any other witnesses would be subjected to rigorous examination by the judge's counsel, and it was intended that those witnesses should have the additional protection afforded by their counsel being able to cross-examine the judge if he gave evidence.

(9) The committee, commissioners and counsel appearing before the committee were given access to the documents and evidence of the previous committee, and were at liberty to

> refer to those documents and evidence in the public proceedings. The committee subsequently persuaded the Senate to restrict this right of access to counsel for the judge and counsel for Mr Briese, and submissions made by the judge's counsel to the first committee were excluded from the right of access, so that witnesses would not be forewarned of the line of cross-examination on behalf of the judge.

In determining its rules and procedures for the examination of witnesses, the committee made the important determinations that it would formulate a statement of the allegation against the judge, that it would follow judicial proceedings as closely as possible, that it would observe the rules of evidence and would hear only evidence admissible in court proceedings. These decisions led to one significant development. Part of Mr Briese's evidence before the first committee was inadmissible. Mr Briese had stated his belief that Mr Justice Murphy, Mr Ryan and Mr Briese's predecessor as chief magistrate, Mr M. F. Farquhar, were parties to a criminal conspiracy apparently having as one of its aims the improper influencing of cases before the Magistrates Court of New South Wales. This allegation did not appear in Mr Briese's evidence in chief before the second committee, but counsel for Mr Justice Murphy, in accordance with the provision in the resolution already mentioned, chose to make it a basis of his cross-examination, and it was thereby made public. The committee reserved the right to hear inadmissible evidence, but did not in fact do so except where such evidence emerged as a result of cross-examination.

At one stage the committee made an order prohibiting the publication of the names of certain persons mentioned in Mr Briese's evidence, including Mr Farquhar against whom criminal proceedings were then in train, but was forced to rescind the order, largely because of speculation as to the identity of the unnamed persons.

The proceedings of the committee departed from parliamentary norms in many other ways. Counsel assisting the committee made recommendations to the commissioners as to witnesses to be brought before the committee, on the basis of preliminary statements taken from those witnesses. The commissioners then advised the committee and their advice was invariably accepted. The members refrained from looking at the preliminary statements by witnesses, and the members and the commissioners refrained from exercising their right of access to the documents and evidence of the previous committee, except as necessary in the course of the examination of witnesses.

Witnesses were taken through their evidence in chief by counsel assisting and were then cross-examined by counsel for Mr Justice Murphy and counsel for witnesses. The committee limited cross-examination by counsel for witnesses to matters relevant to the interests of those witnesses. Counsel also made submissions on law and on the evidence. When questions of law or procedure were raised in the hearings, the commissioners publicly advised the committee, which invariably accepted the advice.

When the committee was established it was thought that the only evidence to be heard would be that of Mr Briese. It happened, however, that there were several witnesses able to give evidence relevant to the judge's intention in his conversations with Mr Briese, and ten witnesses were heard. Of particular significance was the evidence of a judge of the District Court of New South Wales, Judge P. Flannery, who had tried Mr Ryan. This evidence was crucial in the assessment of Mr Justice Murphy's intention. Under cross-examination by counsel for Mr Justice Murphy,

Judge Flannery stated that he believed that conversations he had had with Mr Justice Murphy represented an attempt by Mr Justice Murphy improperly to influence the trial.

Mr Briese was subject to hostile examination from two quarters. His statement to the first committee provided Mr Farquhar's counsel with grounds for extensive examination. The former chief magistrate was then heard and was subject to cross-examination by counsel for Mr Briese. The witnesses heard included two other judges of New South Wales courts and Mr Ryan.

Mr Justice Murphy again declined to give evidence when invited to do so. His counsel made a statement before the committee of his reasons for this decision, the principal reason being that a general election was about to be held and the Senate as then constituted could not and should not take any further action in relation to him.

During the hearings of the committee the then Premier of New South Wales, Mr Wran, made comments on the evidence of Mr Briese which could have been interpreted as threats to him, as his reappointment to the Magistrates Bench was then under consideration following a restructuring of the court. These comments caused the Senate to pass the following resolution:

> That the Senate —
>
> (a) reaffirms the long-established principle that it is a serious contempt for any person to attempt to deter or hinder any witness from giving evidence before the Senate or a Senate committee, or to improperly influence a witness in respect of such evidence; and
>
> (b) warns all persons against taking any action which might amount to attempting to improperly influence a witness in respect of such evidence. (13/9/1984, J.1129)

This resolution was adopted by the committee for itself. The committee also felt constrained to correct a federal minister, who was later the Attorney-General, and who made comments critical of the committee's proceedings.

Report of the second committee

The commissioners made separate reports to the committee, and these were included in the committee's report. The committee adopted the procedure of having each of its members report findings and conclusions to it, and these reports were also included in the committee's report to the Senate (PP 271/1984).

Both commissioners found that the actions of Mr Justice Murphy had a tendency to pervert the course of justice. One commissioner was satisfied beyond reasonable doubt that the judge had the intention to do so, and that therefore his conduct could amount to misbehaviour under both interpretations of that term. The other commissioner confessed to some wavering on the matter but was not satisfied beyond reasonable doubt that Mr Justice Murphy intended to pervert the course of justice. He was of the view that there was conduct which could amount to misbehaviour under the broad interpretation of that term. Two members of the committee, one Labor senator and the Australian Democrat senator, were not satisfied beyond reasonable doubt that Mr Justice Murphy intended to pervert the course of justice, but found on the balance of probabilities that he did so intend. One member, the Opposition senator, was satisfied beyond

reasonable doubt that the judge had attempted to pervert the course of justice. Those three senators therefore found that there was conduct which could amount to misbehaviour in accordance with both interpretations of the term. The other Labor Party senator did not find on either standard of proof that the judge had attempted to pervert the course of justice.

The committee's report was published while the Senate was not sitting, as authorised by a Senate resolution, the House of Representatives having been dissolved for a general election and the Senate having adjourned. Before the Senate met again, in February 1985, the Director of Public Prosecutions had examined the evidence and decided that Mr Justice Murphy should be prosecuted on two charges of attempting to pervert the course of justice (the prosecution, of course, could not make direct use of the committee's evidence). When the Senate met and received the report, senators of all parties agreed that they would refrain from any further consideration of the matter until the criminal proceedings against the judge were concluded.

Criminal proceedings against the judge

The criminal proceedings against Mr Justice Murphy, which took place in 1985 and 1986, gave rise to a disagreement between the Senate and the Supreme Court of New South Wales about the use which could be made in the court proceedings of the evidence given before the two Senate committees. This disagreement led to the passage of the *Parliamentary Privileges Act 1987*. For an account of the disagreement and the provisions of the Act, see Chapter 2, Parliamentary Privilege.

In accordance with the law of New South Wales the prosecution of the judge began with committal hearings before a magistrate, who heard the evidence to decide whether the accused should be sent for trial by jury in the District Court or the Supreme Court of the State. After committal proceedings, Mr Justice Murphy was committed for trial in the Supreme Court. He unsuccessfully attempted to have the Federal Court review the magistrate's decision to commit him (*Murphy v DPP* 1985 60 ALR 299).

The justice, who gave evidence and was cross-examined in the trial, was convicted by a jury in the Supreme Court in July 1985 on one charge of attempting to pervert the course of justice, the charge relating to his alleged approaches to Mr Briese. He was acquitted of the charge relating to his alleged approaches to Judge Flannery. He was then sentenced to eighteen months imprisonment and released pending the hearing of an appeal.

As a result of that appeal, the conviction was quashed because of legal and procedural deficiencies in the original trial, and a new trial in the Supreme Court was ordered.

The second trial on one charge of attempting to pervert the course of justice, in April 1986, was restricted to matters relevant to that charge. The prosecution could not refer to the judge's alleged approaches to Judge Flannery of the District Court in relation to the trial of the solicitor, Morgan Ryan, which were the subject of the other charge of which the judge had been acquitted. Other evidence which had been admitted at the first trial was excluded. In the second trial the judge chose not to give evidence but exercised the right, afforded to accused persons under the law of New South Wales, to make an unsworn statement to the jury upon which he could not be cross-examined. There was, therefore, no opportunity for the prosecution to cross-examine the

judge on the statement which he made to one of the Senate committees, as had occurred in the first trial. The main prosecution witness, however, was again cross-examined on the basis of his evidence to the committees.

The result of the trial was that the judge was acquitted of the one remaining charge, but that was far from the end of the allegations against him. It was revealed that, on the basis of other evidence which had come to light during the trial, the prosecuting counsel had recommended that the judge be prosecuted on charges of bribery and conspiracy, again relating to alleged attempts to influence the outcome of criminal inquiries and proceedings. The Director of Public Prosecutions declined to act on this recommendation for reasons which were not disclosed, but there were demands that the matter be cleared up, in conjunction with outstanding allegations arising from the transcripts and tapes of telephone conversations which were the beginning of the whole affair.

In May 1986 a royal commission, the Royal Commission into Alleged Telephone Interceptions, which had been given the task of examining those transcripts and tapes, reported. It concluded that the materials were what they purported to be: tapes and transcripts of telephone conversations which had been illegally intercepted by New South Wales police officers. The Commission concluded:

> The interceptions were put in place and maintained by otherwise honest, able and effective members of an elite division of the New South Wales Police force engaged not in the pursuit of some private purpose but in the very difficult and often frustrating fight against deeply entrenched organised crime. Indeed, it has been suggested in evidence that it was out of a sense of frustration that this unlawful method of gathering information was adopted. (PP 155/1986, p. 337)

This report put an entirely new light on the whole affair. Hitherto those who had defended the judge and resisted an inquiry into his conduct as purportedly revealed by the tapes and transcripts had done so largely on the basis of the unauthenticated nature of the materials. The first Senate committee had been unable to draw any conclusions from those materials because it was not able to authenticate them.

There was also the question of whether the judge's conduct in his dealings with the New South Wales chief magistrate and Judge Flannery had amounted to misbehaviour as distinct from the criminal offence of attempting to pervert the course of justice, of which the second jury had acquitted him.

Mr Justice Murphy expressed his intention to resume his seat on the High Court, but it was reported that there was some disquiet on the part of the other justices of the Court about his resuming his seat with the new and the old allegations unresolved. There were apparently discussions between the justices and Mr Justice Murphy and the Chief Justice and the government, but the exact nature of those discussions is not known and were the subject of some disputation.

The government then decided that a new inquiry should be established to deal with all outstanding allegations against the judge and to determine whether he had engaged in any

conduct amounting to misbehaviour within the terms of the Constitution and warranting his removal from the bench.

The parliamentary commission of inquiry

The new inquiry took the form of a parliamentary commission, that is, a commission operating similarly to a royal commission but established by statute and reporting to the two Houses of the Parliament. As was noted above, the expression "parliamentary commission" came into use when the Senate was moving towards its first inquiry and there was some contemplation of appointing commissioners to conduct the inquiry on behalf of the Senate. The bill to establish the Commission was brought in and speedily passed by both Houses. The legislation was drafted to make it clear that the Commission was a body established by Parliament for the purpose of advising Parliament in the exercise of its constitutional responsibility. The Commission was to consider all outstanding allegations against the judge, to formulate those it considered worthy of investigation in precise terms and conduct a hearing of the evidence in closed session. The Commission was then to report to each House its findings of fact and its advice as to whether the judge had been guilty of misbehaviour within the meaning of the Constitution. Three distinguished former Supreme Court judges were appointed as the Commissioners.

The Act precluded the Commission from examining the issues dealt with in the trials of the judge except for the purpose of examining other issues. Unlike the second Senate committee, it was empowered to compel the judge to give evidence if it came to the conclusion that there were matters which he should answer. It was to admit only evidence admissible in court, and it was given access to the documents of the two Senate committees and to certain material held by the National Crime Authority. It was to hear evidence in private, and to report to the Houses only such evidence as it thought necessary to support its findings and conclusions.

Questions about the constitutionality of the Houses appointing a Commission to advise them in this way were again raised. Mr Justice Murphy's reaction to the establishment of the Commission was to bring an action before his fellow judges of the High Court to have the Commission stopped. The High Court, however, unanimously rejected the application for an injunction to restrain the Commission, and deferred hearing arguments on the question of the validity of the legislation establishing it (*Murphy v Lush* 1986 65 ALR 651). Mr Justice Murphy subsequently abandoned the attempt to have the Commission declared unconstitutional.

The establishment of the Commission once again took the matter out of the hands of the Houses of the Parliament, and it was expected that the report of the Commission would finally resolve the question of whether Mr Justice Murphy had engaged in any conduct warranting his removal.

In early August 1986, when the Commission had concluded its initial inquiries and was about to start taking evidence on a number of specific allegations, it was revealed that Mr Justice Murphy was suffering from terminal cancer and had only a short time to live. He announced that he did not intend to cooperate with the Commission any further, and the Government indicated that it would introduce legislation to wind up the inquiry. The Parliamentary Commissioners presented a special report to the Houses indicating that they had intended to hear evidence on a number of specific matters, that this process would take a considerable time, and that, in view of the judge's condition it would probably not be possible to conclude the inquiry consistent with the

requirements of natural justice, which dictated that the judge be present during the hearing of evidence.

A bill to repeal the Act establishing the Commission, and to provide for the disposal of the large volume of material which the Commission had collected, was the subject of some disputation. As originally drafted it would have provided for the perpetual suppression of all material before the Commission and for heavy penalties for any person who revealed any matters placed before the Commission. It was amended in the Senate, however, to provide for the release of material after thirty years and for penalties only for persons associated with the Commission who revealed its deliberations or documents. Even so the bill was criticised as being unduly restrictive. The Presiding Officers were given the custody of the documents of the Commission, which were placed in the archives under conditions of high security.

Before it ceased to exist, the Commission presented another report to the Houses on 21 August 1986 (PP 443/1986). This consisted of the findings of the Commissioners on the question of what constitutes misbehaviour within the meaning of the Constitution. In detailed and closely argued findings, all of the Commissioners rejected the view of the Solicitor-General that misbehaviour could be constituted only by misbehaviour in the performance of judicial duties or conviction for a criminal offence. All of the Commissioners supported the opinion of the counsel to the first Senate committee, that misbehaviour consisted of conduct which, in the judgment of the Houses, indicated unfitness of a judge to continue in office. It is expected that these findings will carry great weight in any future deliberations relating to section 72 of the Constitution.

The last attempt to investigate the judge's behaviour thus ended. The prognostications of the judge's physicians, which had been presented to the Commission and to the two Houses, proved only too accurate, and in October 1986 the judge died, leaving the questions as to his conduct unresolved. Early in 1999 there were press reports claiming that relevant evidence had been withheld from the Senate committees and the Commission, but no further investigatory action was taken.

If a case arises in the future which causes the Houses to consider action under section 72 of the Constitution, it is likely that the Parliamentary Commission of Inquiry of 1986 will be looked to as a precedent. As this chapter has suggested, that body, apart from the question of its constitutionality, had serious defects, particularly the provisions for hearing evidence in private and for withholding evidence from the Houses. Those features of the Commission should not be followed in any future cases.

Queensland precedent

The relevant provisions of the Constitution of Queensland replicated the Act of Settlement: judges had tenure of office during good behaviour but could be removed by the Governor on the address of the Legislative Assembly. Misbehaviour was not stated to be the ground of removal.

In the case of the removal of a justice of the Supreme Court of the State in 1989, the body appointed to advise the Legislative Assembly, the Assembly in its address to the Governor and the Governor in his response to the address were all careful not to say that misbehaviour was the ground of removal. The case, however, is a significant precedent for a consideration of conduct

which may be regarded as constituting misbehaviour under the federal constitutional provision, if the restricted interpretation of that provision by the Solicitor-General is not accepted and the interpretation of the parliamentary commissioners and the other authorities referred to above is followed.

After certain evidence was given before a commission of inquiry concerning the conduct of a justice of the Supreme Court, Justice Angelo Vasta, a statutory commission, called the Parliamentary Judges Commission of Inquiry, was established in 1988 to inquire into the conduct of the justice. The Commission consisted of three retired superior court justices, including a former Chief Justice of the High Court. The Commission was enjoined to advise the Legislative Assembly whether any behaviour of the justice following his appointment to the Court warranted his removal from office. The Commission was to present to the Legislative Assembly only so much of its evidence as it thought necessary to support its findings of fact and conclusions. The Commission clearly was modelled on the 1986 federal Parliamentary Commission of Inquiry.

The Commission reported that the following behaviour by the judge warranted his removal from office:

(a) giving false evidence at a defamation hearing

(b) making and maintaining allegations that the Chief Justice, the Attorney-General and the inquiry commissioner had conspired to injure him

(c) making a false statement to an accountant who prepared income tax returns

(d) arranging sham transactions to gain income tax advantages

(e) making false claims for taxation deductions.

None of the grounds of removal related to the judge's conduct as a judge, and the Commission did not advert to the question of whether any of the judge's actions could constitute criminal offences.

The Legislative Assembly allowed the judge to address the Assembly to show cause why he should not be removed from office. Having heard the judge's address, the Assembly on 7 June 1989 concurred with the conclusions of the Commission and resolved to address the Governor requesting the removal of the judge on the grounds specified by the Commission. On the presentation of the address, the Governor removed the judge from office.

New South Wales precedent

The New South Wales constitution and relevant legislation provide that judicial officers may be removed upon address by both Houses of the Parliament on ground of proved misbehaviour or incapacity, but only after a report by the Conduct Division of the Judicial Commission, a panel of judges and barristers which considers complaints about such officers, indicating that matters may justify parliamentary consideration of removal.

In 1998 the Conduct Division found that incapacity had been proved in respect of a justice of the state Supreme Court, Justice Vincent Bruce, as evidenced by unreasonable delay in delivering judgments. A challenge by the justice to the validity of the Conduct Division's report failed in the Court of Appeal (*Bruce v Cole* 1998 45 NSWLR 163).

The Legislative Council, however, on 25 June 1998 rejected a government motion to remove the justice, although the motion was supported by major party leaders. The Council heard the justice before considering the motion. In February 1999, after further criticism of delays in his cases, the judge resigned.

Other office-holders

Various statutes passed by the Parliament provide for independent and quasi-judicial office-holders other than judges to be removed on address of both Houses, including the Auditor-General, members of the Administrative Appeals Tribunal, and the Commonwealth Ombudsman. The stated grounds for removal vary, but generally refer to misbehaviour and incapacity. There are no precedents of these provisions being activated, but many of the considerations analysed in this chapter may be applicable to them.

OTHER ASPECTS OF RELATIONS WITH THE JUDICIARY

Other aspects of relations between the Senate and the judiciary have been analysed in other chapters.

For the jurisdiction of the courts in relation to parliamentary proceedings, the production of Senate documents before courts and tribunals, and reference to Senate proceedings in the proceedings of courts and tribunals, see Chapter 2, Parliamentary Privilege.

For debate and inquiry on matters before courts and on decisions of courts, see Chapter 10, Debate, under Sub judice convention and Discussion of court decisions, and Chapter 16, Committees, under Privilege of proceedings.

For reflection on judicial officers in debate, see Chapter 10, Debate, under Rules of debate.

Scrutiny of judicial administration

While the judges are and must be completely independent of the legislature and the executive in performing their judicial functions, the Houses of the Parliament have a responsibility to provide for and scrutinise the conduct of the administration of the courts.

Various acts of the Parliament provide for the administration of the courts. Rules of court, made by courts under such acts of Parliament, and providing for matters of judicial administration, are subject to disallowance by either House and are scrutinised by the Senate Standing Committee on Regulations and Ordinances (see Chapter 15, Delegated Legislation).

Estimates of expenditure and appropriations for the federal courts are scrutinised by Senate committees and by the Senate before the appropriations are passed. Annual reports of the courts

are also subject to scrutiny by Senate committees. (See Chapter 13, Financial Legislation, and Chapter 16, Committees.)

In June 1986, in a report on the annual report of the High Court, the Standing Committee on Constitutional and Legal Affairs asserted the principle that the constitutional independence of the Court is not affected by the accountability of the Court to Parliament in financial and administrative matters (PP 177/1986).

In its 101st report, presented in June 1995 (PP 97/1995), the Regulations and Ordinances Committee asserted its right, and that of the Senate, to scrutinise rules of court and other legislative instruments made by judicial bodies. Such instruments, like other forms of delegated legislation, are subject to disallowance by the Senate (see Chapter 15, Delegated Legislation; see also statement by the committee, SD 23/6/1997, pp 4868-70).

Chapter 21

RELATIONS WITH THE HOUSE OF REPRESENTATIVES

IN A BICAMERAL SYSTEM the conduct of relations between the two houses of the legislature is of considerable significance, particularly as the houses must reach full agreement on proposed legislation before it can go forward into law, and action on other matters also depends on the houses coming to agreement.

In practice, under the system of government as it has developed in Australia, relations between the two Houses are relations between the Senate and the executive government, as the latter, through its control of a disciplined party majority, controls the House of Representatives. This chapter could well have been combined with Chapter 19, Relations with the Executive Government. There is value, however, in treating the matter on the basis of the constitutional assumption of dealings between two representative assemblies, as this pattern may in certain circumstances, for example, a government in a minority in the House, reassert itself.

The Constitution contains some provisions regulating relations between the Houses:

- section 53 provides some rules relating to proceedings on legislation
- section 57 provides for the resolution of certain disagreements between the Houses in relation to proposed legislation by simultaneous dissolutions of the Houses.

The rules contained in section 53 are dealt with in Chapter 12, Legislation, and Chapter 13, Financial Legislation. Simultaneous dissolutions under section 57 are dealt with in this chapter.

The standing orders of the Senate provide more detailed rules for the conduct of relations between the Houses, particularly in relation to legislation. In so far as these rules regulate relations between the Houses generally, they are also dealt with in this chapter, and in so far as they relate to legislation they are dealt with in more detail in chapters 12 and 13.

Communications between the two Houses

Senate standing orders are concerned only with formal communications between the Houses, as distinct from the many private communications and consultations between members and office-holders of the Houses. The latter, while indispensable to the efficient and orderly conduct of parliamentary proceedings, are of course not regulated by formal rules.

Communications with the House of Representatives may be by:

- message
- conference
- committees conferring with each other (SO 152).

The most common form of communication is by message. Conferences are treated below. For committees conferring with each other, see Chapter 16, Committees; a committee of the Senate may confer with a committee of the House of Representatives only by order of the Senate.

Messages

Messages between the two Houses may deal with:

- transmission of bills for concurrence, return of bills with or without amendment, and other proceedings in connection with the consideration of bills (see Chapter 12, Legislation)

- requests for the attendance of members or officers of the other House as witnesses to be examined by the House or committee (SO 178)

- appointment of joint committees, appointment of members of such committees, and changes in membership (SO 42)

- requests for conferences (see under Conferences, below)

- transmission of resolutions for concurrence (SO 154).

A message from the Senate to the House of Representatives is in writing, is signed by the President or Deputy President, and is delivered by a clerk at the table or the Usher of the Black Rod (SO 153).

If the House of Representatives is sitting, a message is delivered to the House and received by the Deputy Clerk or Sergeant-at-Arms. If the House is not sitting, the message is delivered to the Clerk of the House.

Most messages, for example messages with respect to proceedings on bills, pass automatically between the Houses, under provisions in the standing orders. A motion may be moved at any time without notice that any resolution of the Senate be communicated by message to the House of Representatives (SO 154). This procedure is used where the agreement of the House to a resolution is sought, or it is thought appropriate to advise the House of a resolution of the Senate.

A motion that a resolution of the Senate be communicated by message to the House may be moved by any senator, and not necessarily the senator who moved the motion for the resolution (ruling of President Gould, SD, 28/10/1908, p. 1554).

A message from the House of Representatives is received, if the Senate is sitting, by a clerk at the table, and if the Senate is not sitting, by the Clerk of the Senate, and is reported by the

President as early as convenient, and a future time is normally fixed for its consideration; or it may, by leave, be dealt with at once (SO 155).

A message is reported to the Senate by the President at any stage when other business is not before the Senate. By convention, however, a message from the House concerning government business is handed to the President by the Clerk when a minister indicates that the government is ready for the message to be reported.

The general rule, that when a message has been reported a future time is fixed for its consideration, and it may be dealt with at once only by leave, does not apply to messages with respect to bills, for which special provision is made: see Chapter 12, Legislation.

An unusual situation arose in 1912, when a motion for fixing the time for consideration of a message from the House of Representatives was negatived (21/12/1912, J.244). The message requested the concurrence of the Senate in a resolution agreed to by the House favouring the formation of two new states out of the territory known as Northern and Central Queensland. Motion was made that the message be taken into consideration on the next day of sitting, but the motion was negatived. As the Senate did not further sit during that session, the message was not again brought up. The effect of the Senate's action was that it declined to consider the message. On many occasions the Senate has not returned to the consideration of a message when a future time (usually the next day of sitting) has been fixed for its consideration, because the order of the day for consideration of the message has not been reached.

Conferences

Conferences between the two Houses provide a means of seeking agreement on a bill or other matter when the procedure of exchanging messages fails or is otherwise inadequate to promote a full understanding and agreement on the issues involved.

In the history of the Commonwealth Parliament, there have been only two formal conferences, and those were in connection with disagreements between the Houses on amendments to bills. It is quite competent for the Houses to agree to conferences on other matters, however. The first conference proposed in the Commonwealth Parliament was to consider the question of the selection of a site for the federal capital. The House of Representatives, requesting the conference in 1903, proposed that such conference consist of all members of both Houses, but the conference was refused by the Senate (24/9/1903, J.185; 30/9/1903, J.189). (For history of a proposed conference on the site of the new Parliament House, and resolutions concerning construction matters, see *ASP*, 6th ed., pp 896-900.)

As far as conferences on bills are concerned, the standing orders of the Senate prescribe the stage at which the Senate may request a conference. That stage, pursuant to standing order 127(1), is reached when agreement cannot be achieved, by an exchange of messages, with respect to amendments to Senate bills. There is no provision in the standing orders for a request by the Senate for a conference on a bill originating in the House of Representatives.

The following conferences have been held between the Senate and the House of Representatives:

- Appropriation Bill 1921-22. Disagreement between the Houses on Senate's request for amendments; an informal conference of representatives of both Houses considered the matter in disagreement, namely, whether the salaries of the Clerks of the Houses should be uniform; conference recommended uniformity, and recommendation endorsed by the Houses (10/12/1921, J.527).

- Commonwealth Conciliation and Arbitration Bill 1930 (HR bill). Conference agreed to, at request of House of Representatives, on amendments in dispute. (7/8/1930, J.170).

- Northern Territory (Administration) Bill 1931 (HR bill). Conference agreed to, at request of House of Representatives, on amendments in dispute. (17/12/1930, J.238; 26/3/1931, J.255).

In each of these cases the conference was successful, agreement being reached by the managers and, following their report, by the Houses.

The standing orders provide general rules relating to conferences, which are applicable to conferences on other matters as well as conferences on bills.

Conferences sought by the Senate with the House of Representatives are requested by messages (SO 156(1)). In one instance only has the Senate requested a conference with the House of Representatives, in relation to the Social Services Consolidation Bill 1950. The House of Representatives having insisted on an amendment to the bill to which the Senate insisted on disagreeing, a conference was requested with the House of Representatives on the amendment (22/6/1950, J.98-9). The House of Representatives, however, did not agree to the request of the Senate for a conference, and desired the reconsideration of the bill by the Senate in respect of the amendment. The Senate subsequently agreed to the amendment insisted on by the House of Representatives.

In requesting a conference, the message from the Senate states, in general terms, the object for which the conference is sought and the number of managers proposed, which is not less than five (SO 156(2)).

A motion requesting a conference contains the names of the senators proposed by the mover to be the managers for the Senate. If, on such motion, any senator so requires, the managers for the Senate are selected by ballot (SO 157).

During a conference the sitting of the Senate is suspended (SO 158). For precedent, see conference in connection with Northern Territory (Administration) Bill 1931 (29/4/1931, J.270). The time having arrived for the holding of the conference, the sitting of the Senate was suspended until such time as the conference between the Houses should be concluded. When the conference was ready to report, the bells were rung and the sitting resumed.

Before the Senate suspended for this conference, a point of order was taken on whether a conference could take place except during a suspension of the sittings. President Kingsmill held that, while it was unusual for a conference to sit when the House has adjourned, he did not think that there was anything in the standing orders of the Senate to forbid, or even to imply, that a

conference may not take place when the Senate has adjourned (ruling of President Kingsmill, SD, 29/4/1931, p. 1360).

A conference may not be requested by the Senate on any bill or motion of which the House of Representatives is at the time in possession (SO 156(3)). The rationale of this rule is that a conference should be held only if the Senate is notified of a disagreement between the Houses on a measure.

The managers to represent the Senate in a conference requested by the House of Representatives must consist of the same number of members as those of the House of Representatives (SO 157(3)).

The conferences on the Commonwealth Conciliation and Arbitration Bill 1930 and the Northern Territory (Administration) Bill 1931 both consisted of five managers for the Senate and five managers for the House of Representatives.

In a conference between the Houses, if managers appointed by the Senate decline to act, they should be replaced by others. It has been held that there is no means of compelling any senator to act on a conference (ruling of President Kingsmill, SD, 17/12/1930, p. 1624). For precedent for senator discharged from duty as a manager, and another senator appointed, see 29/4/1929, J.269.

In respect of any conference requested by the House of Representatives the time and place for holding the conference is appointed by the Senate; and when the Senate requests a conference, it agrees to its being held at such time and place as appointed by the House of Representatives, and such agreement is communicated by message. At conferences requested by the House of Representatives the managers for the Senate assemble at the time and place appointed, and receive the managers of the House of Representatives (SO 159).

At conferences the reasons or resolutions of the Senate, to be communicated by the managers, are in writing; and the managers may not receive any such communication from the managers for the House of Representatives unless it is in writing. The managers for the Senate read the reasons or resolutions to be communicated, deliver them to the managers for the House of Representatives, or hear and receive from the managers for the House the reasons or resolutions communicated by the latter; after which the managers for the Senate are at liberty to confer freely with the managers for the House of Representatives (SO 160). That is to say, after the preliminary exchange of formalities, a "free" conference is held, at which debate is permissible.

The managers for the Senate, when the conference has terminated, report their proceedings to the Senate (SO 161). In the case of the two precedents referred to, the Commonwealth Conciliation and Arbitration Bill 1930 and the Northern Territory (Administration) Bill 1931, the bill was, in each case, in possession of the Senate at the time of the conference. On presentation of the report of the conference, motion was made that the report be adopted and taken into consideration in conjunction with the message of the House of Representatives (returning the Bill and requesting the conference) in committee of the whole.

The adoption of the report of a conference does not necessarily bind the Senate to the proposals of the conference, which, with reference to amendments in a bill, come up for consideration in committee of the whole (ruling of President Kingsmill, SD, 29/4/1931, p. 1365).

There must be only one conference on any bill or other matter (SO 162). In so providing, the Senate profited from the experience of the South Australian Parliament, where it was found that a number of conferences served no good purpose, because the representatives of both Houses always put off coming to a final decision until the last conference.

The main reason for conferences falling into disuse is the rigidity of ministerial control over the House of Representatives. It is more efficient for senators involved with legislation to negotiate directly with the ministers who control what the House does with the legislation.

SIMULTANEOUS DISSOLUTIONS OF THE HOUSES

Constitutional provisions and their application

When the Constitution of the Commonwealth was in preparation, one of the major issues in contention was a provision for resolving deadlocks between the Houses of Parliament over legislation. Few constitutions extant at the time contained any such mechanism: those which did mainly provided for conferences between the Houses, reflecting practice as it had developed in the Congress of the United States. Only with enactment of the *Parliament Act 1911* did the United Kingdom establish a formal framework for resolving a deadlock between the House of Commons and the House of Lords, reflecting the non-elected character of the latter house. Canada's national parliament, now the only bicameral legislature in that country, still does not have a comparable procedure. Such procedures as exist in Australian State constitutions post-date the Commonwealth Constitution.

The procedure eventually adopted, and embodied in section 57 of the Constitution, was thus a major innovation in constitutional and bicameral practice. Part of the innovation was the possibility of dissolution of and general election for both Houses of the Parliament.

The provisions in section 57 were intended to be more than a mechanism for resolving deadlocks. They were to be a concession of federalism to democracy. Provided that the whole process set out in section 57 is followed, the normal double majority for the passage of laws would be dispensed with, only for the legislation causing the deadlock, and laws could be passed in accordance with the wishes of the majority of the representatives of the people as a whole, if that majority were not too narrow. In cases of significant disagreement, democratic representation was to prevail over the geographically distributed representation of the people provided by the Senate. (But see Chapter 1 for the point that the House of Representatives is now controlled by the executive government and may not in fact reflect in its composition the votes of the majority of the electors.) It is sometimes said that the purpose of section 57 is to enable the government or the House of Representatives to prevail over the Senate. This interpretation, however, was explicitly rejected by the High Court (see H. Evans, 'Constitution, section 57', *Constitutional Law and Policy Review*, 1.2, August 1998).

Laws have been passed in this way only once, in 1974, when there occurred the only double dissolution followed by a joint sitting of the Houses.

Section 57 of the Constitution as it relates to simultaneous dissolutions provides:

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

Since federation, section 57 has been activated on six occasions — 1914, 1951, 1974, 1975, 1983 and 1987 — to resolve deadlocks over legislation between the Houses. On three occasions the government advising simultaneous dissolutions has been returned to office; on only one of those occasions, 1974, did the legislation leading to the dissolutions become law, and, in that instance, after a joint sitting as provided for in paragraphs 2 and 3 of section 57. In 1951, the Menzies Government, while not reintroducing the banking legislation which was the subject of the simultaneous dissolutions, nonetheless proceeded with other legislation of similar character. The Hawke Government abandoned the single bill on which it had secured a simultaneous dissolution in 1987 when a majority of the Senate in effect declared that it would disallow regulations made under the legislation to bring it into operation.

The simultaneous dissolutions of 1914 and 1983 saw the defeat of the government advising the dissolutions. The legislation on which the dissolution was based was, in all cases, dropped. In 1975, the simultaneous dissolutions were based on 22 proposed laws of the ousted Whitlam Government. The caretaker Fraser Government, however, secured majorities in both Houses so no further action was taken.

As a consequence of the six simultaneous dissolutions, and the judgments of the High Court in the three cases arising from the 1974 dissolutions, it is now possible to amplify the workings of section 57 of the Constitution so far as simultaneous dissolutions of the two Houses are concerned. The following observations can be advanced as influencing the activation of section 57.

1. **The provisions of section 57 are mandatory, not directory in respect of the validity of legislation.** Failure to comply with them therefore results in invalidity of any enactment which does not conform to its stipulations. However, even failure to observe the provisions of section 57 would not invalidate dissolutions of the two Houses. (*Victoria v Commonwealth* 1975 7 ALR 1)

2. **The interval of three months referred to in paragraph 1 of section 57 is measured from the Senate's rejection or failure to pass a bill.** According to the High Court, it is "measured not from the first passage of a proposed law by the House of Representatives, but from the Senate's rejection or failure to pass it. This interpretation follows both from the language of section 57 and its purpose which is to provide time for the reconciliation

of the differences between the Houses; the time therefore does not begin to run until the deadlock occurs". (*Victoria v Commonwealth* 1975 7 ALR 1)

3. **A prorogation of Parliament does not have the effect of negating earlier events which qualified bills as proposed laws in respect of which a double dissolution could be granted.** Simultaneous dissolutions may be granted in respect of bills which qualified under section 57 in an earlier session. (*Western Australia v Commonwealth* 1975 7 ALR 159)

4. **Simultaneous dissolutions have been granted on several occasions where the proposed legislation has been deemed to have "failed to pass" the Senate.** In 1951, following the second passage of the Commonwealth Bank Bill through the House, the Senate, after second reading debate extending over several days, referred it to a select committee. This was said by Prime Minister Menzies to constitute "failure to pass", a phrase which encompassed "delay in passing the bill" or "such a delaying intention as would amount to an expression of unwillingness to pass it". The Attorney-General, Senator J.A. Spicer, wrote that the phrase, "failure to pass", was intended to deal with procrastination. Professor K.H. Bailey, the Solicitor-General, considered, inter alia, that "adoption of Parliamentary procedures for the purpose of avoiding the formal registering of the Senate's clear disagreement with a bill may constitute a 'failure to pass' it within the meaning of the section". (See below, under Simultaneous dissolutions of 1951.)

   The Deputy Leader of the Opposition in the House of Representatives, Dr H.V. Evatt, had previously been reported in the press as saying that referral of legislation to a select committee, being clearly provided for in the standing orders of the Senate, was not a failure to pass. (See below.)

   In 1975, the High Court held that the proposed law creating the Petroleum and Minerals Authority had not, as claimed, "failed to pass" the Senate on 13 December 1973 and, as a result, it was declared not to be a valid law of the Commonwealth. The second reading was, in fact, negatived a first time in the Senate on 2 April 1974. In its judgment, the High Court held that "The Senate has a duty to properly consider all Bills and cannot be said to have failed to pass a Bill because it was not passed at the first available opportunity; a reasonable time must be allowed". In so deciding, the majority observed that the opinions of individual members of either House "are irrelevant to the question of whether the Senate's action amounted to a failure to pass". (*Victoria v Commonwealth* 1975 7 ALR 1)

   In 1983 nine proposed laws dealing with sales tax were deemed to have "failed to pass" the Senate after being first passed by the House of Representatives. These bills, being legislation which under section 53 the Senate could not amend but only suggest amendments, were in the possession of the House of Representatives prior to being discharged from its notice paper, the Senate having decided to press requests. As the government was defeated in the election it is not possible to affirm conclusively that the Senate had, in these circumstances, "failed to pass" the bills. It might be argued that pressed requests refused by the House are analogous to amendments to a bill by the

Senate which are unacceptable to the House of Representatives and thus bring the proposed legislation within the ambit of section 57, but this argument was not advanced.

5. **It is not necessary for the Houses to be dissolved without delay once the conditions of section 57 have been met.** According to the High Court,

> This interpretation follows both from the language of s. 57, which provides for express time limits in relation to other parts of the procedure laid down by the section but provides for none in respect to the interval between the Senate's second rejection of a proposed law and the double dissolution...

Inter alia, the Court observed that "'undue delay' would be impossible of determination by the court". (*Western Australia v Commonwealth* 1975 7 ALR 159) In the case in question, Chief Justice Barwick (in minority) contended that "there is a temporal limitation which requires that the second rejection by the Senate and the double dissolution must be so related in time as to form part of the current disagreements between the Houses". However, the lapse of time in this instance, a maximum of seven and a half months, was not sufficient to disqualify them as grounds for simultaneous dissolutions. (*ibid*.)

6. **Not only is it not necessary for simultaneous dissolutions to follow a second rejection etc. by the Senate "without undue delay", it is not usual for account to be taken of the currency of legislation when it is submitted as a basis for simultaneous dissolutions.** Thus, in 1983, Governor-General Stephen simply noted that "in the case of each of these measures a considerable time has passed since they were rejected or not passed a second time in the Senate". (Governor-General to Prime Minister, 4 February 1983, PP 129/1984, p. 43)

7. **There is no limit to the number of proposed laws on which simultaneous dissolutions of the Houses may be based.** The first dissolutions based on more than one bill occurred in 1974 (subsequently in 1975 and 1983). In 1974 the Attorney-General (Senator Lionel Murphy, QC) and the Solicitor-General (M.H. Byers, QC) advised the Governor-General in a joint opinion that:

> The words of the paragraph [one of section 57], in our view, clearly indicate that the power to dissolve is exercisable when more than one proposed law has been dealt with in the required manner. ... Our view does not require nor involve that the words "any proposed law" are read as comprising a plural. We do not, of course, suggest that so to read them would be to depart from recognised canons of construction. What we have said above but treats the words of condition as operating successively and singularly upon each such law. (PP 257/1975, p. 30)

This view, when challenged, was upheld by the High Court: "... a joint sitting of both Houses of Parliament convened under s. 57 may deliberate and vote upon any number of proposed laws in respect of which the requirements of s. 57 have been fulfilled." (*Cormack v Cope* 1974 131 CLR 432). As Justice Stephen observed: "One instance of double rejection suffices but if there be more than one it merely means that there is a

multiplicity of grounds for a double dissolution, rather than grounds for a multiplicity of double dissolutions" (*ibid*., 469).

8. **The political or policy significance of legislation is not material to a decision to accede to a request that both Houses be simultaneously dissolved.** This issue arose in 1914. The Opposition in the Senate, which contested the Governor-General's decision to grant simultaneous dissolutions, protested that the proposed legislation, the Government Preference Prohibition Bill, was not a vital measure and that the deadlock had been contrived. That the deadlock was contrived in a narrow sense cannot be disputed for this is clearly set out in a memorandum furnished to the Governor-General by Prime Minister Joseph Cook which stated that when it became "abundantly clear" that the Opposition had taken control of the Senate, "we [the Government] decided that a further appeal to the people should be made by means of a double dissolution, and accordingly set about forcing through the two short measures for the purpose of fulfilling the terms of the Constitution". (PP 2/1914-17, p. 3)

   An address to the Governor-General carried by the Senate on motion of the Opposition Labor Party stated that the Senate's powers would be "reduced to a nullity" were it possible to secure a dissolution on legislation which contained "no vital principle" or gave "effect to no reform". (17/6/1914, J.86-8)

   It has been customary subsequently for prime ministers, when proposing simultaneous dissolutions, to stress the significance of the legislation involved. Thus, in 1951, Prime Minister Menzies referred to the Commonwealth Bank Bill and other proposed laws about which there was dispute between the Senate and the House as "major legislative measures"; in 1974, Prime Minister Whitlam informed the Governor-General that "the Senate has twice rejected, failed to pass or unacceptably amended several proposed laws which are integral parts of the Government's program of reform and development", and, later, "the six proposed laws are all of importance to the Government"; in 1983, Prime Minister Fraser based advice about simultaneous dissolutions on 13 proposed laws "of importance to the Government's budgetary, education and welfare policies ..."; four years later Prime Minister Hawke declared that the Australia Card Bill 1986 was "an integral part of the Government's tax reform package and is aimed at restoring fairness to the Australian taxation and social welfare systems". (See below for relevant documents.)

   Except in 1983 (up to a point), governors-general have refrained from comment about the significance of the legislation. In 1983, Governor-General Stephen wrote that on the basis of precedents he should inter alia "pay regard to the importance of the measures in question". In the event, however, he disclaimed ability so to do: "... I am not myself in any position, from their mere subject matter and text, to form a view about the particular importance of any of them". (PP 129/1984, pp 43-4)

9. **Even where the conditions for simultaneous dissolutions as prescribed in section 57 have been met, it is customary for advice to be provided to the Governor-General on the "workability of Parliament".** The issue of the workability of the Parliament was addressed in the granting of the 1914 simultaneous dissolutions. Prime Minister Cook claimed that the Liberal Government was hindered in the Senate but that the Opposition

Labor Party would not be able to "carry on for a single hour in the House of Representatives". The caucus practices of Labor made compromise impossible. Moreover, a dissolution of the House of Representatives alone would not necessarily resolve the situation: "... however large the Liberal majority in the House of Representatives might be as a result of an election, it would have the same Senate as at present". (PP 2/1914-17, p. 4)

In 1951, Prime Minister Menzies observed that in discussions about the 1914 simultaneous dissolution "... some importance appears to have been attached to the unworkable condition of the Parliament as a whole". He went on to state that "the present position in the Commonwealth Parliament is such that good government, secure administration, and the reasonably speedy enactment of a legislative program are being made extremely difficult, if not actually impossible". (PP 6/1957, p. 12)

In 1974, Prime Minister Whitlam wrote that "the Senate has delayed and obstructed the program on the basis of which the Government was elected to office in December 1972". (PP 257/1975, p. 4) Nine years later, Prime Minister Fraser stated that he regarded "a double dissolution as critical to the workings of the government and of the Parliament ... some significant Government legislation was not passed by the Senate. There are measures that we have not even put to the Parliament because we know that they would not achieve passage through the Senate". (PP 129/1984, p. 5)

And in 1987 Prime Minister Hawke advised: "In summary, I regard the situation which has arisen in the Parliament as critical to the workings of the Government and the Parliament. The Senate has been spending large amounts of time debating matters of marginal significance, with the effect of reducing substantially the time available for proper consideration of essential government legislation. The imposition of artificial deadlines by the Senate on receipt of government bills for passage has exacerbated this problem. Just today the Senate has refused to reconsider the Government's legislation to extend television services to rural areas." (PP 331/1987, p. 2)

Argument about the workability of the Parliament is sometimes joined by argument about the importance of decisions to be made in the future. Prime Minister Cook said that "It has been apparent to all that the Federal Parliament will shortly be faced with the most serious financial difficulty which has yet come before it". (PP 2/1914-17, p. 1)

The 1983 advice included the following observation:

> It is of paramount importance in facing the difficult economic circumstances that lie ahead that the Government knows that it has the full confidence of the Australian people and that the Australian people have full confidence in its Government's ability to point the way towards recovery. I regard this as of such paramount importance that on this issue alone I believe that I am justified in asking Your Excellency to dissolve the Parliament and issue writs for a general election in both Houses. (PP 129/1984, p. 5)

Governor-General Munro-Ferguson, in 1914, responded simply that he had decided to accede to the Prime Minister's request "having considered the parliamentary situation". (PP 2/1914-17, p. 1)

Governor-General Hasluck refused to be drawn in 1974: as it was clear that the grounds for granting simultaneous dissolutions were provided by the parliamentary history of the six nominated bills, it was "not necessary for [him] to reach any judgment on the wider case [the Prime Minister had] presented that the policies of the Government have been obstructed by the Senate". He concluded: "It seems to me that this is a matter for judgment by the electors". (PP 257/1975, p. 38)

The simultaneous dissolutions of 1975, whilst not providing opportunity for advice in the usual manner, nevertheless disclosed the views of the Governor-General in authorising simultaneous dissolutions on that occasion. The election itself was brought on by the Prime Minister's inability to secure passage of appropriation legislation through the Senate. The Governor-General decided that "the appropriate means is a dissolution of the Parliament and an election for both Houses".

Governor-General Kerr, in his 'Detailed Statement of Decisions', specifically rejected use of a periodical election for the Senate (due by 30 June 1976) as a possible resolution of the deadlock because it would "not guarantee a prompt or sufficiently clear prospect of the deadlock being resolved in accordance with proper principles". (see *ASP*, 6th ed., p. 85) The treatment of this possibility in this instance is not dissimilar to that of Prime Minister Cook's review of possible solutions to the situation faced by his Government.

Governor-General Stephen adopted a different view in 1983. In considering the Prime Minister's advice he decided, on the basis of "such precedents as exist", that he should, inter alia, "pay regard ... to the workability of Parliament"; and it was on this "score" that he sought further advice from the Prime Minister. The Prime Minister's counsel was unambiguous: "Clearly, there is a need for the Government, in the critical period we face, to have decisive control over both Houses of Parliament". (PP 129/1984, p. 41)

10. The process of enacting legislation by joint sitting following simultaneous dissolutions may be the subject of review by the High Court to ensure compliance with the terms of section 57.

In 1974 legislation of the Whitlam Government creating a Petroleum and Minerals Authority was held by the High Court to be invalid on the ground that its enactment did not comply with the requirements of section 57. In particular, the Court held that the provision for an interval of three months between first rejection by the Senate and second passage by the House of Representatives had not been observed. In so deciding, the Court determined that the fact that the Senate had not passed the bill on 13 December 1973, the day on which it was received from the House of Representatives, did not constitute a failure to pass.

Among the findings of the Court on this matter were the following:

- The Court has jurisdiction to intervene at any stage in the special process provided by s. 57 to restrain excesses of constitutional authority, but it should not do so before a proposed law is passed by a joint sitting in any case where the

proposed law can be declared invalid if s. 57 has not been complied with. (*Cormack v Cope* 1974 131 CLR 432)

- The provisions of s. 57 are not concerned with internal parliamentary procedure but constitute conditions of law-making; the principle that courts may not examine the law-making process has no application where a legislature is established and governed by an instrument which prescribes that certain laws may only be passed in a particular way. (*Victoria v Commonwealth* 1975 7 ALR 1)

- The question of whether there was any failure to comply with the provisions of s. 57 is justiciable. *(Victoria v Commonwealth* 1975 7 ALR 1)

11. Amendments may be included in a bill on its second presentation. Section 57 allows a bill submitted to the Senate for a second time to include "any amendments which have been made, suggested, or agreed to by the Senate". This provision has not been subjected to judicial analysis, but see C.K. Comans, 'Constitution, section 57 — further questions', *Federal Law Review*, 15:3, September 1985, p. 243. For the question of amendments which may be submitted to a joint sitting, see below under Joint sittings of the Houses. If the Senate were to agree to amendments to a bill but reject it at the third reading, it may be doubted whether those amendments could be included in the bill on its second presentation (this question arose in relation to the New Tax System Bills in May 1999). For a bill resubmitted to the Senate after a three month interval with amendments made by the Senate, see the Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill 1995: the original bill, the ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994 was still in the possession of the Senate after the government had disagreed to some Senate amendments; see also SD, 21/3/1995, pp 1803-4, for an observation by a senator that a mistake had been made in incorporating one of the Senate's amendments, which probably prevented the bill validly providing a basis for a simultaneous dissolution, apart from the dubious character of the government's claim that the original bill had failed to pass within the meaning of section 57.

12. A disagreement between the Houses over amendments probably requires more than a single rejection of Senate amendments by the government to satisfy the requirements of section 57.

In *Victoria v Commonwealth* 1975 7 ALR 1, the Chief Justice made the following observation (at 16):

> The expression in s 57 is "passes with amendments with which the House of Representatives will not agree". Those words would not, in my opinion and with due respect to a contrary opinion attributed to Sir Kenneth Bailey, necessarily be satisfied by the amendments made in the first place by the Senate. At the least, the attitude of the House of Representatives to the amendments must be decided and, I would think, must be made known before the interval of three months could begin. But the House of Representatives, having indicated in messages to the Senate why it will not agree, may of course find that the Senate concurs in its view so expressed, or there may be some modification thereafter of the amendments made by the Senate which in due course may be acceptable to the House of Representatives. It cannot be said, in my opinion, that there are amendments to

> which the House of Representatives *will* not agree until the processes which parliamentary procedure provides have been explored.

Although the question was not decided by the Court, it is reasonable to conclude that there is not a disagreement over amendments within the terms of section 57 until the House has disagreed with Senate amendments and the Senate has had an opportunity, by the return of the bill to the Senate, to decide whether it insists on its amendments.

In 1997-98 the government claimed that the conditions of section 57 had been met in respect of the Native Title Amendment Bill 1997 by the government rejecting some Senate amendments in the House and immediately laying the bill aside without returning it to the Senate. This claim was disputed by advices provided to senators by the Clerk of the Senate. (The advices were tabled in the Senate: 1/4/1998, J.3541.) As the government did not proceed to simultaneous dissolutions on the basis of this bill, there was no opportunity for this question to be judicially answered. The view then taken seems to have been abandoned in the case of the Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No. 2], which made a further journey between the Houses after the Senate had already once insisted on its amendments (24/3/2003, J.1629).

For the "processes which parliamentary procedure provides" referred to by the Chief Justice, see Chapter 12, Legislation. See also H. Evans, 'Constitution, section 57', *Constitutional Law and Policy Review*, 1.2, August 1998.

On occasions the government in the Senate has voted against the third readings of its own bills, apparently to express disapproval or rejection of amendments made by the Senate to the bills (Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002, 21/8/2002, J.621; Workplace Relations Amendment (Genuine Bargaining) Bill 2002, 25/9/2002, J.822). If those bills had been rejected at the third reading, the government could not have claimed that there was a disagreement between the Houses over amendments, because the House of Representatives would not have considered the amendments. It would also be difficult to argue that the Senate had rejected or failed to pass the bills when the government had voted against them.

Simultaneous dissolutions of 1914

Following the 1913 general election for the House of Representatives and periodical election for the Senate, the new Liberal government under Joseph Cook had a narrow majority in the House (38-37) but was in a significant minority (29-7) in the Senate. These were the circumstances in which the first simultaneous dissolutions of the two Houses of the Commonwealth Parliament occurred the following year.

The occasion for the simultaneous dissolutions was the Government Preference Prohibition Bill. The bill was first passed by the House on 18 November 1913, only to be rejected in the Senate on the second reading on 11 December 1913; in the next session the proposed law was again passed by the House on 28 May 1914 and again rejected by the Senate on the first reading on 28 May 1914.

On 10 June 1914 the Prime Minister informed the House of Representatives that, subject to provision of funds for carrying on the public service during the election period, the Governor-General had granted a double dissolution on the basis of advice that the "Parliament was unworkable, that it was impossible to manage efficiently the public business... ." (HRD, pp 1970-1).

There was debate about the decision to dissolve on the ground that the measure in question was not a national or vital one. The Deputy Leader of the Opposition in the Senate, Senator G.F. Pearce of Western Australia, contended that a simultaneous dissolutions should only occur when the Senate, by its treatment of the financial measures of the Government, rendered government impossible. Pointing to the collocation of section 57, which follows immediately upon those sections of the Constitution dealing with the financial powers of the Houses, Pearce argued that the House of Representatives was specifically mentioned in section 57 because it is there that money bills must originate. (SD, 15/5/1914, pp 1009-23)

Quick and Garran claim that section 57 may apply to any bill (*Annotated Constitution of the Australian Commonwealth*, 1901, p. 685), but Pearce's argument found support in a speech to the Federal Convention by Edmund Barton, Leader of the Convention:

> "Deadlock" is not a term which is strictly applicable to any case except that in which the constitutional machine is prevented from properly working. I am in very grave doubt whether the term can be strictly applied to any case except the stoppage of legislative machinery arising out of conflict upon the finances of the country. A stoppage which arises on any matter of ordinary legislation, because the two Houses cannot come to an agreement at first, is not a thing which is properly designated by the term "deadlock" — because the working of the Constitution goes on — the constitutional machine proceeds notwithstanding a disagreement. It is only when the fuel of the machine of government is withheld that the machine of government comes to a stop, and that fuel is money. (Debates of the Convention, Sydney, 1897, p. 620)

Pearce's approach would likewise seem to be supported by the advice of Chief Justice Griffith to the Governor-General. According to Griffith, the power of dissolution should not be exercised simply because the conditions specified in section 57 exist:

> It should, on the contrary, be regarded as an extraordinary power, to be exercised only in cases in which the Governor-General is personally satisfied, after independent consideration of the case, either that the proposed law as to which the Houses have differed in opinion is one of such public importance that it should be referred to the electors of the Commonwealth for immediate decision by means of a complete renewal of both Houses, or that there exists such a state of practical deadlock in legislation as can only be ended in that way. (Quoted in L.F. Crisp, *Australian National Government*, 4th ed., 1978, pp 404-5)

Pearce also observed that the government had not made any attempt to resolve the deadlock by means of a conference between managers of the two Houses.

On 17 June 1914 the Senate agreed to an address to the Governor-General requesting that the correspondence which passed between the Governor-General and his advisers in regard to the double dissolution of the Parliament might be made public. The address stated, inter alia, that:

> The decision of Your Excellency appears to be fatal to the principles upon which the Senate has hitherto acted, which, we submit, are in strict accordance with a truly Federal interpretation of the Constitution. The Constitution deliberately created a House in which the States as such may be

> represented, and clothed this House with co-ordinate powers (save in the origination of Money Bills) with the Lower Chamber of the Legislature. These powers were given to the Senate in order that they might be used; but if a Senate may not reject or even amend any bill because a Government chooses to call it a "test" bill, although such bill contains no vital principle or gives effect to no reform, the powers of the Senate are reduced to a nullity. We submit that no constitutional sanction can be found for that view, which is repugnant to one of the fundamental bases of the Constitution, viz, a Legislature of two Houses, clothed with equal powers, one representing the people as such, the other representing the States. And we respectfully submit that the dissolution of the Senate ought not to follow upon a mere legitimate exercise of its functions under the Constitution, but only upon such action as makes responsible government impossible, e.g. the rejection of a measure embodying a principle of vital importance necessary in the public interest, creating an actual legislative deadlock and preventing legislation upon which the Ministry was returned to power. These conditions do not exist in the present case. (J.86-8)

The Address also stated that there was not a deadlock between the Houses, referring to the following statement:

SESSION 1913

Bills passed and assented to	23
Bills passed by Senate only	6
Bills passed by Senate without amendment	18
Bills passed by Senate with amendments	5
Amendments disagreed with (Bills laid aside by House of Representatives)	3*
Bills rejected by Senate	2

* Including Committee of Public Accounts Bill No. 1

The Governor-General declined to respond to the Senate's request. He stated, however, that the grounds for the decision were to be found in the Prime Minister's statement, made with his permission, to the House of Representatives.

The Parliament was dissolved on 30 July 1914. At the election on 5 September 1914, the Labor Party led by Andrew Fisher won 42 seats in the House of Representatives against 32 by the Liberal Party, with one Independent; the result in the Senate was: Labor, 31; Liberal, 5.

The correspondence relating to the dissolutions was tabled in both Houses on 8 October 1914 (PP 2/1914-17).

Simultaneous dissolutions of 1951

The general election for the House of Representatives and the periodical election for the Senate held on 10 December 1949 were notable in that they were the first to be held following enlargement of the Parliament in 1948 for the first time since the formation of the Commonwealth, and since adoption of the proportional/preferential method of electing the Senate. The election brought the Menzies Liberal-Country Party Government to office with a majority in the House (74-48, with one independent) but, partly as a result of the as yet uncompleted transition from the old method of election, in a minority in the Senate (34-26).

Soon after the Parliament assembled in 1950 it became obvious that there would be serious disagreements between the Houses. These were ultimately resolved at a double dissolution election on 28 April 1951 based on the Commonwealth Bank Bill. While the Government's House majority was slightly reduced (69-54), the Senate position was reversed and it now had a majority of 4 (32-28).

The proposed legislation which formed the basis of the double dissolution was the Commonwealth Bank Bill.

In initial consideration of the proposed legislation, the bill was read a third time in the House of Representatives on 4 May 1950 and received by the Senate on 10 May 1950. After amendment, it was read a third time by the Senate on 21 June 1950. The next day the House disagreed with the amendments of the Senate; the Senate insisted on the amendments which were again rejected by the House on 23 June 1950. The Senate reaffirmed its insistence on the amendments on 10 October. The bill was returned to the House which ordered that the Senate's message be taken into consideration at the next sitting. The matter was, however, put on the bottom of the House notice paper and was still there when Parliament adjourned on 8 December 1950.

Meanwhile, on 4 October 1950, an identical bill, the Commonwealth Bank Bill (No. 2) was introduced in the House of Representatives, was read a third time a week later, and was received by the Senate on 12 October 1950.

The battle over the bill resumed the following year when, on Monday evening 12 March 1951, the Leader of the Government in the Senate, Senator O'Sullivan, ordered a reprint of the Senate notice paper in order to bring the Commonwealth Bank Bill (No. 2) to the top of the business paper. When the Senate met on 13 March 1951 it proceeded with consideration of the bill.

The same evening, in the House of Representatives, the Prime Minister challenged the Labor majority in the Senate to reject the measure.

However, following the second reading of the bill late that night, the Leader of the Opposition in the Senate, Senator Ashley, successfully moved that the bill be referred to a select committee. The resolution provided that the select committee should report in four weeks. (This course of action had been foreshadowed in Senator Ashley's second reading speech.)

On the basis of advice submitted on Friday 16 March by the Prime Minister, the Governor-General dissolved both Houses on 19 March. In the Proclamation the Governor-General determined that the Senate had "failed to pass" the Commonwealth Bank Bill after it had, on the first occasion, been unacceptably amended.

In addition to the Commonwealth Bank Bill, there was disagreement between the Houses about other legislation. At the time of the winter adjournment the House of Representatives had laid aside the Communist Party Dissolution Bill on the basis that amendments made in the Senate were not acceptable. The bill was again passed by the House. When it reached the Senate, the Government Leader (O'Sullivan) moved unsuccessfully "That the bill be declared an Urgent Bill." Also unsuccessful was a government attempt to suspend Standing Orders so as to eliminate formal delays in the passage of the legislation. For their part, the Opposition brought on its own

bill, the Constitution Alteration (Prices) Bill. It was resolved that this bill should have precedence so long as it remained on the notice paper.

Eventually, following a decision by the National Executive of the Labor Party, it was decided that the Party should not oppose the Communist Party Dissolution Bill in the form submitted to the Senate. The bill was brought forward on 17 October and passed all remaining stages the next day. The legislation was declared invalid by the High Court on 9 March 1951.

Another bill, the Government's Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill, was referred to a select committee of the Senate for report.

In the new year, the Labor caucus resolved on 7 March 1951, the day following its introduction, to block government legislation amending the Conciliation and Arbitration Act to provide for secret ballots for the election of union officials.

Other bills which had failed to pass but did not meet the requirements of section 57 were the Social Services Consolidation Bill and the National Service Bill. The latter bill had been referred to a select committee which trenchantly criticised the government for the action of the cabinet in causing a direction to be issued to the Chiefs of Staff and certain other officials not to attend before the committee.

The 1951 double dissolution did not involve rejection of proposed legislation and accordingly gave rise to discussion of the meaning of "fails to pass." In handling the Commonwealth Bank Bill (No. 2), Prime Minister Menzies stated in advice to the Governor-General that:

> ... there is clear evidence that the design and intention of the Senate in relation to this bill has been to seek every opportunity for delay, upon the principle that protracted postponement may be in some political circumstances almost as efficacious, though not so dangerous, as straight-out rejection. Since failure to pass it, in section 57, distinguished from rejection or unacceptable amendment, it must refer, among other things, to such a delay in passing the bill or such a delaying intention as would amount to an expression of unwillingness to pass it. Clear evidence emerges from the whole of the history of the legislation in the Senate. (PP 6/1957, pp 10-11)

The Prime Minister then outlined decisions of the Senate, made against the vote of the government, which provided "evidentiary value as an indication of the real intentions of the Senate."

The Prime Minister further observed that when the bill came before the Senate for the second time, the Senate might have given the bill a second reading and immediately referred it to a select committee. Instead, there was another second reading debate "precisely similar" to that which had occurred months before.

The Prime Minister's advice to the Governor-General concluded:

> There is no room for doubt that ever since the bill went to the Senate for a second time on October 12th, 1950, no new issues have arisen in relation to it. It is a relatively short bill. Its contentious provisions are clear, have been canvassed in both Houses of Parliament at great length, and have been the subject, as I have shown, of a long series of votes. The appointment of a Select Committee at this extremely late hour is conclusive evidence of an intention to delay the bill, and clearly constitutes a failure to pass it. (*ibid*., p. 12)

The Prime Minister, referring back to the double dissolution of 1914, observed that "some importance appears to have been attached to the unworkable condition of the Parliament as a whole."

The Attorney-General, Senator Spicer, informed the Prime Minister in advice later put before the Governor-General:

> The words "fail to pass" in the section are designed to preclude the Senate, upon being proffered a bill with an opportunity to pass it with or without amendments or to reject it, from declining to take either course, and instead deciding to procrastinate.
>
> In the present circumstances the Senate has had a second opportunity of choosing whether to pass with or without amendments or to reject the proposed law. It has declined to take either course and, unquestionably, has decided to procrastinate. In my opinion, this completely satisfies the words "fail to pass" as properly understood in the section and, in my opinion, the power of the Governor-General to dissolve both Houses has arisen. (*ibid*., pp 16-17)

Professor K.H. Bailey, the Solicitor-General, stated that:

> The addition of the words "fail to pass" is intended to bring the section into operation if the Senate, not approving a bill, adopts procedures designed to avert the taking of either of these definitive decisions on it. The expression "fails to pass" is clearly not the same as the neutral expression "does not pass", which would perhaps imply mere lapse of time. "Failure to pass" seems to me to involve a suggestion of some breach of duty, some degree of fault, and to import, as a minimum, that the Senate avoids a decision on the bill.
>
> In a recent opinion, Sir Robert Garran enumerated as follows, and in terms which in general I respectfully adopt, the matters to be taken into account in ascertaining the fact of failure or non-failure to pass:
>
> "Mainly, I think, the ordinary practice and procedure of Parliament in dealing with bills; including facts arising out of the unwritten law relating to the system of responsible government: the way in which the Government arranges the order of business and conducts the passage of Government measures through both Houses, and the various ways in which the Opposition seeks to oppose. It will be material to know what opportunities the Government has given for proceeding with the bill, and what steps the Senate has taken to delay or defer consideration.
>
> There are many ways in which the passage of a bill may be prevented or delayed: e.g.
>
> (i) It may be ordered to be read (say) this day six months.
> (ii) It may be referred to a Select Committee.
> (iii) The debate may be repeatedly adjourned.
> (iv) The bill may be 'filibustered' by unreasonably long discussion, in the House or in Committee.
>
> The first of these would leave no room for doubt. To resolve that a bill be read this day six months is a time-honoured way of shelving it.
>
> The second would be fair ground for suspicion. But all the circumstances would need to be looked at.
>
> The third, if it became systematically employed against the Government, would lead to a strong inference.

> But just at what point of time failure to pass could be established, might be hard to determine ...
>
> In the fourth case too, the point at which reasonable discussion is exceeded, and obstruction, as differentiated from honest opposition, begins, would be very hard to determine. But sooner or later, a 'filibuster' can be distinguished from a debate ..."

> Section 57 cannot of course be regarded as nullifying the express provision in section 53 that except as provided in that section the Senate should have equal power with the House of Representatives in respect to all proposed laws. But it is equally clear that on the fair construction of section 57 a disagreement between the Houses can be shown just as emphatically by failure to pass a bill as by its rejection or amendment. Perhaps the principle involved can be expressed by saying that the adoption of Parliamentary procedures for the purpose of avoiding the formal registering of the Senate's clear disagreement with a bill may constitute a "failure to pass" it within the meaning of the section. (*ibid*., pp 18-22)

The double dissolution was criticised on two grounds. Dr H.V. Evatt, MP, Deputy Leader of the Opposition in the House of Representatives and a former Justice of the High Court, claimed that the requirements of section 57 had not been met:

> That section stated that there should be an interval of at least three months between the end of the first dispute between the House of Representatives and the Senate and the beginning of the second dispute on the same issue before a double dissolution could be sought on the ground that the legislation had been twice rejected or unacceptably amended. (*Sydney Morning Herald*, 30/10/1950)

The second objection was that reference of the bill to a select committee did not constitute failure to pass, such reference being clearly provided for in the standing orders of the Senate and being a legitimate and proper function of the Senate in the consideration of bills.

On 17 October 1951 Senator McKenna, Leader of the Opposition in the Senate, moved that government papers relating to the double dissolution be tabled. In his speech Senator McKenna said that production of the documents would do a great deal to clarify certain constitutional issues involved: Whether the period of three months which must elapse before the same bill is again presented commences from the beginning of the dispute between the two Houses, or from the end of the first dispute between the two Houses; in what circumstances apart from outright rejection of a measure, or the making of amendments to it which are unacceptable to the House of Representatives, can the Senate be deemed to have failed to pass it; has the Governor-General, under section 57, an absolute discretion either to grant or to refuse a request for a double dissolution, or is he bound to act upon the advice tendered to him by the Ministers of the Crown; and whether the government based any portion of its case upon the general conduct of the Senate apart altogether from the Commonwealth Bank Bill.

The Prime Minister, whilst agreeing to table the documents at "a proper time", told the House of Representatives that he did not propose to do so "at a time when they would give rise to discussions in which the present occupant of the position of Governor-General would be involved." The documents were tabled on 24 May 1956 (PP 6/1957).

In a foreword, the Prime Minister offered views which coincide with those of Chief Justice Griffith in his advice to the Governor-General concerning the 1914 double dissolution:

> In the course of our discussion, I had made it clear to His Excellency that, in my view, he was not bound to follow my advice in respect of the existence of the conditions of fact set out in section 57, but that he had to be himself satisfied that those conditions of fact were established. (*ibid*., p.4)

Simultaneous dissolutions of 1974

On 11 April 1974 Governor-General Hasluck simultaneously dissolved the Senate and the House of Representatives, acting upon advice of Prime Minister Whitlam.

This occasion was unusual in several respects. In the first instance, the Prime Minister's advice did not immediately stem from disagreement over legislation but from the decision of the Opposition (Liberal and Country) parties, supported by the Democratic Labor Party in the Senate, to refuse passage of the second reading of appropriation legislation until the government agreed "to submit itself to the judgment of the people" at the same time as the forthcoming periodical election for the Senate which had been set down for 18 May 1974. The specific background to this decision of the Opposition parties was the announcement that Senator Vincent Gair, a former Premier of Queensland and a former Leader of the Democratic Labor Party in the Senate, had accepted an appointment as Australian Ambassador to Ireland.

As Gair's term did not expire until 30 June 1977, his appointment was seen as creating a sixth vacancy in Queensland: there was speculation that the additional vacancy would improve the government's chances of winning a third seat in Queensland and thus improve its chances of securing a majority in the Senate.

Second, while the simultaneous dissolutions of 1914 and 1951 had been granted on the basis of a single bill only, that of 1974 was granted on the basis of six bills believed to meet the terms of section 57 of the Constitution. Subsequently, and again for the first time, one of the bills (following enactment) was challenged in the High Court. The court declared the legislation invalid because the terms of section 57 had not been met.

Finally, the simultaneous elections for the two Houses did not resolve the disagreement and a joint sitting was thus required to consider and enact the legislation upon which the election had been based.

The 1974 general elections for both Houses were the climax of disagreements between the two following the general election of 1972. At that election the ALP secured a majority in the House by winning 68 seats to 58 won by the Opposition parties. It thus formed a government for the first time in 23 years. The party position in the Senate, however, remained as it had been since 1 July 1971: ALP, 26; Liberal, 21; Country Party, 5; Democratic Labor Party, 5; Independents, 3.

From the commencement of the Parliament it was clear that the Senate would continue to be a forum of vigorous scrutiny of the government as it had been especially in the previous half decade. Indeed, in the debate on the Address-in-Reply, Senate Opposition Leader, Senator Withers, reminded the Senate that it had been deliberately created by the founding fathers to act as a check and a balance and that it might well be called upon to protect the national interest by exercising its undoubted constitutional rights and powers.

In considering the background to the simultaneous dissolutions of 1974 it is sensible to distinguish those aspects which relate directly to legislation, and thus potentially fall within the scope of section 57, and other, general proceedings of the Parliament including scrutiny of regulations, statutory rules and the like.

Four bills were postponed. Two, relating to seas and submerged lands, were initially postponed in order to allow the states to consult each other or to make representations to the Commonwealth Government. In postponing consideration of the legislation it was explained that such a course was consistent with the Senate's role as a states assembly and that the step was taken in the knowledge that all six state premiers (3 ALP; 2 Liberal; 1 Country Party) were opposed.

The government, however, reintroduced the bills in the House instead of bringing on the bills on the Senate notice paper for debate.

The second Seas and Submerged Lands Bill was eventually amended on the ground that the proposed mining code vested too much power in the minister; the second Seas and Submerged Lands (Royalty on Minerals) Bill was rejected as having no relevance following rejection of the mining code.

The Compensation (Commonwealth Employees) Bill 1973 was postponed, inter alia, to await a report on national rehabilitation and compensation from a committee chaired by Mr Justice Woodhouse. Consideration was resumed in committee of the whole on 11 December 1973; on motion by an Opposition senator, progress was reported and further consideration deferred until the first sitting day of the Senate after 21 February 1974.

The Constitution Alteration (Inter-change of Powers) Bill 1973 was deferred until after its proposals had been considered by all state governments and by the Australian Constitutional Convention.

Three bills were referred to committees: the Constitution Alteration (Simultaneous Elections) Bill 1973 to the Standing Committee on Constitutional and Legal Affairs (a move deemed by the government to be a failure to pass); the Australian Industry Development Corporation Bill 1973 and the National Investment Fund Bill 1973 to a Select Committee on Foreign Ownership and Control.

The following legislation was amended and the amendments were accepted by the House of Representatives:

- Pipeline Authority Bill 1973
- Cities Commission Bill 1973
- Australian National Airlines Bill 1973
- Australian Citizenship Bill 1973
- States Grants (Advanced Education) Bill 1973
- States Grants (Universities) Bill 1973
- Australian Capital Territory (House of Representatives) Bill 1973

- Schools Commission Bill 1973
- States Grants (Schools) Bill 1973.

The House did not, however, accept Senate amendments to the Constitution Alteration (Mode of Altering the Constitution) Bill 1973. A second bill, amended in similar manner, was laid aside at the third reading because it did not pass the Senate by an absolute majority as required by the Constitution.

The following bills were rejected by the Senate:

- Commonwealth Electoral Bill (No. 2) 1973: second reading negatived on 17 May 1973; after an interval of three months, bill again passed by House of Representatives; second reading negatived in Senate on 29 August 1973.

- Conciliation and Arbitration Bill 1973: second reading negatived on 6 June 1973. (A second bill passed by House but not in same terms, certain contentious provisions being eliminated or amended. Thirty amendments made to the second bill, all of which were accepted by the House.)

- Senate (Representation of Territories) Bill 1973: Second reading negatived on 7 June 1973; after interval of three months, bill again passed by the House; second reading negatived by Senate on 14 November 1973.

- Representation Bill 1973: Second reading negatived on 7 June 1973; after interval of three months, bill again passed by House (27 September 1973) but second reading negatived by Senate (14 November 1973).

- Constitution Alteration (Democratic Elections) Bill: second reading negatived (4 December 1973).

- Constitution Alteration (Local Government Bodies) Bill: second reading negatived (4 December 1973).

- Health Insurance Commission Bill 1973: second reading negatived (13 December 1973). In addition, the second reading of the Health Insurance Bill 1973 was rejected by way of amendment (12 December 1973).

- Petroleum and Minerals Authority Bill 1973: received from House of Representatives on 13 December 1973; debate adjourned until first sitting day in February 1974; restored to notice paper following prorogation on 12 March 1974; second reading negatived on 2 April 1974.

By the time that the Opposition declared its intention to block appropriation legislation on 4 April 1974, three bills, the Commonwealth Electoral Bill (No. 2) 1973; Senate (Representation of Territories) Bill 1973; and Representation Bill 1973, provided the basis for a simultaneous dissolution. In the period leading up to the Proclamation dissolving the Parliament on 11 April 1974, the government reintroduced, and the Senate negatived, the two Health Insurance Bills and

the Petroleum and Minerals Authority Bill (although the latter was negatived for the first time in the Senate on 2 April 1974, the government appeared to argue that the three months period commenced on 12 December 1973 when the House of Representatives first passed the bill, an argument subsequently rejected by the High Court).

The government's proposals for amending the Constitution were also rejected by the Senate. Such legislation, however, is governed by special procedures set down in section 128 of the Constitution rather than by the provisions of section 57. Under the second paragraph of section 128, legislation proposing a referendum, if passed by either House by an absolute majority, and is, in the same form, passed again by an absolute majority after an interval of three months, may be submitted to the electors even if the other house rejects or fails to pass it, or passes it with any amendment to which the first-mentioned house will not agree. Accordingly, the Senate's concurrence was not necessarily required in order to hold a referendum to amend the Constitution.

It was, however, not only in legislation that the government experienced vigorous second chamber scrutiny. Scrutiny manifested itself with particular force in four matters during 1973.

On 7 March 1973 the Opposition successfully moved disallowance of a determination of the Public Service Arbitrator increasing annual leave of public servants from three to four weeks but in effect confining eligibility to members of the staff associations which made application to the Arbitrator. The determination was disallowed on the basis that public servants should not be compelled to join a union in order to enjoy a benefit which it was considered should be in the nature of a common rule. It was also considered that as the Public Service Act made explicit provision for three weeks annual leave, the appropriate method for introducing an entitlement of four weeks was by way of amending the legislation. The Public Service Act was subsequently amended for this purpose. The Senate later (29 March 1973) disallowed the Matrimonial Causes Rules. Opposition to these rules included argument that, while the Senate was not opposed to divorce reform, the rules were not consistent with the Act and were of a nature that should be implemented by legislation, not by executive regulations.

Terrorist activity in Australia was another issue. The Senate considered that a board of inquiry consisting of three High Court or Supreme Court justices should be established by the government to inquire into terrorist activity in Australia and the actions of the Attorney-General in entering the Canberra and Melbourne offices of the Australian Security Intelligence Organisation, accompanied by Commonwealth police officers. The Senate's opinion was expressed in a resolution which was agreed to on 12 April 1973 (J.124-5).

The government, however, declined to appoint the proposed board of inquiry. The Senate responded by proposing (on the motion of the Democratic Labor Party) that a select committee be appointed on civil rights of migrant Australians, including the circumstances surrounding and relevant to the Attorney-General's actions in relation to ASIO. This motion was negatived on 10 May 1973, when the government cancelled pairs, the government contending that "all pairs are off" if there is anything which amounts to a vote of confidence, and the proposed inquiry, it was argued, involved that question in relation to the Attorney-General. It was further argued that the non-government parties had broken convention by not providing that the proposed committee

should have a chair from the government side and also a majority of government votes even if (as was the case) the government were in a minority on the floor of the Senate.

The breaking of pairs which led to the defeat of the select committee motion caused considerable bitterness and the Leader of the Opposition (Senator Withers) announced that, at the next sitting, he would give notice for the rescission of the vote negativing the appointment of the select committee. This was done and, on 17 May 1973, the Senate reversed the vote of 10 May and a Select Committee on Civil Rights of Migrant Australians was appointed, consisting of seven senators, three to be nominated by the Leader of the Government in the Senate and four other senators, one to be nominated by the Leader of the Opposition in the Senate, one to be nominated by the Leader of the Democratic Labor Party, one to be nominated by the Leader of the Australian Country Party in the Senate and one Independent senator to be nominated by the independent senators.

There was speculation in the press as to whether the government would nominate members to the committee. In the event, government senators served on the committee. (The committee had not reported when both Houses were dissolved on 11 April 1974 and the committee was not re-appointed in the new Parliament.)

Added to these non-legislative disputes was the matter of the Address-in-Reply. To the usual motion for the adoption of a formal Address-in-Reply, the Leader of the Opposition (Senator Withers) moved an amendment criticising the government's economic, defence and foreign policies. There was precedent in 1914 for an amendment critical of government policies but, as in 1914, the government in 1973 believed there were other forms of the Senate to propose such matters and, as the session proceeded, the Address-in-Reply debate was put aside for consideration of the legislative program. The Address-in-Reply, as amended, was eventually agreed to on 30 August 1973, and presented on 19 September, but no government senator attended Government House for the presentation of the address.

On 10 April 1974 the Prime Minister advised a simultaneous dissolution based on six bills:

> Commonwealth Electoral Bill (No. 2) 1973;
> Senate (Representation of Territories) Bill 1973;
> Representation Bill 1973;
> Health Insurance Commission Bill 1973;
> Health Insurance Bill 1973;
> Petroleum and Minerals Authority Bill 1973.

He claimed that each proposed law was of "importance to the Government". He also drew attention to other legislation which, he asserted, had "in one way or another been the subject of unreasonable obstruction in the Senate". The Prime Minister referred also to legislation proposing amendments to the Constitution, and to Opposition action concerning Appropriation bills.

Prime Minister Whitlam also made reference to previous simultaneous dissolutions. That of 1914, he wrote, had been granted partly on the basis that a dissolution of the House alone "might

well not resolve the political situation, and that a situation under section 57 of the Constitution being in existence, a dissolution of both Houses should be ordered".

With reference to the simultaneous dissolution in 1951, the Prime Minister observed that Prime Minister Menzies had drawn attention to "difficulties" relating to other legislation and "that this indicated a continuing conflict between the two Houses".

He concluded: "It is the Government's view that the present circumstances are analogous to those in which the earlier dissolutions were granted ...".

The Governor-General's reply was, however, confined to the matter as it related to section 57. He wrote to the Prime Minister: "As it is clear to me that grounds for granting a double dissolution are provided by the Parliamentary history of the six bills ..., it is not necessary for me to reach any judgment on the wider case you have presented that the policies of the government have been obstructed by the Senate. It seems to me that this is a matter for judgment by the electors".

The Prime Minister's advice included, as an attachment, an opinion of the Attorney-General and the Solicitor-General on application of section 57 to more that one proposed law. Their view was "that section 57 of the Constitution is applicable to more than one law at each of the stages it refers to". The Attorney-General also furnished detailed advice on the application to each proposed law of section 57.

In responding to the Prime Minister the Governor-General stated that, in agreeing to the advice tendered on simultaneous dissolutions, he had "accepted the learned Opinion of the Attorney-General on the requirements for the exercise of the Governor-General's power under section 57 and the Joint Opinion of the Attorney-General and the Solicitor-General on the question whether section 57 is applicable to more than one proposed law".

Having regard to the provisions of section 128, the Prime Minister recommended and the Governor-General agreed that four questions seeking amendment of the Constitution would be submitted to the people although the relevant legislation had not passed the Senate. The questions concerned simultaneous elections, the mode of altering the Constitution, democratic elections and local government bodies. None was endorsed by a majority of the voters and in only one state, New South Wales, were the proposals supported by a majority.

The documents relating to the dissolutions were tabled on 30 October 1975 (PP 257/1975).

Simultaneous dissolutions of 1975

The simultaneous elections for both Houses on 18 May 1974 did not resolve the political situation which led to its calling. The government retained a majority in the House of Representatives, albeit reduced (66-61). The party situation in the Senate was ALP, 29; Liberal, 23; National Country Party, 6; Liberal Movement, 1; and Independent, 1. During the course of the Parliament the government's position was further weakened by the resignation, in February 1975, of the Attorney-General, Senator Murphy (New South Wales), who was replaced by an independent, Senator Cleaver Bunton, and the death of Senator Milliner (Queensland) on 30 June

1975. Senator Milliner was replaced by Senator Albert Field, also an independent, whose eligibility to sit was immediately challenged. (The decision of the two state governments not to appoint nominees of the parties of the senators whose resignation or death had caused the casual vacancy was unprecedented in the period since introduction of proportional representation in 1948. The method of filling casual vacancies was the subject of successful amendment of the Constitution in 1977.)

After the new Parliament opened, the first business centred upon the six bills which had formed the grounds for the simultaneous dissolution. These bills again failed to pass the Senate. A joint sitting of the two Houses was convened in the House of Representatives chamber in the provisional Parliament House on 6-7 August 1974. Numbers favoured the government in the Joint Sitting (95-92) and the six bills were enacted, although the *Petroleum and Minerals Authority Act 1974* was later declared to be invalid by the High Court on the basis that its passage did not conform to the requirements of section 57.

The parliamentary crisis, however, deepened in the course of the Parliament. From the start the government laid grounds for a possible simultaneous dissolution of the Parliament, including in the event that appropriation legislation did not pass the Senate. By the end of 1974 there were three bills (Health Insurance Levy Assessment Bill 1974; Health Insurance Levy Bill 1974; and Income Tax (International Agreements) Bill 1974) meeting the stipulations of section 57. By the time that the Houses were dissolved on 11 November 1975, the total was 21.

During 1975 the political climate was influenced by the decision to appoint Senator Murphy to the High Court and his replacement by an independent senator on the ground, in the words of then Liberal Premier of New South Wales, Tom Lewis, that it was a "contrived vacancy"; the circumstances of Speaker Cope's resignation on 27 February 1975; controversies concerning overseas loans, including special sittings of both Houses in July; the result of the Bass by-election occasioned by the resignation of Defence Minister Lance Barnard on appointment as Australian Ambassador to Denmark; selection of independent Senator A. Field by the Queensland Parliament to fill the casual vacancy caused by the death of Senator Milliner (ALP, Qld); and the dismissals of the Deputy Prime Minister (Dr J.F. Cairns) and the Minister for Minerals and Energy (Mr R.F.X. Connor).

In March 1975 Mr Malcolm Fraser replaced Mr B.M. Snedden as Leader of the Opposition in the House of Representatives. In a press conference at the time he said that governments should run a full term except in the event of unforeseen and reprehensible circumstances. The Opposition in the Senate remained active in examination of legislation and the list of rejected and twice rejected bills continued to increase. As the time for consideration of the appropriation legislation arising from the 1975 Budget grew closer there seemed little doubt that the Prime Minister would not be as acquiescent to the blocking of funds by the Senate as he had been in April 1974.

There was, at the same time, speculation that the government would seek to restore its parliamentary position by a periodical election for half the Senate, to be held before 30 June 1976. Some calculations indicated that the government might, without delay, be able to add sufficiently to its numbers in the Senate, expanded to 64 by the High Court's decision to uphold the validity of the Senate (Representation of Territories) Act, to win control at least where

Budget legislation was concerned. This speculation hinged on Labor candidates successfully filling the vacancies created by Senator Murphy's resignation and Senator Milliner's death, success for former Prime Minister John Gorton in the ACT contest (combined with that of the ALP candidate), and an affirmative vote from Senator Steele Hall, Liberal Movement, South Australia. This strategy depended, inter alia, on the agreement of state governors to issue the necessary writs.

On 15 October 1975 the Opposition announced that its members in the Senate would vote against the Loan Bill 1975, Appropriation Bill (No. 1) 1975-76, and Appropriation Bill (No. 2) 1975-76. The motion for the second reading of these bills would be amended to the effect that the legislation "be not further proceeded with until the Government agrees to submit itself to the judgment of the people, the Senate being of the opinion that the Prime Minister and his Government no longer have the trust and confidence of the Australian people ...".

The Prime Minister responded the following day with a detailed resolution in the House of Representatives in which the claim was made that "the Constitution and the conventions of the Constitution vest in [the House of Representatives] the control of the supply of moneys to the elected Government and that the threatened action of the Senate constitutes a gross violation of the roles of the respective Houses of Parliament in relation to the appropriation of moneys".

The reference in the resolution to the House of Representatives' control of the supply of money is true only to the degree that initiative in money matters is vested in that House; the Senate has constitutional power to defer or reject all bills. Any contention that there is a convention that the Senate should not defer or reject money bills is insupportable:

(1) When the executive government first sought funds in 1901, the Senate deferred the passing of supply until the government acknowledged that the provision of supply was a joint grant of the two Houses.

    The Senate followed up in 1904 by resolving that an Address be presented to the Governor-General praying His Excellency that, on all occasions when opening or proroguing Parliament, due recognition should be made of the constitutional fact that the providing of revenue and the grant of supply is the joint act of the Senate and the House of Representatives, and not of the House of Representatives alone.

(2) In 1974 the Opposition in the Senate moved to defer the appropriation bills until the government agreed to submit itself to the judgment of the people. The then Leader of the Government in the Senate (Senator Murphy) moved the closure to the Opposition's motion, declaring that if the closure motion were defeated, the government would treat that as a denial of supply and that the Prime Minister would then tender certain advice to the Governor-General. The closure motion was defeated and Parliament was dissolved the next day, 11 April 1974.

(3) See also appendix 6 listing money bills in respect of which the Senate has not only made requests for amendments but has pressed its requests until complied with by the House of Representatives.

(4) Tax bills which passed the House of Representatives but were rejected by the Senate include the Entertainments Tax Bill 1920, Lessee Tax Bill (No. 2) 1924 and Income Tax Bill 1965.

(5) Precedents in the Australian states for upper houses denying supply to a government include: 1878 Victoria; 1912 South Australia; 1947 Victoria; 1948 Tasmania; 1952 Victoria.

Furthermore, on 18 June 1970 (SD, p. 2647) the then Leader of the Opposition in the Senate (Senator Lionel Murphy, QC, Australian Labor Party) said:

> The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money bill or other financial measure whenever necessary to carry out our principles and policies. The Opposition has done this over the years, and, in order to illustrate the tradition which has been established, with the concurrence of honourable senators I shall incorporate in Hansard at the end of my speech a list of the measures of an economic or financial nature, including taxation and appropriation bills, which have been opposed by this Opposition in whole or in part by a vote in the Senate since 1950.

Addressing himself to the Appropriation Bill (No. 1) 1970-71, the then Leader of the Opposition in the House of Representatives, Mr E.G. Whitlam, QC, said on 25 August 1970:

> Let me make it clear at the outset that our opposition to the Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it. (HRD, p. 463.)

As foreshadowed by Mr Whitlam, the Australian Labor Party in the Senate voted against the third reading of Appropriation Bill (No. 1) 1970-71 and also against the third reading of the Appropriation Bill (No. 2) 1970-71; the voting on the first bill was 25 Ayes and 23 Noes and on the second bill 24 Ayes and 23 Noes.

On 1 October 1970, Mr Whitlam, speaking in the House of Representatives with reference to the receipts duties legislation, said:

> We all know that in British parliaments the tradition is that, if a money bill is defeated, as the receipts duties legislation was defeated last June [by the Senate], the government goes to the people to seek their endorsement of its policies. (HRD, pp 1971-2.)

In the above-mentioned statements, Mr Whitlam was referring to the rejection of a money bill. On 21 October 1975 (pp 2301-2), Mr Whitlam drew attention to the fact that the Senate had deferred, not rejected, the appropriation bills 1975-76. Because the Senate had not rejected the appropriation bills, they were still before the Senate and it was open to the Senate to pass the bills.

The next parliamentary development was on 21 October 1975 when the House of Representatives resolved to send a message to the Senate asserting that the action of the Senate

in delaying the passage of the appropriation bills was not contemplated within the terms of the Constitution and was contrary to established constitutional convention, and requesting the Senate to reconsider and pass the bills without delay. The Leader of the Government in the Senate (Senator Wriedt), in response, proposed a motion for the restoration of the appropriation bills to the notice paper. The next day, however, the Opposition successfully moved an amendment declaring that there was no convention and never had been any convention that the Senate should not exercise its constitutional powers. The Senate affirmed that it had the constitutional right to act as it had and, now that there was a disagreement between the Houses of Parliament and a position might arise where the normal operations of government could not continue, a remedy was available to the government under section 57 of the Constitution to resolve the deadlock. In the debate, government and Opposition again declared their determination not to back down.

On 23 October 1975 the Senate considered two further appropriation bills sent to it by the House of Representatives. These bills were identical in every respect to Appropriation Bill (No. 1) 1975-76 and Appropriation Bill (No. 2) 1975-76, consideration of which had been deferred by the Senate on 16 October 1975 until the government agreed to submit itself to the judgment of the people. The second bills met the same fate as the first bills, being deferred until the government agreed to an election. Thus the deadlock continued, the Senate contending that the remedy was available to the government under section 57 of the Constitution (the simultaneous dissolutions provision) and the Prime Minister adamant that while he commanded a majority in the House of Representatives there would be no election for that House at the behest of the Senate.

Over the following weeks the government and Opposition engaged in various stratagems but the crisis remained unresolved:

- 27 October 1975: Mr Khemlani, a central figure in the overseas loan raising controversies, returned to Australia. Neither the government nor Opposition responded to his proposal for a Senate hearing.

- 29 October 1975: the Opposition in the Senate gave notice of motion for appointment of a select committee to inquire into aspects of the overseas loan raising activities of the government, but the motion was not proceeded with.

- 30 October 1975: the Governor-General spoke to the Prime Minister and the Leader of the Opposition in the House of Representatives. Following the talks, both leaders reaffirmed their determination not to give in and the deadlock remained.

- The Leader of the Opposition in the House suggested a compromise — passage of the Budget bills in return for an undertaking to hold a general election for the House and a periodical election for the Senate before 1 July 1976. The compromise was rejected.

- 5 November 1975: a government motion to restore the appropriation bills to the Senate notice paper was negatived. Further, identical appropriation bills were sent by the House. Although the bills were declared to be urgent bills, the Opposition again successfully moved that the bills be not further proceeded with until the government had submitted itself to the people.

- 5 November 1975: Loan Bill 1975 again blocked.

- 11 November 1975: the Prime Minister and the Leader of the Opposition met at 9 am. They did not reach agreement. When the House met at 11.45 am the Opposition moved to censure the government; the government countered with a resolution censuring the Leader of the Opposition.

During the luncheon adjournment the Governor-General dismissed the Prime Minister and commissioned the Leader of the Opposition to form a caretaker government which was able "to secure supply and willing to let the issue go to the people".

The Governor-General issued a statement on his decisions of 11 November 1975. He wrote that it was necessary for him "to find a democratic and constitutional solution to the current crisis which will permit the people of Australia to decide as soon as possible what should be the outcome of the deadlock which developed over supply between the two Houses of Parliament and between the Government and the Opposition parties".

He stated that "the Senate undoubtedly has constitutional power to refuse or defer supply to the Government. Because of the principles of responsible government a Prime Minister who cannot obtain supply, including money for carrying on the ordinary services of government, must either advise a general election or resign".

The Governor-General drew a distinction between the Commonwealth Parliament and that of the United Kingdom, pointing out that under the Constitution of Australia "the confidence of both Houses on supply is necessary to ensure its provision".

In a detailed statement of reasons the Governor-General stated that he had come to the conclusion that there was "no likelihood of a compromise". He considered that "When ... an Upper House possesses the power to reject a money bill including an appropriation bill, and exercises the power by denying supply, the principle that a government which has been denied supply by the Parliament should resign or go to an election must still apply — it is a necessary consequence of Parliamentary control of appropriation and expenditure and of the expectation that the ordinary and necessary services of Government will continue to be provided".

Of the Senate, the Governor-General wrote: "It was denied power to originate or amend appropriation bills but was left with power to reject them or defer consideration of them. The Senate accordingly has the power and has exercised the power to refuse to grant supply to the Government".

He specifically observed that he would have rejected advice for a periodical election of senators because such an election "held whilst supply continues to be denied does not guarantee a prompt or sufficiently clear prospect of the deadlock being resolved in accordance with proper principles".

Chief Justice Barwick in a letter of 10 November 1975 to the Governor-General, pointed to the Senate's position in the parliamentary framework specified by the Constitution: "The Parliament

consists of two houses, the House of Representatives and the Senate, each popularly elected, and each with the same legislative power, with the one exception that the Senate may not originate nor amend a money bill". And again: "... the Senate has constitutional power to refuse to pass a money bill; it has power to refuse supply to the Government of the day. Secondly, a Prime Minister who cannot ensure supply to the Crown, including funds for carrying on the ordinary services of Government, must either advise a general election (of a kind which the constitutional situation may then allow) or resign".

In the House of Representatives, Malcolm Fraser, now Prime Minister, announced that he had accepted the Governor-General's commission and that he would seek to secure passage of appropriation legislation then before the Senate. He also stated that all bills in a double dissolution position would be put forward as the basis for the dissolution.

While these proceedings were continuing in the House of Representatives, the Senate had resumed at 2 pm and dealt with some other business. At 2.20 pm the first Order of the Day was called on by the Clerk, the consideration of Message No. 406 from the House of Representatives (J.1022-3) calling upon the Senate to pass the appropriation bills without further delay. The Order of the Day having been called on, Senator Wriedt moved:

> That, responding to Message No. 406 of the House of Representatives again calling upon the Senate to pass without further delay the Appropriation Bill (No. 1) 1975-76 and the Appropriation Bill (No. 2) 1975-76, and responding to the Resolution of the Senate agreed to on 6 November on the voices and without division that the Appropriation bills are urgent bills, and in the public interest, so much of the Standing Orders be suspended as would prevent a Question being put by the President forthwith — That the bills be now passed — which Question shall not be open to debate or amendment. (J.1031)

The motions were agreed to on the voices and the appropriation bills passed the Senate. Then the Senate suspended at 2.24 pm, not to meet again until after general elections for both Houses, the date of which was subsequently fixed for 13 December 1975.

The extraordinary feature of the proceedings was that the Senate was not advised that there had been a change of government during the luncheon adjournment. If the Senate had been advised of the change of government, it is unlikely that the former Government Leader in the Senate would have proceeded with the passing of supply. Obviously Senator Withers (Leader of the Opposition when the Australian Labor Party was in office) knew what the position was and he did not oppose a speedy passage of the appropriation bills.

If the Senate had been informed of the dismissal of the Whitlam ministry, the course of events might have been different. For example, the Australian Labor Party senators could have delayed the calling on of the appropriation bills by moving motions to bring on other business. Having a majority, the Liberal-National Country Party senators would eventually have taken charge of the business of the Senate, but they would have had problems. If Senator Withers had moved the motion proposed by Senator Wriedt, and if the motion had been opposed by Australian Labor Party senators, it would have failed unless carried by 31 affirmative votes, being an absolute majority for the suspension of the standing orders without notice as required by then standing order 48. To muster 31 votes, the support of Senator Steele Hall (Liberal Movement) or Senator Bunton (Independent) would have been required. There were, therefore, procedures and

circumstances which might have upset any timetable for a dissolution of the Parliament on 11 November 1975, but the final act could only have been delayed, not changed.

In the House of Representatives, the Prime Minister (Mr Fraser), having announced the change of government, moved that the House adjourn, but the motion was negatived by 64 Labor votes to the new government's 55 votes. Thereupon Mr Whitlam (as Leader of the Australian Labor Party) moved: "That this House expresses its want of confidence in the Prime Minister and requests Mr Speaker forthwith to advise His Excellency the Governor-General to call the honourable Member for Werriwa (Mr Whitlam) to form a Government". It was argued that, the budget bills having been passed by the Senate, there was no longer a deadlock between the two Houses, the party Mr Whitlam led had the confidence of the House, and that Mr Whitlam should therefore be called to form a government. As an argument it fails, because obviously the Senate agreed to supply on the understanding that an election would ensue. Also, a government which lacks the confidence of the House may properly appeal to the electorate, which is what Mr Fraser's government did.

The House of Representatives, by 64 Labor Party votes to 54 for Mr Fraser's Government, carried the motion of want of confidence in the Prime Minister, Mr Fraser. Mr Speaker announced that he would convey the advice to the Governor-General at the first opportunity and the House then suspended from 3.15 pm to 5.30 pm, but it was destined not to meet again till after the general elections for both Houses on 13 December 1975.

If there had been more time for thought, other procedures might have been devised. For example, the Labor Party might have considered stalling proceedings in the Senate while the Labor Party majority in the House of Representatives put through a motion rescinding all votes on the appropriation bills and sending a message to the Senate acquainting that House of the decision of the House of Representatives and desiring the return of the bills. If the Senate ignored a request for the return of the appropriation bills and went ahead and passed them notwithstanding a message from the House of Representatives that all votes on the bills had been rescinded, conceivably the House could have instructed the Speaker that the bills were not to be presented to the Governor-General for assent. Failing the passing of supply, presumably there would have been simultaneous dissolutions and an election with what funds were available and with what arrangements could be made for the services of the government until the meeting of the new Parliament.

The bills forming the basis for the simultaneous dissolutions of the Senate and the House of Representatives were, as cited in the Proclamation of 11 November 1975:

Health Insurance Levy Bill 1974
Health Insurance Levy Assessment Bill 1974
Income Tax (International Agreements) Bill 1974
Minerals (Submerged Lands) Bill 1974
Minerals (Submerged Lands) (Royalty) Bill 1974
National Health Bill 1974
Conciliation and Arbitration Bill 1974
Conciliation and Arbitration Bill (No. 2) 1974
National Investment Fund Bill 1974

Electoral Laws Amendment Bill 1974
Electoral Bill 1975
Privy Council Appeals Abolition Bill 1975
Superior Court of Australia Bill 1974
Electoral Re-distribution (New South Wales) Bill 1975
Electoral Re-distribution (Queensland) Bill 1975
Electoral Re-distribution (South Australia) Bill 1975
Electoral Re-distribution (Tasmania) Bill 1975
Electoral Re-distribution (Victoria) Bill 1975
Broadcasting and Television Bill (No. 2) 1974
Television Stations Licence Fees Bill 1974
Broadcasting Stations Licence Fees Bill 1974.

Mr Fraser's caretaker government was sworn in on Wednesday, 12 November 1975, and comprised himself as Prime Minister and 14 other ministers, the ratio between the Houses being 9 members of the House of Representatives and 6 senators.

The same day, 12 November 1975, the Speaker of the House of Representatives (Mr Scholes) addressed a letter to the Queen, communicating his concern at the maintenance in office of Mr Fraser as Prime Minister despite his lack of majority support in the House of Representatives and asking for the restoration of Mr Whitlam as prime minister. The reply from Buckingham Palace, dated 17 November 1975, advised that the only person competent to commission a Prime Minister in Australia was the Governor-General, and the Queen had no part in the decisions which the Governor-General must take in accordance with the Constitution.

The elections were held on 13 December 1975 and the result was a win for the Liberal-National County Party coalition by 55 seats in the House of Representatives and by 6 in the Senate. The party composition in the two Houses was as follows: House of Representatives — Liberal, 68; National Country Party, 23; ALP, 36; Senate — Liberal, 27; National Country Party, 8; ALP, 27, Liberal Movement, 1; Independent, 1.

It is of interest, in reflecting on the events of October/November 1975, to consider what might have happened if there had been no twice rejected bill or bills upon which to base simultaneous dissolutions of the two Houses.

It was argued at the time that, the disagreement between the Houses being in relation to supply, the constitutional process of section 57 of the Constitution should have been followed with respect to the appropriation bills. That is to say that, the Senate having failed to pass the appropriation bills on the first occasion, there should have been an interval of three months, the bills resubmitted and, if they again failed to pass the Senate, then a dissolution of the Parliament might have ensued.

The weakness of that argument is that, without supply for three months, the machine of government could come to a halt. Obviously, the government of the country cannot remain at a standstill for months while constitutional requirements for a double dissolution based on an appropriation bill are being satisfied.

Therefore, if there had been no twice rejected bill or bills upon which to base a simultaneous dissolution at the time when the Senate withheld supply in 1975, a dissolution of the House of Representatives alone would appear to have been inevitable.

It is also of interest to consider whether, notwithstanding that proposed laws were available for the purpose of a double dissolution pursuant to section 57 of the Constitution, the refusal of supply by the Senate might have been resolved by a dissolution of the House of Representatives pursuant to section 5 and 28 of the Constitution and not by a dissolution of both Houses pursuant to section 57. That could have happened, but in all the circumstances it was fair that both Houses should have been dissolved, and that was what the Senate resolution advocated.

The simultaneous dissolutions of 1974 and 1975 may be regarded as affirming that a government which has been denied supply by the Senate cannot govern and should advise a general election or resign. If a prime minister refuses to take either course, the Governor-General has constitutional authority to make other arrangements for the carrying on of the government. The difficult question is always likely to be when and in what way the Governor-General might invoke the reserve powers. While circumstances will govern such decision-making, the presumption must always be that the Constitution and the public interest will prevail over all other considerations.

In 1982 the Senate passed the Constitution Alteration (Fixed Term Parliaments) Bill 1982. The bill would have provided that the House of Representatives could not be dissolved except in the circumstance of no person being able to form a government with the support of the House, or under section 57 of the Constitution. If a House were dissolved more than three months before the expiration of its term its successor would last only till the end of that term. These provisions would have overcome the difficulties highlighted by the 1975 simultaneous dissolutions, in that they would have effectively removed the ability of the Senate to force an early House of Representatives election by refusing supply. Although introduced and supported by the Australian Labor Party, the bill was abandoned after that party came to government in 1983.

For a proposal to ensure that both Houses would be dissolved in the event of a Senate rejection of supply, see the Constitution Alteration (Appropriation Bills) Bill 1983 (agreed to by the Senate, but failed to gain absolute majority, 13/10/1983, J.386).

For a proposal to allow the government access to appropriations equal to those of the previous year in the event of a Senate rejection or failure to pass supply, see the Constitution Alteration (Appropriations for the Ordinary Annual Services of the Government) Bill 1987 (introduced but not considered, 23/9/1987, J.111).

Simultaneous dissolutions of 1983

Following the general election for the House of Representatives and the periodical election for the Senate in October 1980, the Fraser Government had a secure majority in the House (82-66), but after 1 July 1981 only 31 votes in a Senate of 64 (the Opposition had 27, Australian Democrats 5 and Independent 1).

The government's minority situation was revealed in consideration of Sales Tax Amendment Bills (Nos 1A to 9A) 1981. These proposed laws were finally passed by the House on 27 August 1981, and received by the Senate on the same day. Following debate in the Senate, the bills were returned to the House on 23 September 1981 requesting amendments. The House resolved on 14 October 1981 not to make the requested amendments. The Senate considered the House's position and declined to pass a resolution "that the requests be not pressed," the effect of which was to press the requests. This action, it was argued in the Prime Minister's advice to the Governor-General recommending simultaneous dissolution of the two Houses, constituted "failure to pass": "Pressing the requests was simply prevarication," the Prime Minister claimed.

In the event, the requests were returned to the House which declined to consider the message containing them. The bills were not again considered by the House and on 7 May 1982 the relevant Order of the Day was discharged from the notice paper.

In the meantime, on 16 February 1982, bills in the same form were again presented to the House of Representatives. They were passed the following day and transmitted to the Senate on 18 February 1982. After debate the Senate declined, on 10 March 1982, to give the bills a second reading.

Other bills, Social Services Amendment Bill (No. 3) 1981, States Grants (Tertiary Education Assistance) Amendment Bill (No. 2) 1981, Australian National University Amendment Bill (No. 3) 1981 and the Canberra College of Advanced Education Bill 1981, were also cited as coming within section 57 for simultaneous dissolution purposes when Prime Minister Malcolm Fraser, on 3 February 1983, tendered advice to Governor-General Stephen. All of these bills had been twice rejected outright by the Senate.

According to the Prime Minister, the 13 proposed laws were "of importance to the Government's budgetary, education and welfare policies". A second consideration was that Australia was facing "a very difficult economic period with potentially great social consequences". He continued:

> It is of paramount importance in facing the difficult economic circumstances that lie ahead that the Government knows that it has the full confidence of the Australian people and that the Australian people have full confidence in its Government's ability to point the way towards recovery. I regard this as of such paramount importance that on this issue alone I believe that I am justified in asking Your Excellency to dissolve the Parliament and issue writs for a general election in both Houses. (PP 129/1984, p. 5)

Later in the day the Prime Minister wrote, in further correspondence with the Governor-General:

> ... I regard a double dissolution as critical to the workings of the Government and of the Parliament.
>
> Clearly, there is a need for the Government, in the critical period we face, to have decisive control over both Houses of Parliament. Even though the last session continued well past its normal time, indeed close to Christmas, some significant Government legislation was not passed by the Senate. There are measures that we have not even put to the Parliament because we know that they would not achieve passage through the Senate. (*ibid*., p. 41)

In responding the Governor-General wrote that he had satisfied himself that there existed measures meeting "the description of measures such as are referred to in section 57 of the Constitution". He continued:

> Such precedents as exist, together with the writings on section 57 of the Constitution, suggest that in circumstances such as the present, I should, in considering your advice, pay regard to the importance of the measures in question and to the workability of Parliament.
>
> I note that your letter states that the thirteen proposed laws are "of importance to the Government's budgetary, education and welfare policies". I also note that in the case of each of these measures a considerable time has passed since they were rejected or not passed for a second time in the Senate. I have considered their nature; the nine Sales Tax measures seek to impose tax on a range of goods now exempt; three of the other measures provide for the limited re-introduction of tuition fees in tertiary education institutions; the last measure, a social service measure, seeks to preclude spouses of those involved in industrial action from receiving unemployment and special benefits.
>
> As to the importance of these measures, viewed in the context of the extraordinary nature of a double dissolution, I am not myself in any position, from their mere subject matter and context, to form a view about the particular importance of any of them.
>
> It was in those circumstances that I spoke with you by telephone early this afternoon about the workability of Parliament, seeking further advice from you on that score; this was a matter to which you had already referred, in a prospective sense, in your original letter.
>
> As a result of your second letter to me, in which you speak of difficulties of the immediate past and described a double dissolution as critical to the workings of the Government and of the Parliament, I am now satisfied that in accordance with your advice I should dissolve the Senate and the House of Representatives simultaneously. I note your assurance as to the availability of funds to enable the work of the administration to be carried on through the election period. (*ibid.*, p. 43-4)

At the election, actually fought on issues of economic management, interest rates, industrial relations and union power, saw a victory for the Opposition which won 75 seats in the House of Representatives to 50 for the Liberal-National parties. The result in the Senate contest was: ALP, 30; Liberal, 24; National, 4; Australian Democrats, 5; and Independent, 1.

The simultaneous dissolution of 1983 again highlighted "grey areas" in relation to disagreements between the Houses. One was the stockpiling of several bills in anticipation of simultaneous dissolution, a matter to which the Governor-General referred when he eventually accepted the Prime Minister's advice ("... a considerable time has passed since [the proposed laws] were rejected or not passed for a second time in the Senate" [*ibid*., p. 43]). At least in circumstances where there is no withholding of supply by the Senate, such a use of stockpiled bills, perhaps stale and unrelated to a particular situation, does not appear to be within the intent of section 57 of the Constitution.

It was to meet this aspect of simultaneous dissolution practice that Senator David Hamer (Liberal, Victoria) proposed amendment to the Constitution so that such dissolutions had to take place within three months of the Senate rejecting or otherwise failing to pass a bill for the second time (Constitution Alteration (Double Dissolution) Bill 1983; agreed to by the Senate but failed to gain absolute majority, 13/10/1983, J.386-7).

A new and more contentious element in the events leading to the simultaneous dissolution of 1983 is the treatment of the sales tax bills. As the above account shows, the initial parliamentary consideration of these bills ended in the House, not the Senate. The fault lay with the House in deliberately and wrongly breaking off communication with the Senate and shelving the bills. The issue of the Senate's right to press suggested amendments to bills which it may not amend is addressed in Chapter 13, Financial Legislation.

At the time it was contended that sufficient grounds for simultaneous dissolutions existed on the basis of the legislative history of the sales tax bills. Whether the Governor-General would have been satisfied that the Senate had failed to pass the bills on the first occasion is an interesting question.

Simultaneous dissolutions of 1987

The simultaneous dissolutions of the House of Representatives and the Senate on 5 June 1987 were, by comparison with other such dissolutions, relatively straightforward. A single proposed law, the Australia Card Bill, was involved. The bill was unquestionably of major significance to the government and had been unambiguously rejected by the Senate on two occasions in clear conformity with the time requirements of section 57.

The Australia Card Bill 1986 was presented to the House of Representatives and read a first time on 22 October 1986. It completed its passage through the House on 14 November and was received by the Senate, and read a first time, on 17 November 1986. On 10 December 1986 the Senate refused to give the bill a second reading.

The bill was presented to the House of Representatives again on 18 March 1987 and read a first time. It was read a second time on 25 March 1987, declared an urgent bill, and read a third time on the same day.

The bill was received by the Senate and read a first time on 26 March 1987. Following debate the Senate again refused to give the bill a second reading on 2 April 1987.

On 27 May 1987 the Prime Minister advised the Governor-General to dissolve the House and the Senate simultaneously on 5 June 1987. In his letter the Prime Minister wrote:

> I advise you to exercise your power under section 57 of the Constitution and dissolve simultaneously the Senate and the House of Representatives on 5 June, with a view to elections for both Houses being held on Saturday 11 July 1987.
>
> The provisions of the Constitution for a double dissolution are set out in the first paragraph of section 57 ...
>
> I advise that all conditions justifying a double dissolution have been established. The Senate has twice rejected the Australia Card Bill 1986 in a manner which brings this proposed law directly within the provisions of section 57 and your power to dissolve both Houses. The prohibition in the last sentence quoted above does not apply as the term of the House of Representatives does not expire until 21 February 1988.
>
> The Australia Card Bill 1986 is an integral part of the Government's tax reform package and is aimed at restoring fairness to the Australian taxation and social welfare systems. By providing a

> basic national system of personal identification, together with broad and effective protections for individual privacy, the Bill would help to ensure that every Australian pays his or her fair share of tax and that benefits from the welfare system go properly and only to those in need.
>
> The Government considers that introduction of the Australia Card would result in savings of considerable magnitude — the most conservative estimate by the Australian Taxation Office of revenue gains in the tax area alone being $724 million a year once the program is fully operational. Department estimates of savings which would accrue in social security and medicare expenditures are of the order of $153 million, so that the total gain to public resources from this measure would be of the order of $877 million. This makes it the single most effective weapon available to the Government for combating tax evasion and welfare fraud and an important element in the Government's program of economic reform to meet the challenge of difficult economic circumstances. My Government believes that it is bound at this time to seize every reasonable opportunity, such as is afforded by this Bill, to reduce the budgetary deficit and thus to underpin our progress towards economic recovery.
>
> The Australia Card Bill which has been obstructed by the Senate is a fundamental part of the Government's legislative program both in terms of its economic impact and in terms of the principle of equity it represents. Not only has the Senate frustrated this critical measure but it has also obstructed a number of other measures including various taxation bills such as the Taxation (Unpaid Company Tax) Assessment Amendment Bill 1985.
>
> The Senate has been spending large amounts of time debating matters of marginal significance, with the effect of reducing substantially the time available for proper consideration of essential government legislation. The imposition of artificial deadlines by the Senate on receipt of government bills for passage has exacerbated this problem. Just today the Senate has refused to reconsider the Government's legislation to extend television services to rural areas.
>
> In summary, I regard the situation which has arisen in the Parliament as critical to the workings of the Government and the Parliament. (PP 331/1987, pp 1-2)

The Governor-General replied later the same day:

> I am satisfied that circumstances such as are specified in S57 of the Constitution exist in relation to the Australia Card Bill and that I should dissolve both Houses of the Parliament simultaneously in accordance with your advice.
>
> I note your assurances that funds will be available which will ensure that the work of the administration can continue through the election period. I note, too, your intention to table in the Parliament your letter and my reply to it. (*ibid*., p. 5)

A proclamation dissolving the two Houses was accordingly issued by the Governor-General on 5 June 1987.

The government was returned at the general election on 11 July 1987 by 86 seats to 62 in the House of Representatives. However, it remained in a minority in the Senate (32-44).

The Australia Card legislation was again passed by the House of Representatives on 16 September 1987. During second reading debate in the Senate the Opposition released details of advice that the legislation, to be effective, would be dependent on certain action taken by regulations. These regulations would be liable to disallowance in the Senate. Government attempts to forestall disallowance by seeking passage of a resolution stating that the Senate affirmed "that it will, consequent upon the passage of the Australia Card Bill at a joint sitting of the Houses, secure the effective operation of the legislation by not disallowing regulations" did

not succeed. The bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on 23 September 1987.

On 8 October 1987 the Senate resolved on the motion of the government that the committee report the bill on or before the next sitting without further considering the bill or matters referred in relation to it, and that on receipt of the report the bill be laid aside without further question being put. It was then open to the government, on the basis that it could claim that the Senate had again failed to pass the bill, to advise the Governor-General to call a joint sitting of the two Houses, at which the government would have had a majority to pass the bill. The resulting statute, however, could have been rendered inoperative by the disallowance by the Senate of any regulations made under it. This problem could not be overcome by amendment of the bill, because under section 57 a bill submitted to a joint sitting must be the bill as last proposed by the House of Representatives together with any amendments proposed by one House and not agreed to by the other. There were no such amendments which could be put to a joint sitting. Any amendment would have to be made after the bill's passage and would require the consent of the Senate. (On the question of the same bill under s. 57, and the amendments which may be put to a joint sitting, see below and C.K. Comans, 'Constitution, section 57 — further questions', *Federal Law Review*, 15:3, September 1985, p. 243.)

The government therefore decided to abandon the bill.

Joint sittings of the Houses

Simultaneous dissolutions of the two Houses of the Parliament do not necessarily ensure that the proposed law(s) in dispute between them will be settled. As has been noted, the two Houses constitute distinctive reflections of electoral opinion and, particularly when it is closely divided, it is possible that there will be different majorities in the two Houses following simultaneous elections.

In the history of simultaneous dissolutions the consequent elections have brought the disputes decisively to a conclusion on four occasions, 1914, 1951, 1975 and 1983. On only one of these occasions, 1951, was the government whose legislation was at stake returned to office and in that instance it also secured a majority in the Senate.

On two occasions, however, the resulting elections have not been sufficient to resolve the fate of the legislation in dispute. In 1974, the Whitlam Government, although supported by a majority in the House, still lacked support for the disputed legislation in the Senate. As a consequence, a joint sitting was convened as provided for in paragraphs 2 and 3 of section 57:

> If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.
>
> The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House

> of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

The requirements for a joint sitting are thus that following simultaneous elections for the two Houses, the proposed law must again be passed by the House of Representatives, "with or without any amendments which have been made, suggested, or agreed to by the Senate". If the Senate then rejects, or fails to pass the proposed law(s) or passes it (them) with amendments to which the House does not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

At the joint sitting the members present "may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives".

The joint sitting is empowered to consider amendments proposed by one House and not agreed by the other. To take effect these amendments must be affirmed by an absolute majority of the total number of senators and members of both Houses. The wording of this provision concerning amendments presents some difficulties of interpretation, concerning which see C.K. Comans, 'Constitution, section 57 — further questions', *Federal Law Review*, 15:3, September 1985, p. 243. The provision does not allow the government to submit to a joint sitting completely new provisions which have not previously been considered by the Senate, as this would amount to de facto unicameralism for any legislation following a simultaneous dissolution. The provision refers only to amendments agreed to by the Senate and amendments proposed by the House in substitution for Senate amendments prior to the dissolution. It may be doubted whether the provision allows the submission of amendments to a bill to which the Senate agreed where the Senate subsequently rejected the bill at the third reading (see also above, under Constitutional provisions and their application, section 11).

The proposed law itself, with the amendments, if any, must likewise be affirmed by an absolute majority of the total number of senators and members.

Following the simultaneous dissolutions of April 1974 the six proposed laws in dispute were submitted to the new Parliament for consideration. They were swiftly passed by the House of Representatives, where the guillotine was employed, but again were rejected by the Senate. A joint sitting of the two Houses was therefore convened for 6-7 August 1974 to deliberate and vote upon each of the six bills "as last proposed by the House of Representatives" (Proclamation of 30 July 1974).

Prior to the joint sitting, however, two senators sought injunctions from the High Court to prevent it from proceeding. Issues in question concerned consideration of more than one proposed law at a joint sitting; "stockpiling" of bills prior to simultaneous dissolutions; the meaning of "failure to pass" in relation to one of the proposed laws; the effect of prorogation on bills which already met the requirements of section 57; and specification in the Proclamation of the proposed legislation to be considered at the joint sitting. The Court refused to grant interim injunctions: *Cormack v Cope* 1974 131 CLR 432. The issues in question were ultimately determined in later challenges to laws enacted at the joint sitting. Briefly, the Court saw no

objection to more than one bill forming the basis for simultaneous dissolutions; nor did it consider that prorogation altered the status of a bill so far as section 57 requirements were concerned. It did, however, eventually hold one of the six laws enacted on this occasion to be invalid on the basis that the timetable specified in section 57 had not been observed: *Victoria v Commonwealth* 1975 7 ALR 1.

So far as the joint sitting itself was concerned there were questions about the proclamation. In answering them there was a divergence of opinion in the Court, ranging from Chief Justice Barwick, who held that specification of the proposed laws to be considered may invalidate the proclamation, through views that specification was unnecessary, to positive statements that the proclamations should always state the proposed laws which are the subject of double dissolution and joint sitting. There are advantages in specifying the proposed laws being considered, for this in effect provides the basis for an agenda.

Prior to the joint sitting, rules for its conduct were drawn up and adopted by the two Houses. These are set out in *ASP*, 6th ed., pp 1052-6.

The rules provided only for those procedures which appeared to be necessary for the consideration of proposed laws under section 57 of the Constitution and they kept as close as possible to standard parliamentary practices. An exception was in the mode of putting the question on a proposed law, namely: "That the proposed law be affirmed". Because amendments could not be moved at the joint sitting to any of the proposed laws, it was considered unnecessary to take a bill through the usual three readings and committee stage. Other rules provided for a 20 minute time limit on all speeches, relief for the Chair, closure of debate, and suspension of the rules (those relating to the 20 minute time limit on speeches and the closure could not be suspended). In any matter of procedure not provided for in the rules, the Standing Orders of the Senate were to be followed as far as they could be applied.

The venue for the joint sitting was the chamber of the House of Representatives in the provisional Parliament House. The rules provided that members and senators should address the joint sitting from lecterns provided on either side of the chair.

In sittings of each House prior to the joint sitting, other bills were introduced to enact amendments to the Parliamentary Papers Act, the Parliamentary Proceedings Broadcasting Act, and the Evidence Act, so that those Acts could apply to the proceedings of a joint sitting. The Parliamentary Papers Act was amended to protect the Government Printer in publishing the Hansard report of the joint sitting as well as any papers that might be tabled at the joint sitting. The amendment of the Parliamentary Proceedings Broadcasting Act ensured that the proceedings of the joint sitting could be broadcast and televised and that the Australian Broadcasting Commission would enjoy the same immunity in respect of the broadcasting and televising of a joint sitting as it enjoyed in relation to an ordinary sitting of either House. The amending Evidence Act applied provisions of the Act to a joint sitting, so that judicial notice could be taken of the official signature of the member presiding at a joint sitting, and provided for documents presented at a joint sitting to be admitted in court in evidence.

On the question of freedom of speech at the joint sitting, it was considered that section 49 of the Constitution applied to a joint sitting.

The matter was the subject of a resolution of the Senate:

> That this Senate resolves that it be a rule and order of the Senate that, at a joint sitting with the House of Representatives, the proceedings are proceedings in Parliament, and that the powers, privileges, and immunities of Senators shall, *mutatis mutandis*, be those relating to a sitting of the Senate. (J.117)

A similar resolution was also agreed to by the House of Representatives.

A further question considered was the matter of possible disagreement by the Houses on the proposed rules. Section 50(ii) of the Constitution contemplates that both Houses sitting separately would adopt the rules to apply to the joint sitting. Failing agreement being reached by both Houses, it was thought possible that a joint sitting might have sufficient authority to draw up its own rules. A further suggestion was that the joint sitting might resolve to adopt the standing orders and practices of the Senate as far as they could be applied, in accordance with the parliamentary convention that the procedure of a joint committee of the two Houses follows the procedure of committees of the Senate when such procedure differs from that of committees of the House whether the chair is a member of the House or not. Following that guideline, it was suggested that the joint sitting might resolve that the standing orders and practices of the Senate apply to the procedure of the joint sitting, subject to certain modifications, which would include such matters as the mode of putting questions and speaking times.

All proceedings of the joint sitting were broadcast by the Australian Broadcasting Commission and a complete sound record was made for archival purposes.

The joint sitting occupied two days, 6-7 August 1974, and the six proposed laws named in the Governor-General's proclamation were all affirmed by an absolute majority of the total number of the members of the Senate and of the House of Representatives, as required by section 57 of the Constitution. The bills were so certified by the Joint Clerks, presented to the Governor-General, and assented to. As noted above, one of the laws was subsequently held to be invalid by the High Court.

The simultaneous dissolutions of 1987, based on the Australian Card Bill 1986, had a simpler and speedier resolution. Once again, the government proposing the legislation secured a majority in the House but failed to do so in the Senate. The proposed legislation was promptly introduced, again passing the House. The bill was then sent to the Senate. During the second reading debate in the Senate, it was pointed out that the bill depended for its operation upon regulations which could be disallowed by the Senate. The bill was then abandoned by the government, thus obviating the possibility of a joint sitting.

Reform of section 57

Section 57 of the Constitution was intended to provide a mechanism for resolving deadlocks between the two Houses in relation to important legislation. By judicial interpretation, and by the misuse of the section by prime ministers over the years, it now appears that simultaneous dissolutions can be sought in respect of any number of bills; that there is no time limit on the seeking of simultaneous dissolutions after a bill has failed to pass for the second time; that a

ministry can build up a "storehouse" of bills for simultaneous dissolutions; that the ministry which requests simultaneous dissolutions does not have to be the same ministry whose legislative measures have been rejected or delayed by the Senate; that virtually any action by the Senate other than passage of a measure may be interpreted as a failure to pass the measure, at least for the purposes of the dissolutions; and that the ministry does not need to have any intention to proceed with the measures which are the subject of the supposed deadlock after the elections. By putting up a bill which is certain of rejection by the Senate on two occasions, a ministry, early in its life, can thus give itself the option of simultaneous dissolutions as an alternative to an early election for the House of Representatives. This gives a government a de facto power of dissolution over the Senate which it was never intended to have, and greatly increases the possibility of executive domination of the Senate as well as of the House of Representatives:

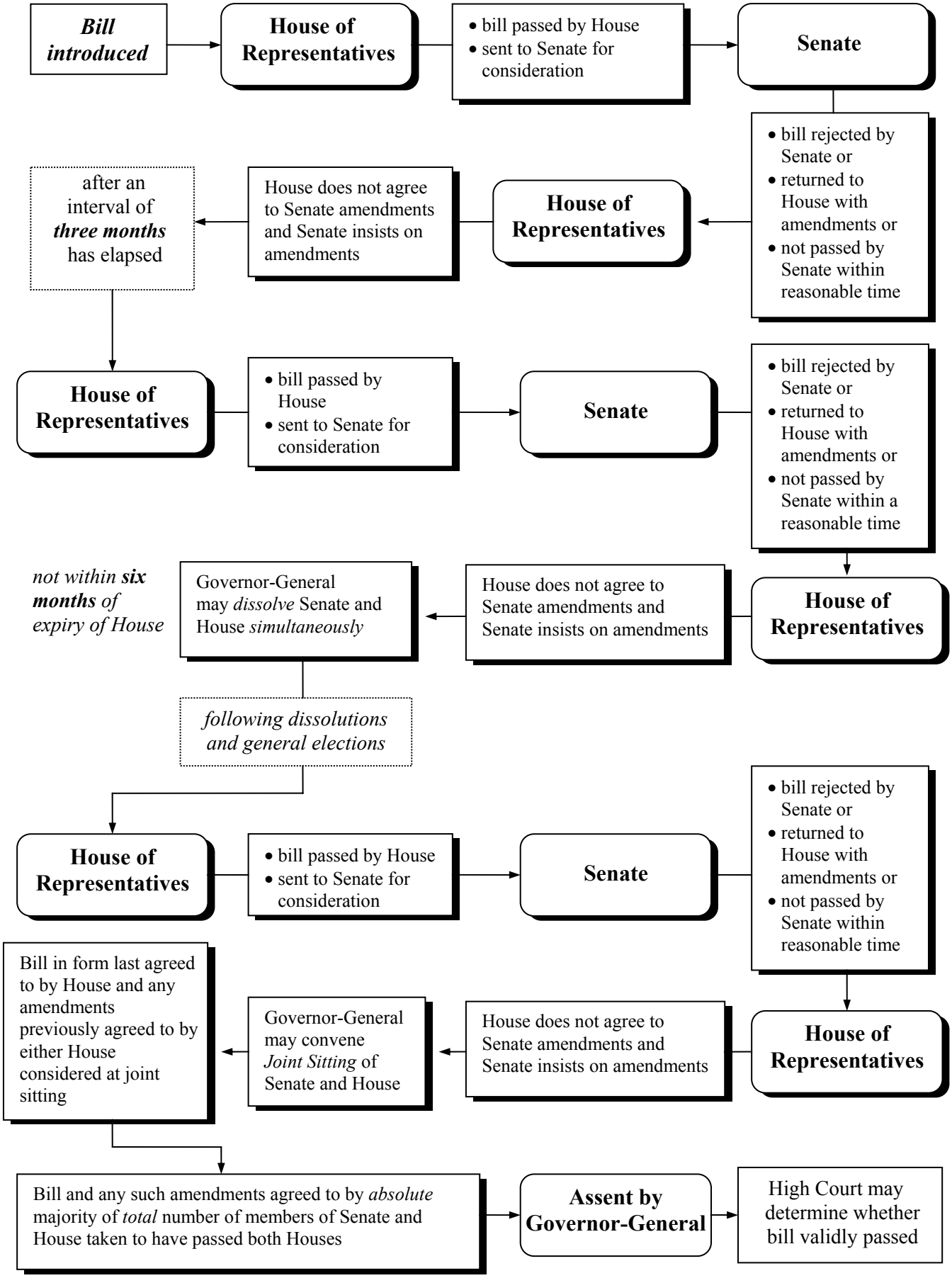
> The power of a double dissolution is one of the reserve powers of the Constitution and should only be resorted to on great and urgent occasions involving momentous issues of legislative policy. (John Quick, *The Legislative Powers of the Commonwealth and the States of Australia*, 1919, p. 641)

Consideration should be given to a reform of section 57 to restrict the power of a ministry to go to simultaneous dissolutions as a matter of political convenience. In order to restrict section 57 to its intended purpose, a limitation should be placed on the number of measures which may be the subject of a request for dissolutions, time limits should be placed upon such dissolutions in relation to the rejection of the measures in question, and a prime minister should be required to certify that the measures in question are essential for the ministry to carry on and that it is the intention of the ministry to proceed with the measures should it remain in office, and the Governor-General should be required to be satisfied independently as to those matters. Any ambiguity as to the amendments which may be submitted to a joint sitting should also be removed.

In October 2003 the then Prime Minister announced that he was considering a scheme of constitutional amendment, supposedly to "reform" section 57, but in effect either to allow legislation to bypass the Senate or to give the Prime Minister greater control over the electoral cycle. A consultative group appointed by the Prime Minister reported in 2004 that the electors would not approve such schemes. (15/6/2004, J.3439-40; letter from the Clerk of the Senate to the consultative group, 4/11/2003)

A simpler method of resolving disagreements between the Houses could be sought without, unlike such proposals, giving a government in control of the House of Representatives unfettered power to legislate by decree. At the Constitutional Convention of 1897, a proposal was considered to refer legislation in disagreement to a referendum, to allow the electors to resolve the issue. This would provide a wholly democratic method of resolution without destroying the essential safeguard of bicameralism.

DISAGREEMENT BETWEEN THE HOUSES
SECTION 57 OF THE CONSTITUTION



PARLIAMENTARY PRIVILEGES ACT 1987

Act No. 21 of 1987 as amended

TABLE OF PROVISIONS

Section

PARLIAMENTARY PRIVILEGES ACT 1987

An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes

1. Short title [see Note 1]

This Act may be cited as the *Parliamentary Privileges Act 1987*.

2. Commencement [see Note 1]

This Act shall come into operation on the day on which it receives the Royal Assent.

3. Interpretation

(1) In this Act, unless the contrary intention appears:

committee means:

(a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act; or

(b) a sub-committee of a committee referred to in paragraph (a).

court means a federal court or a court of a State or Territory.

document includes a part of a document.

House means a House of the Parliament.

member means a member of a House.

tribunal means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power.

(2) For the purposes of this Act, the submission of a written statement by a person to a House or a committee shall, if so ordered by the House or the committee, be deemed to be the giving of evidence in accordance with that statement by that person before that House or committee.

(3) In this Act, a reference to an offence against a House is a reference to a breach of the privileges or immunities, or a contempt, of a House or of the members or committees.

3A. Application of the Criminal Code

(1) Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) To avoid doubt, subsection (1) does not apply the *Criminal Code* to an offence against a House.

4. Essential element of offences

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

5. Powers, privileges and immunities

Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

6. Contempts by defamation abolished

(1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Subsection (1) does not apply to words spoken or acts done in the presence of a House or a committee.

7. Penalties imposed by Houses

(1) A House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House determined by that House to have been committed by that person.

(2) A penalty of imprisonment imposed in accordance with this section is not affected by a prorogation of the Parliament or the dissolution or expiration of a House.

(3) A House does not have power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this section.

(4) A resolution of a House ordering the imprisonment of a person in accordance with this section may provide that the President of the Senate or the Speaker of the House of Representatives, as the case requires, is to have power, either generally or in specified circumstances, to order the discharge of the person from imprisonment and, where a resolution so provides, the President or the Speaker has, by force of this Act, power to discharge the person accordingly.

(5) A House may impose on a person a fine:

(a) not exceeding $5,000, in the case of a natural person; or

(b) not exceeding $25,000, in the case of a corporation;

for an offence against that House determined by that House to have been committed by that person.

(6) A fine imposed under subsection (5) is a debt due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by a House for that purpose.

(7) A fine shall not be imposed on a person under subsection (5) for an offence for which a penalty of imprisonment is imposed on that person.

(8) A House may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this section into effect.

8. Houses not to expel members

A House does not have power to expel a member from membership of a House.

9. Resolutions and warrants for committal

Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

10. Reports of proceedings

(1) It is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and the defamatory matter was contained in a fair and accurate report of proceedings at a meeting of a House or a committee.

(2) Subsection (1) does not apply in respect of matter published in contravention of section 13.

(3) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

11. Publication of tabled papers

(1) No action, civil or criminal, lies against an officer of a House in respect of a publication to a member of a document that has been laid before a House.

(2) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

12. Protection of witnesses

(1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

Penalty:

(a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of:

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given;

before a House or a committee.

Penalty:

(a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

(3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee.

13. Unauthorised disclosure of evidence

A person shall not, without the authority of a House or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or

(b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalty:

(a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

14. Immunities from arrest and attendance before courts

(1) A member:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause;

on any day:

(c) on which the House of which that member is a member meets;

(d) on which a committee of which that member is a member meets; or

(e) which is within 5 days before or 5 days after a day referred to in paragraph (c) or (d).

(2) An officer of a House:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause;

on any day:

(c) on which a House or a committee upon which that officer is required to attend meets; or

(d) which is within 5 days before or 5 days after a day referred to in paragraph (c).

(3) A person who is required to attend before a House or a committee on a day:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause;

on that day.

(4) Except as provided by this section, a member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or a tribunal or from arrest or detention in a civil cause by reason of being a member or such an officer or person.

15. Application of laws to Parliament House

It is hereby declared, for the avoidance of doubt, that, subject to section 49 of the Constitution and this Act, a law in force in the Australian Capital Territory applies according to its tenor (except as otherwise provided by that or any other law) in relation to:

(a) any building in the Territory in which a House meets; and

(b) any part of the precincts as defined by subsection 3(1) of the *Parliamentary Precincts Act 1988*.

16. Parliamentary privilege in court proceedings

(1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***proceedings in Parliament*** means 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, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:

(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or

(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:

(a) a question arising under section 57 of the Constitution; or

(b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

17. Certificates relating to proceedings

For the purposes of this Act, a certificate signed by or on behalf of the President of the Senate, the Speaker of the House of Representatives or a chairman of a committee stating that:

(a) a particular document was prepared for the purpose of submission, and submitted, to a House or a committee;

(b) a particular document was directed by a House or a committee to be treated as evidence taken in camera;

(c) certain oral evidence was taken by a committee in camera;

(d) a document was not published or authorised to be published by a House or a committee;

(e) a person is or was an officer of a House;

(f) an officer is or was required to attend upon a House or a committee;

(g) a person is or was required to attend before a House or a committee on a day;

(h) a day is a day on which a House or a committee met or will meet; or

(i) a specified fine was imposed on a specified person by a House;

is evidence of the matters contained in the certificate.

Notes to the *Parliamentary Privileges Act 1987*

Note 1

The *Parliamentary Privileges Act 1987* as shown in this compilation comprises Act No. 21, 1987 amended as indicated in the Tables below.

For all relevant information pertaining to application, saving or transitional provisions *see* Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
Parliamentary Privileges Act 1987	21, 1987	20 May 1987	20 May 1987	
Parliamentary Precincts Act 1988	9, 1988	5 Apr 1988	Ss. 1–4, 7 and 14 (in part): Royal Assent S. 11: 6 May 1988 (*see Gazette* 1988, No. S129) Remainder: 1 Aug 1988 (*see Gazette* 1988, No. S229)	S. 12
Law and Justice Legislation Amendment Act (No. 3) 1992	165, 1992	11 Dec 1992	Schedule (Note): Royal Assent *(a)*	—
Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001	24, 2001	6 Apr 2001	S. 4(1), (2) and Schedule 38: *(b)*	S. 4(1) and (2)

Act Notes

(a) The *Parliamentary Privileges Act 1987* was amended by the Schedule (Note) only of the *Law and Justice Legislation Amendment Act (No. 3) 1992*, subsection 2(1) of which provides as follows:

(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.

(b) The *Parliamentary Privileges Act 1987* was amended by Schedule 38 only of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*, subsection 2(1)(a) of which provides as follows:

(1) Subject to this section, this Act commences at the later of the following times:

(a) immediately after the commencement of item 15 of Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*;

Item 15 commenced on 24 May 2001.

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 3A	ad. No. 24, 2001
Heading to s. 14	am. No. 165, 1992
S. 15	am. No. 9, 1988

Table A

Application, saving or transitional provisions

Parliamentary Precincts Act 1988 (No. 9, 1988)

12. Saving of powers, privileges and immunities

Nothing in this Act shall be taken to derogate from the powers, privileges and immunities of each House, and of the members and committees of each House, under any other law.

Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001 (No. 24, 2001)

4. Application of amendments

(1) Subject to subsection (3), each amendment made by this Act applies to acts and omissions that take place after the amendment commences.

(2) For the purposes of this section, if an act or omission is alleged to have taken place between 2 dates, one before and one on or after the day on which a particular amendment commences, the act or omission is alleged to have taken place before the amendment commences.

Appendix 2

PARLIAMENTARY PRIVILEGE

RESOLUTIONS AGREED TO BY THE SENATE ON 25 FEBRUARY 1988

CONTENTS

Page No.

PARLIAMENTARY PRIVILEGE

RESOLUTIONS AGREED TO BY THE SENATE ON 25 FEBRUARY 1988

1. Procedures to be observed by Senate committees for the protection of witnesses

That, in their dealings with witnesses, all committees of the Senate shall observe the following procedures:

(1) A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.

(2) Where a committee desires that a witness produce documents relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents be produced shall be made (whether or not an invitation to produce documents has previously been made) only where the committee has made a decision that the circumstances warrant such an order.

(3) A witness shall be given reasonable notice of a meeting at which the witness is to appear, and shall be supplied with a copy of the committee's order of reference, a statement of the matters expected to be dealt with during the witness's appearance, and a copy of these procedures. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken.

(4) A witness shall be given opportunity to make a submission in writing before appearing to give oral evidence.

(5) Where appropriate, reasonable opportunity shall be given for a witness to raise any matters of concern to the witness relating to the witness's submission or the evidence the witness is to give before the witness appears at a meeting.

(6) A witness shall be given reasonable access to any documents that the witness has produced to a committee.

(7) A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for that decision.

(8) Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all

or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.

(9) A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.

(10) Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.

(11) Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall give consideration to hearing that evidence in private session.

(12) Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.

(13) Where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (12) is not taken in respect of the evidence, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance before the committee.

(14) A witness may make application to be accompanied by counsel and to consult counsel in the course of a meeting at which the witness appears. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an

application is not granted, the witness shall be notified of reasons for that decision.

(15) A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which the witness appears.

(16) An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.

(17) Reasonable opportunity shall be afforded to witnesses to make corrections of errors of transcription in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.

(18) Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the Senate.

2. Procedures for the protection of witnesses before the Privileges Committee

That, in considering any matter referred to it which may involve, or gives rise to any allegation of, a contempt, the Committee of Privileges shall observe the procedures set out in this resolution, in addition to the procedures required by the Senate for the protection of witnesses before committees. Where this resolution is inconsistent with the procedures required by the Senate for the protection of witnesses, this resolution shall prevail to the extent of the inconsistency.

(1) A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the Committee and relevant to the Committee's inquiry, against the person, and of the particulars of any evidence which has been given in respect of the person.

(2) The Committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:

(a) making written submission to the Committee;

(b) giving evidence before the Committee;

(c) having other evidence placed before the Committee; and

(d) having witnesses examined before the Committee.

(3) Where oral evidence is given containing any allegation against, or reflecting adversely on, a person, the Committee shall ensure as far as possible that that person is present during the hearing of that evidence, and shall afford all reasonable opportunity for that person, by counsel or personally, to examine witnesses in relation to that evidence.

(4) A person appearing before the Committee may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance.

(5) A witness shall not be required to answer in public session any question where the Committee has reason to believe that the answer may incriminate the witness.

(6) Witnesses shall be heard by the Committee on oath or affirmation.

(7) Hearing of evidence by the Committee shall be conducted in public session, except where:

(a) the Committee accedes to a request by a witness that the evidence of that witness be heard in private session;

(b) the Committee determines that the interests of a witness would best be protected by hearing evidence in private session; or

(c) the Committee considers that circumstances are otherwise such as to warrant the hearing of evidence in private session.

(8) The Committee may appoint, on terms and conditions approved by the President, counsel to assist it.

(9) The Committee may authorise, subject to rules determined by the Committee, the examination by counsel of witnesses before the Committee.

(10) As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate.

(11) The Committee may recommend to the President the reimbursement of costs of representation of witnesses before the Committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee, the President may

make reimbursement of all or part of such costs as the President considers reasonable.

(12) Before appearing before the Committee a witness shall be given a copy of this resolution.

3. Criteria to be taken into account when determining matters relating to contempt

The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:

(a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;

(b) the existence of any remedy other than that power for any act which may be held to be a contempt; and

(c) whether a person who committed any act which may be held to be a contempt:

(i) knowingly committed that act, or
(ii) had any reasonable excuse for the commission of that act.

4. Criteria to be taken into account by the President in determining whether a motion arising from a matter of privilege should be given precedence of other business

Notwithstanding anything contained in the Standing Orders, in determining whether a motion arising from a matter of privilege should have precedence of other business, the President shall have regard only to the following criteria:

(a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and

(b) the existence of any remedy other than that power for any act which may be held to be a contempt.

5. Protection of persons referred to in the Senate

(1) Where a person who has been referred to by name, or in such a way as to be readily identified, in the Senate, makes a submission in writing to the President:

(a) claiming that the person has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person; and

(b) requesting that the person be able to incorporate an appropriate response in the parliamentary record,

if the President is satisfied:

(c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Committee of Privileges; and

(d) that it is practicable for the Committee of Privileges to consider the submission under this resolution,

the President shall refer the submission to that Committee.

(2) The Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Senate.

(3) If the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any Senator who referred in the Senate to that person.

(4) In considering a submission under this resolution, the Committee shall meet in private session.

(5) The Committee shall not publish a submission referred to it under this resolution or its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the Senate.

(6) In considering a submission under this resolution and reporting to the Senate the Committee shall not consider or judge the truth of any statements made in the Senate or of the submission.

(7) In its report to the Senate on a submission under this resolution, the Committee may make either of the following recommendations:

(a) that no further action be taken by the Senate or by the Committee in relation to the submission; or

(b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person and the Committee, be published by the Senate or incorporated in Hansard,

and shall not make any other recommendations.

(8) A document presented to the Senate under paragraph (5) or (7):

(a) in the case of a response by a person who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and

(b) shall not contain any matter the publication of which would have the effect of:

(i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or

(ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.

6. Matters constituting contempts

That, without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.

Interference with the Senate

(1) A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of the Senator's duties as a Senator.

Improper influence of Senators

(2) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Senator in the Senator's conduct as a Senator or induce a Senator to be absent from the Senate or a committee.

Senators seeking benefits etc.

(3) A Senator shall not ask for, receive or obtain, any property or benefit for the Senator, or another person, on any understanding that the Senator will be influenced in the discharge of the Senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Senator's independence or freedom of action as a Senator, or pursuant to which the Senator is in any way to act as the representative of any outside body in the discharge of the Senator's duties.

Molestation of Senators

(4) A person shall not inflict any punishment, penalty or injury upon, or deprive of any benefit, a Senator on account of the Senator's conduct as a Senator.

Disturbance of the Senate

(5) A person shall not wilfully disturb the Senate or a committee while it is meeting, or wilfully engage in any disorderly conduct in the precincts of the Senate or a committee tending to disturb its proceedings.

Service of writs etc.

(6) A person shall not serve or execute any criminal or civil process in the precincts of the Senate on a day on which the Senate meets except with the consent of the Senate or of a person authorised by the Senate to give such consent.

False reports of proceedings

(7) A person shall not wilfully publish any false or misleading report of the proceedings of the Senate or of a committee.

Disobedience of orders

(8) A person shall not, without reasonable excuse, disobey a lawful order of the Senate or of a committee.

Obstruction of orders

(9) A person shall not interfere with or obstruct another person who is carrying out a lawful order of the Senate or of a committee.

Interference with witnesses

(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before

the Senate or a committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

Offences by witnesses etc.

(12) A witness before the Senate or a committee shall not:

(a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;

(b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or

(c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

(13) A person shall not, without reasonable excuse:

(a) refuse or fail to attend before the Senate or a committee when ordered to do so; or

(b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a committee.

(14) A person shall not wilfully avoid service of an order of the Senate or of a committee.

(15) A person shall not destroy, damage, forge or falsify any document required to be produced by the Senate or by a committee.

Unauthorised disclosure of evidence etc.

(16) A person shall not, without the authority of the Senate or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;

(b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or

(c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.

7. Raising of matters of privilege

That, notwithstanding anything contained in the Standing Orders, a matter of privilege shall not be brought before the Senate except in accordance with the following procedures:

(1) A Senator intending to raise a matter of privilege shall notify the President, in writing, of the matter.

(2) The President shall consider the matter and determine, as soon as practicable, whether a motion relating to the matter should have precedence of other business, having regard to the criteria set out in any relevant resolution of the Senate. The President's decision shall be communicated to the Senator, and, if the President thinks it appropriate, or determines that a motion relating to the matter should have precedence, to the Senate.

(3) A Senator shall not take any action in relation to, or refer to, in the Senate, a matter which is under consideration by the President in accordance with this resolution.

(4) Where the President determines that a motion relating to a matter should be given precedence of other business, the Senator may, at any time when there is no other business before the Senate, give notice of a motion to refer the matter to the Committee of Privileges. Such notice shall take precedence of all other business on the day for which the notice is given.

(5) A determination by the President that a motion relating to a matter should not have precedence of other business does not prevent a Senator in accordance with other procedures taking action in relation to, or referring to, that matter in the Senate, subject to the rules of the Senate.

(6) Where notice of a motion is given under paragraph (4) and the Senate is not expected to meet within the period of one week occurring immediately after the day on which the notice is given, the motion may be moved on that day.

8. Motions relating to contempts

That, notwithstanding anything contained in the Standing Orders, a motion to:

(a) determine that a person has committed a contempt; or

(b) impose a penalty upon a person for a contempt,

shall not be moved unless notice of the motion has been given not less than 7 days before the day for moving the motion.

9. Exercise of Freedom of Speech

(1) That the Senate considers that, in speaking in the Senate or in a committee, Senators should take the following matters into account:

(a) the need to exercise their valuable right of freedom of speech in a responsible manner;

(b) the damage that may be done by allegations made in Parliament to those who are the subject of such allegations and to the standing of Parliament;

(c) the limited opportunities for persons other than members of Parliament to respond to allegations made in Parliament;

(d) the need for Senators, while fearlessly performing their duties, to have regard to the rights of others; and

(e) the desirability of ensuring that statements reflecting adversely on persons are soundly based.

(2) That the President, whenever the President considers that it is desirable to do so, may draw the attention of the Senate to the spirit and the letter of this resolution.

10. Reference to Senate proceedings in court proceedings

(1) That, without derogating from the law relating to the use which may be made of proceedings in Parliament under section 49 of the Constitution, and subject to any law and any order of the Senate relating to the disclosure of proceedings of the Senate or a committee, the Senate declares that leave of the Senate is not required for the admission into evidence, or reference to, records or reports of proceedings in the Senate or in a committee of the Senate, or the admission of evidence relating to such proceedings, in proceedings before any court or tribunal.

(2) That the practice whereby leave of the Senate is sought in relation to matters referred to in paragraph (1) be discontinued.

(3) That the Senate should be notified of any admission of evidence or reference to proceedings of the kind referred to in paragraph (1), and the Attorneys-General of the Commonwealth and the States be requested to develop procedures whereby such notification may be given.

11. Consultation between Privileges Committees

That, in considering any matter referred to it, the Committee of Privileges may confer with the Committee of Privileges of the House of Representatives.

PRIVILEGE RESOLUTIONS

RESPONSES TO QUESTIONS RAISED IN DEBATE ON 25 FEBRUARY 1988

(1) Senator Puplick asked (SD, p. 634) whether there would be any difference between publication of a response by a person named in the Senate and incorporation of the response in Hansard. The only difference between the two methods is that when a document is ordered to be published by resolution of the Senate copies are distributed by the Table Office to the normal list of recipients or other inquirers, but the text does not appear in Hansard. It is envisaged that in particular circumstances, e.g., if a response were of considerable length or, possibly, a considerable time had elapsed since the debate in the Senate, the Senate may think it appropriate that the response be published rather than incorporated in Hansard.

(2) Senator Puplick asked (SD, p. 634) whether a response published or incorporated in Hansard would attract absolute privilege. A response published or incorporated would attract absolute privilege; that is why the rules provided that a response be succinct and strictly relevant and not contain anything offensive in character.

(3) Senator Cooney asked (SD, p. 636) about the appropriateness of considering whether a person had a reasonable excuse for committing an act which might be a contempt in relation to such offences as obstructing the Senate in the performance of its functions. Resolution 3 merely indicates that the Senate will consider whether any defence of reasonable excuse is available. Of course, there may be contempts which, by their nature, exclude any defence of reasonable excuse (e.g., threatening a witness), but that does not prevent the Senate from considering whether such a defence is available.

(4) Senator Cooney asked (SD, p. 637) whether questions as to a witness's credit would be regarded as relevant to a matter under inquiry by a committee. As Senator Durack pointed out, the question of whether a question is relevant would be determined in the first instance by the committee. A committee may well regard questions as to the credit of a witness as relevant, depending on the circumstances, but it would be for the committee to decide, subject to any direction by the Senate. The same answer applies to a question asked by Senator Harradine (Hansard p. 638) concerning relevance of questions.

(5) Senator Harradine questioned (SD, pp. 638 and 639) the inclusion of the expression "improperly influence" in the list of matters which may be treated as contempts. Resolution 6, as its terms indicate, is intended to give some guidance as to matters which may be treated as contempts. It is in the nature of the offence concerned that it is not possible to specify in advance all methods of influencing Senators which may be regarded as improper. It is analogous to such statutory offences as attempting to pervert the course of justice.

(6) Senator Harradine asked (SD, p. 638) whether the existence of another remedy for an act which may be held to be a contempt, in the criteria to be taken into account when determining matters relating to contempts, refers to the ability to sue a person for an act which may be held to be a contempt. The criterion does refer to the availability of any civil or criminal remedy, but it does not follow that, as Senator Harradine suggested, no account will be taken of a matter because a civil or criminal remedy is available; it is merely a matter to be considered.

(7) Senator Haines referred (SD, pp. 639 and 640) to the inclusion in the list of matters which may be treated as contempts of the references to influencing Senators and Senators seeking benefits in return for the discharge of their parliamentary duties. That these statements may be too broadly worded was suggested in the explanatory notes accompanying the draft resolutions. Again it must be stressed, however, that Resolution 6 is simply an indication, for the guidance of the public, of matters which may be treated as contempts. The resolution does not commit the Senate Committee to treat any particular matters as contempts, nor does it affect the ability of the Senate to judge particular cases on their merits and according to circumstances. The resolution therefore does not create any difficulties or give rise to any questions which did not exist before the resolution was passed.

COMMITTEE OF PRIVILEGES REPORTS 1966–2008

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Unauthorised Publication of Draft Committee Report (No. 1) PP No. 163/1971	4/5/71 (J.555)	**Senate:**[*] Motion moved by Chairman of Select Committee on Drug Trafficking and Drug Abuse (Senator Marriott) and agreed to 4/5/71	13/5/71 (J.605)	**Findings** • the publication prior to presentation to the Senate of contents of report constituted a breach of the privileges of the Senate • the editor and publisher of the relevant newspapers were the responsible and culpable persons • the Senate has the power to commit to prison, to fine, to reprimand or admonish, or to otherwise withdraw facilities held, by courtesy of the Senate, in and around its precincts **Recommendations** • that the editor and publisher be reprimanded • that any such breach in future be met by a much heavier penalty •	Report adopted 13/5/71 (J.606); persons attended and reprimanded 14/5/71 (J.612)
Executive Government Claim of Privilege (No. 2) PP No. 215/1975	17/7/75 (J.836)	**Senate:** Motion moved by Leader of the Opposition in the Senate (Senator Withers), amendment moved by Leader of Government in the Senate (Senator Wriedt), amendment negatived, motion agreed to 17/7/75	7/10/75 (J.936)	**Findings** • no breach of privilege involved (majority report) • claims of executive privilege were misconceived but that no action should be taken by the Senate (dissenting report)	Motion for adoption of dissenting report debated 17/2/77 (J.571)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Security in Parliament House (No. 3) PP No. 22/1978	4/4/78 (J.88-9)	**Senate:** Motion moved by Senator Button, amendment moved by Senator Chaney agreed to, motion as amended agreed to 4/4/78	30/5/78 (J.207)	**Recommendations** • resolutions should be passed by both Houses to establish the police authority for Parliament's own protection • external and internal policing of Parliament should be within the jurisdiction of one force • a position of security coordinator, directly responsible to the Presiding Officers, should be permanently created • certain methods of identification of members and visitors should be instituted • an effective protection system is necessary for Parliament House and its occupants • details of the agreed system should be incorporated in standing orders	Report noted 17/8/78 (J.310)
Quotation of Unparliamentary Language in Debate (No. 4) PP No. 214/1979	29/5/79 (J.748)	**Senate:** Motion moved by Senator Georges and agreed to 29/5/79	20/9/79 (J.936)	**Finding** • question not a matter of privilege **Recommendation** • matter should be referred to Standing Orders Committee for consideration	Report adopted 20/9/79 (J.936)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Imprisonment of a Senator (No. 5) PP No. 273/1979	30/8/79 (J.901-2)	**Senate:** Motion moved by Senator Georges and agreed to 30/8/79	25/10/79 (J.1000)	**Finding** • imprisonment of a certain senator did not attract the privilege of freedom from arrest **Recommendations** • that certain resolutions relating to notification of detention of senators should be agreed to • if resolutions agreed to, Commonwealth and State Presiding Officers and Attorneys-General should confer upon action to be taken to secure compliance	Resolutions agreed to 26/2/80 (J.1153)
Harassment of a Senator (No. 6) PP No. 137/1981	26/5/81 (J.271-2)	**Senate:** Motion moved by Senator Harradine and agreed to 26/5/81	11/6/81 (J.388)	**Finding** • contempt found but no action recommended other than adoption of report	Report adopted 22/10/81 (J.591)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Unauthorised Publication of Committee Evidence taken *in camera* (No. 7) PP No. 298/1984	14/6/84 (J.992), 22/8/84 (J.1029)	**Senate:** Motion moved by Chairman of Select Committee on the Conduct of a Judge (Senator Tate) and agreed to 14/6/84 Motion moved by Chairman of Committee of Privileges (Senator Childs) and agreed to 27/8/84	17/10/84 (J.1243)	**Findings** • publication constituted serious contempt of Senate • editor and publisher of relevant newspaper should be held responsible and culpable for the publication • author of articles culpable for the contempt • publications were based on unauthorised disclosure by unknown person(s), and that such disclosure, if wilfully and knowingly made, constitutes serious contempt of Senate • that committee would report on the question of penalty after persons affected place submissions before committee	Report adopted 24/10/84 (J.1295)
Question of Appropriate Penalties Arising from the 7th Report of the Committee (No. 8) PP No. 239/1985	27/2/85 (J.64)	**Senate:** Motion moved by Chairman of Standing Committee of Privileges (Senator Childs) and agreed to 27/2/85	23/5/85 (J.317)	**Recommendations** • that no penalty be imposed at that time but that if further offence committed within the remainder of the session of Parliament consideration be given to imposing an appropriate penalty for present offence • that legislation be introduced to put the power of the Houses of Parliament to fine beyond doubt	—

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
The Improper Disclosure and Misrepresentation by a Departmental Officer of an Amendment Prepared for Moving in the Senate (No. 9) PP No. 506/1985	23/4/85 (J.193)	**Senate:** Motion moved by Senator Haines and agreed to 23/4/85	16/9/85 (J.454)	**Recommendation** • that matter be not further pursued	Report adopted 18/9/85 (J.470)
Detention of a Senator (No. 10) PP No. 433/1986	13/11/85 (J.594)	**Senate:** Motion moved by Senator Reynolds and agreed to 13/11/85	5/12/86 (J.1571)	**Recommendations** • that certain resolutions be passed • that the Senate give consideration to the alteration of the immunity from arrest and detention	Resolutions agreed to 18/3/87 (J.1693-4)
The Circulation of Petitions (No. 11) PP No. 46/1988	16/3/88 (J.556)	**Senate: Advisory Report** President determined precedence to notice of motion 15/3/88, motion moved by Leader of the Opposition in the Senate (Senator Chaney) 16/3/88, amendment moved by Senator Collins agreed to, motion as amended agreed to 16/3/88.	2/6/88 (J.843)	**Findings** • that the circulation of petitions is not absolutely privileged and is probably not subject to qualified privilege • that a change to the law would be required if Parliament were to determine that circulation of petitions should be privileged • that the circulation of petitions containing defamatory matter should not be privileged • that the circulation of most petitions requires no special protection and that therefore no change to present law is warranted	Report noted 2/11/88 (J.1065)
Person Referred to in the Senate — Mr T. Motion (No. 12) PP No. 385/1988	30/11/88	**President**	7/12/88 (J.1264)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 13/12/88 (J.1297)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Person Referred to in the Senate — Mr I R Cornelius (No. 13) PP No. 386/1988	12/12/88	**President**	14/12/88 (J.1314)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 14/12/88 (J.1314)
Possible False or Misleading Evidence and Manipulation of Evidence before Senate Committees — Travel by Aboriginal Community Representatives (No. 14) PP No. 461/1989	8/11/88 (J.1098-9)	**Senate:** President determined precedence to notice of motion 7/11/88, motion moved by Leader of the Opposition in the Senate (Senator Chaney) and agreed to 8/11/88	28/2/89 (J.1385)	**Findings** • that on evidence available to the Committee (a) no false or misleading evidence was given to Estimates Committee E in relation to attendance of officers, (b) there was no attempt to manipulate the evidence laid before the Select Committee, and (c) therefore no contempt was committed	Report noted 12/4/89 (J.1549)
Possible False or Misleading Evidence before a Senate Estimates Committee — Department of Defence Project Parakeet (No. 15) PP No. 461/1989	6/12/88 (J.1247)	**Senate:** President determined precedence to notice of motion 5/12/88, motion moved by Senator MacGibbon and agreed to 6/12/88	6/3/89 (J.1433-4)	**Findings** • as there was no intention to give false or misleading evidence to a Senate Estimates Committee, no contempt committed	Report noted 12/4/89 (J.1549)
Person Referred to in the Senate — Mr C Wyatt (No. 16) PP No. 461/1989	11/4/89	**President**	5/5/89 (J.1606)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 5/5/89 (J.1606)
Possible Improper Interference with a Witness — Drugs in Sport Inquiry (No. 17) PP No. 461/1989	8/12/88 (J.1276-7)	**Senate:** President determined precedence to notice of motion 8/12/88, motion moved by Chairman of Environment, Recreation and the Arts Committee (Senator Black), by leave, and agreed to 8/12/88	5/6/89 (J.1792) Note: finding separately reported to Senate 11/5/89 (J.1662)	**Finding** • because requisite intention not established, no contempt committed	Finding endorsed 4/10/89 (J.2087-8)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Interference with Witnesses in Consequence of their giving evidence before Senate Select Committee on Administration of Aboriginal Affairs (No. 18) PP No. 461/1989	3/11/88 (J.1070)	**Senate:** President determined precedence to notice of motion 2/11/88, motion moved by Leader of the Opposition in the Senate (Senator Chaney) and agreed to 3/11/88	16/6/89 (J.1921)	**Findings** • in relation to term of reference (1)(a) (resolution of 23 May 1988) no contempt committed • in relation to term of reference (1)(b) (Presentation of papers and submissions) no contempt committed • in relation to term of reference (1)(c) (resolution of no confidence in Mrs S McPherson) in particular circumstances of case finding of contempt should not be made • in relation to paragraph (1)(d) (proposed transfer of Mr M O'Brien) no contempt committed	Findings endorsed 4/10/89 (J.2087)
Person Referred to in the Senate — Sir Charles Court (No. 19) PP No. 461/1989	25/9/89	**President**	27/10/89 (J.2171)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 27/10/89 (J.2171)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Unauthorised Disclosure of Senate Committee Report (No. 20) PP No. 461/1989	18/8/89 (J.1961)	**Senate:** President determined precedence to notice of motion 17/8/89, motion moved by Senator Hamer, at the request of Senator Teague, and agreed to 18/8/89	21/12/89 (J.2445)	**Findings** • that a finding of contempt should not be made in light of all circumstances • that no further action should be taken **Recommendations** • that the President draw paragraph 6(16) of the Privilege Resolutions and standing order 37 to the attention of Senators • that a proposal for the early tabling of committee reports when the Senate meets in the mornings be referred to the Procedure Committee for consideration	Findings endorsed and recommendations adopted 16/5/90 (J.96-7)
Possible Adverse Treatment of a Witness before the Select Committee on the Administration of Aboriginal Affairs (No. 21) PP No. 461/1989	9/3/89 (J.1458-9)	**Senate:** President determined precedence to notice of motion 9/3/89, motion moved by Senator P Baume, debated and agreed to 9/3/89	22/12/89 (J.2465)	**Findings** • that there was adverse treatment of Mr M Pope by Messrs Wyatt and Stewart partially in consequence of Mr Pope's having given evidence to a Senate Committee • that a contempt was committed in each case although not serious **Recommendation** • that in the light of apologies no further action should be taken	Notice of motion given for next day of sitting not less than 7 days after the day on which notice given — that Senate endorse findings 22/12/89 (J.2466). Fresh notice given 9/5/90 (J.37). Findings endorsed 16/5/90 (J.97)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Unauthorised Disclosure of Senate Committee Submission (No. 22) PP No. 45/1990	6/12/89 (J.2321)	**Senate:** President determined precedence to notice of motion 5/12/89, motion moved by Chairman of Select Committee on Health Legislation and Health Insurance (Senator Crowley) and agreed to 6/12/89	9/5/90 (J.41)	**Finding** • that in the light of circumstances no finding of contempt should be made **Recommendations** • that an appropriate warning about conditions of disclosure be given in public advertisements calling for submissions, in notes to witnesses, and in letter acknowledging receipt of submissions • that persons making submissions be notified when submissions are publicly released by a committee	Finding endorsed and recommendations adopted 23/5/90 (J.130)
Person Referred to in the Senate —Mr A E Harris (No. 23) PP No. 45/1990	26/2/90	**President**	25/5/90 (J.144)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted and noted 25/5/90 (J.146)
Person Referred to in the Senate —Dr P Ingram Cromack (No. 24) PP No. 438/1990	18/7/90	**President**	19/9/90 (J.293)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 19/9/90 (J.293)
Person Referred to in the Senate —Mr A E Harris (No. 25) PP No. 438/1990	23/8/90	**President**	17/10/90 (J.345)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 17/10/90 (J.345)
Possible Misleading Evidence before a Senate Estimates Committee — Department of Defence Asbestos in Royal Australian Navy Ships (No. 26) PP No. 438/1990	24/8/90 (J.250-1)	**Senate:** President determined precedence to notice of motion 23/8/90, motion moved by Senator Newman and agreed to 24/8/90	8/11/90 (J.398)	**Finding** • no contempt committed	Finding endorsed 14/11/90 (J.449)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Person Referred to in the Senate —Sir William Keys (No. 27) PP No. 438/1990	26/11/90	**President**	29/11/90 (J.493)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted (J.493), motion to take note (J.494) 29/11/90. Report noted 5/12/90 (J.510)
Person Referred to in the Senate — Mr C H Cannon (No. 28) PP No. 438/1990	11/12/90	**President**	19/12/90 (J.644)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 19/12/90 (J.644)
Person Referred to in the Senate —The Honourable Tom Uren (No. 29) PP No. 438/1990	17/12/90	**President**	19/12/90 (J.646)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 19/12/90 (J.646)
Possible Improper Influence or Penalty on a Witness in respect of Evidence before a Senate Committee (No. 30) PP No. 258/1991	18/10/90 (J.359)	**Senate:** President determined precedence to notice of motion 17/10/90, motion moved by Chairman of Environment, Recreation and the Arts Committee (Senator Crowley) and agreed to 18/10/90	6/3/91 (J.812)	**Finding** • no contempt committed	Finding endorsed 7/3/91 (J.831)
Person Referred to in the Senate —Sir William Keys (No. 31) PP No. 258/1991	11/12/90	**President**	11/3/91 (J.842)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 11/3/91 (J.842)
Person Referred to in the Senate — Ms Patsy Harmsen (No. 32) PP No. 258/1991	19/6/91	**President**	21/6/91 (J.1280)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 21/6/91 (J.1280)
Person Referred to in the Senate —Dr Alex Proudfoot, FRACP (No. 33) PP No. 470/1991	21/8/91	**President**	3/9/91 (J.1452)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 3/9/91 (J.1452)
Person Referred to in the Senate —Ms Jeannie Cameron (No. 34) PP No. 470/1991	13/11/91	**President**	14/11/91 (J.1726)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 14/11/91 (J.1726)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Report on Work Since Passage of Privilege Resolutions of 25 February 1988 (No. 35) PP No. 467/1991	—	**General repor**t	2/12/91 (J.1811)	—	Report noted 26/3/92 (J.2133)
Possible Improper Interference with a Witness and Possible Misleading Evidence Before the National Crime Authority Committee (No. 36) PP No. 194/1992	12/11/90 (J.410)	**Senate:** President determined precedence to notice of motion 8/11/90, motion moved by Leader of the Opposition in the Senate (Senator Hill) and agreed to 12/11/90	25/6/92 (J.2623)	**Finding** • committee determined that no contempt should be found **Recommendations** • that sections 51 and 55 of the *National Crime Authority Act 1984* should be clarified • that any conflict between accountability of statutory bodies to Parliament and secrecy requirements should be resolved during passage of legislation through Parliament • that the Scrutiny of Bills Committee might appropriately draw such provisions to the attention of Parliament • that urgent consideration should be given to legislation such as the Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991 • that the Senate should warn persons dealing with Houses of Parliament and their committees to direct attention to the real effects of their actions, and in particular to answer committees' questions as fully and frankly as possible	Finding endorsed and recommendations adopted 17/12/92 (J.3427)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Improper Interference with Witnesses before the Community Affairs Committee (No. 37) PP No. 235/1992	2/4/92 (J.2178)	**Senate:** President determined precedence to motion 2/4/92, motion moved by Chair of Community Affairs Committee (Senator Zakharov) and agreed to 2/4/92	9/9/92 (J.2731)	**Finding** • no finding of contempt can or should be made	Finding endorsed 17/12/92 (J.3427)
Person Referred to in the Senate —The Honourable Paul B Toose (No. 38) PP No. 540/1992	6/10/92	**Deputy President**	13/10/92 (J.2891)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 13/10/92 (J.2891)
Person Referred to in the Senate — Mr Dale E Hennessy (No. 39) PP No. 540/1992	24/11/92	**President**	30/11/92 (J.3158)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 30/11/92 (J.3158)
Persons Referred to in the Senate — Ms Margaret Piper, Ms Eve Lester and Mr Seth Richardson (No. 40) PP No. 40/1992	14/12/92	**President**	17/12/92 (J.3426)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted and noted 17/12/92 (J.3426)
Person Referred to in the Senate —Mr R.S. Lippiatt (No. 41) PP No 82/1993	26/8/92	**President**, after consultation with Committee of Privileges	12/5/93 (J.126)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 12/5/93 (J.126)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Adverse Treatment of a Witness before the Corporations and Securities Committee (No. 42) PP No 85/1993	12/10/92 (J.2879)	**Senate:** Deputy President determined precedence to motion 8/10/92, motion moved by Senator Bell, at the request of Senator Spindler, and agreed to 12/10/92	27/5/93 (J.310)	**Findings** • In respect of charge F - (a) laying the charge could deter other witnesses from appearing before other committees (b) laying the charge had the effect of penalising a witness for having given evidence in a private capacity to a committee (c) a contempt was committed in laying charge F • In respect of charges A to E - (a) charges A to E were not laid with the intention of penalising the witness, nor did the laying of these charges have such an effect (b) on the evidence, no contempt was involved in the laying of charges A to E **Recommendations** • that the Senate endorse the findings • that no penalty should be imposed in respect of the identified contempts • that the Senate pass a resolution relating to the study by senior public servants of the operation of Parliament and their accountability to Parliament	Report noted 27/5/93 (J.310) Notice of motion given for next day of sitting not less than 7 days after the day on which notice given — that Senate endorse findings and adopt recommendations 27/5/93 (J.310-11) Findings and recommendations debated 30/9/93 (J.557) Amendment moved by Senator Cooney (negatived), findings endorsed and recommendations adopted 21/10/93 (J.684) President's response 16/3/94 (J.1413) Government response 22/8/95 (J.3650)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Threats to Senate Select Committee or Senators (No. 43) PP No. 389/1993	5/5/93 (J.67)	**Senate:** President determined precedence to motion 4/5/93, motion moved by Senator Reynolds and Senator Walters and agreed to 5/5/93	15/12/93 (J.1028)	**Finding** • committee did not find that contempt committed	Finding endorsed 3/2/94 (J.1198)
Possible Improper Interference with or Misleading Reports of Proceedings of Senate Legal and Constitutional Affairs Committee (No. 44) PP No. 390/1993	30/8/93 (J.405)	**Senate:** President determined precedence to motion 8/8/93, motion moved by Chair of Legal and Constitutional Affairs Committee (Senator Cooney) and agreed to 30/8/93	15/12/93 (J.1028)	**Finding** • committee did not find that contempt committed **Recommendation** • that The Watchdog Association Incorporated place an appropriate notification of the matters raised in this report, and the Committee's conclusions, in *The Watchdog Reporter* as soon as possible after the Senate has considered and adopted this recommendation	Finding endorsed, recommendation adopted 3/2/94 (J.1198) Watchdog Association complied with Senate order 15/3/94 (J.1394)
Person referred to in the Senate — Mr T.T. Vajda (No. 45) PP No. 4/1994	28/1/94	**President**	7/2/94 (J.1208)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 7/2/94 (J.1209)
Possible False or Misleading Information given to Estimates Committee E or the Senate (No. 46) PP No. 43/1994	28/9/93 (J.516)	**Senate:** President determined precedence to motion 27/9/93, motion moved by Senator Ferguson and agreed to 29/9/93	2/3/94 (J.1342)	**Finding** • committee determined that it should not find that contempt committed	Finding endorsed 24/3/94 (J.1524)
Person Referred to in the Senate — Councillor Michael Samaras (No. 47) PP No. 112/1994	11/5/94	**President**	31/5/94 (J.1713)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 2/6/94 (J.1746)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Improper Disclosure of Document or Proceedings of Migration Committee (No. 48) PP No. 113/1994	25/11/93 (J.901)	**Senate:** President determined precedence to motion 25/11/93, motion moved by Chair of Migration Committee (Senator McKiernan) and agreed to 25/11/93	8/6/94 (J.1778)	**Finding** • committee did not find that contempt committed **Recommendation** • that question of journalistic ethics be referred to Legal and Constitutional Affairs Committee	Finding endorsed, recommendation adopted 30/6/94 (J.1999)
Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (No. 49) PP No. 171/1994	12/5/94 (J.1683)	**Senate: Advisory report** Motion moved by Leader of the Australian Democrats (Senator Kernot) 12/5/94, agreed to 12/5/94	19/9/94 (J.2160)	**Recommendation** • that the Bill be not proceeded with	Report noted 19/9/94 (J.2160)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Improper Interference with a Witness and Possible False or Misleading Answers given to the Senate or a Senate Committee (No. 50) PP No. 322/1994	20/5/93 (J.214)	**Senate:** President determined precedence 19/5/93. Motion moved by Senator Watson and agreed to 20/5/93	8/12/94 (J.2767)	**Findings** • that a threatening call was made to a witness and this constituted a serious contempt. The Committee was unable to discover the source of the call. • the witness suffered penalty or injury but the Committee could not establish whether this was as a result of his giving evidence to a committee • answers and evidence to the Senate and committees did not constitute a contempt **Recommendations** • that the Senate request the Comptroller-General of Customs to circulate copies of this report to all senior officers of the Australian Customs Service • that the following matter be referred by the Senate to the Senate Economics Legislation Committee: Continuing scrutiny of the implementation of recommendations contained in the Conroy Report entitled *Review of the Australian Customs Service*, tabled in the Senate on 8/2/94.	Findings endorsed and recommendations adopted 2/2/95 (J.2863)
Possible Penalty or Injury to a Witness before the Employment, Education and Training Committee (No. 51) PP No. 4/1995	31/5/94 (J.1711)	**Senate:** President determined precedence 30/5/94. Motion moved by Senator Crane and agreed to 31/5/94	7/2/95 (J.2899)	**Finding** • committee did not find that contempt committed	Finding endorsed 2/3/95 (J.3008)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 Casselden Place Reference (No. 52) PP No. 21/1995	22/6/94 (J.830-31)	**Senate: Advisory report** Motion moved by Senator Spindler and agreed to 22/6/94	1/3/95 (J.2984)	—	Report noted 2/3/95 (J.3008)
Possible Threat to a Senator (No. 53) PP No. 44/95	20/10/94 (J.2342)	**Senate:** President determined precedence 19/10/94. Motion moved by Senator Parer and agreed to 20/10/94	22/3/95 (J.3107)	**Finding** • committee did not find that contempt committed	Finding endorsed 23/3/95) (J.3136)
Possible Unauthorised disclosure of a submission to the Joint Committee on the National Crime Authority (No. 54) PP No. 133/1995	3/3/94 (J.1359)	**Senate:** President determined precedence 2/3/94. Motion moved by Deputy Chairman of Joint Committee on the National Crime Authority (Senator Amanda Vanstone) and agreed to 3/3/94	30/6/95 (J.3602)	**Findings** • that a submission and letter from a WA Police Superintendent received in camera by the Joint Committee on the National Crime Authority was improperly disclosed and that such disclosure constituted a serious contempt • the committee was unable to establish the source of the improper disclosure, owing to the constraints on its capacity to examine members of the SA legislature responsible for publishing and referring to the two documents in each house **Recommendation** • if the source of the improper disclosure is subsequently revealed, that the matter again be referred to the committee, with a view to a possible prosecution for an offence under s.13 of the *Parliamentary Privileges Act 1987*	Findings endorsed and recommendation adopted 24/8/95 (J.3694)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Penalty or Injury to a Witness Before the Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure (No. 55) PP No. 134/1995	18/11/93 (J.812)	**Senate:** President determined precedence 27/10/93. Motion moved by Chair of Industry, Science, Technology, Transport, Communications and Infrastructure Committee (Senator Childs) and agreed to 18/11/93	30/6/95 (J.3602)	**Findings** • that a statement issued by the NT Minister for Health and Community Services could be regarded as constituting a threat to Dr Philip Nitschke • that Dr Philip Nitschke was penalised by the Royal Darwin Hospital through the failure to offer him an early contract for 1994 as a Resident Medical Officer • that the threat was not made and penalties were not imposed in consequence of Dr Nitschke's appearance before the Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure • committee determined that no finding of contempt be made	Findings endorsed 24/8/95 (J.3694)
Person Referred to in the Senate — Ms Yolanda Brooks (No. 56) PP No. 135/1995	20/6/95	**President**	30/6/95 (J.3602)	**Recommendation** • that the response be incorporated in *Hansard*	Report adopted 24/8/95 (J.3694)
Possible Penalty or Injury Imposed on Witnesses before the Senate Select Committee on Superannuation (No. 57) PP No. 183/1995	16/12/93 (J.1073)	**Senate:** President determined precedence 16/12/93. Motion moved by Senator West, on behalf of Superannuation Committee, and agreed to 16/12/93	17/10/95 (J.3937)	**Finding** • committee determined not to make finding that contempt committed	Finding endorsed 19/10/95 (J.3984)
Possible Improper Interference with a Witness before Select Committee on Unresolved Whistleblower Cases (No. 58) PP No. 476/1995	30/6/95 (J.3600)	**Senate:** President determined precedence 29/6/95. Motion moved by Senator Foreman, on behalf of Chair of Select Committee on Unresolved Whistleblower Cases (Senator Murphy), and agreed to 30/6/95	26/10/95 (J.4069)	**Finding** • no contempt of the Senate committed	Finding endorsed 9/5/96 (J.146)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Person Referred to in the Senate — Mrs Esther Crichton-Browne (No. 59) PP No. 475/1995	22/11/95	**President**	1/12/95 (J.4345)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 9/5/96 (J.146)
Possible unauthorised disclosure of documents or private deliberations of the Select Committee on the Dangers of Radioactive Waste (No. 60) PP No. 9/1996	30/6/95 (J.3600)	**Senate:** President determined precedence 29/6/95 Motion moved by Chair of Select Committee on the Dangers of Radioactive Waste (Senator Chapman) and agreed to 30/6/95	30/4/96 (J.31)	**Finding** • no question of contempt involved **Recommendation** • that a resolution be adopted for committee proceedings following unauthorised disclosure of proceedings	Finding endorsed and recommendation adopted 20/6/96 (J.361)
Possible false or misleading statements to Senate Select Committee on Public Interest Whistleblowing (No. 61) PP No. 10/1996	21/3/95 (J. 3084)	**Senate:** President determined precedence 9/3/95 Motion moved by Chair of Select Committee on Public Interest Whistleblowing (Senator Murphy) and agreed to 21/3/95	30/4/96 (J.32)	**Finding** • no finding of contempt should be made	Finding endorsed 20/6/96 (J.361)
Committee of Privileges 1966-1996: History, Practice and Procedure (No. 62) PP No. 108/1996	—	**General report** Presented to the President of the Senate on 28 June 1996	21/8/96 (J.481)	—	Report noted 25/9/97 (J.2527)
Possible false or misleading evidence before Select Committee on Unresolved Whistleblower Cases (No. 63) PP No. 360/1996	25/6/96 (J.385)	**Senate:** President determined precedence 24/6/96 Motion moved by Chair of Select Committee on Unresolved Whistleblower Cases (Senator Murphy) and agreed to 25/6/96	5/12/96 (J.1212)	**Finding** • no finding of contempt should be made	Finding endorsed 29/5/97 (J. 2041)
Possible false or misleading evidence before the Environment, Recreation, Communications and the Arts Legislation Committee (No. 64) PP No. 40/1997	9/9/96 (J.532)	**Senate:** President determined precedence 22/8/96 Motion moved by Chair of Environment, Recreation, Communications and the Arts Legislation Committee (Senator Patterson) and agreed to 9/9/96	19/3/97 (J.1635)	**Finding** • no contempt of the Senate has been committed **Recommendation** • that the Senate reaffirm the accountability of statutory authorities to Parliament	Finding endorsed and recommendation adopted 29/5/97 (J.2042)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Person referred to in the Senate — Dr Neil Cherry (No. 65) PP No. 48/1997	5/3/97	**President**	25/3/97 (J.1759)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 25/3/97 (J.1759)
Person referred to in the Senate — Ms Deborah Keeley (No. 66) PP No. 89/1997	22/4/97	**President**	29/5/97 (J.2038)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 29/5/97 (J.2038)
Possible threats of legal proceedings made against a Senator and other persons (No. 67) PP No. 141/1997	23/8/95 (J.3665)	**Senate:** President determined precedence 22/8/95 Motion moved by Senator Boswell and agreed to 23/8/95	3/9/97 (J.2412)	**Findings** • contempt of the Senate committed by the threat of legal proceedings against a person; no contempt involved in the threat of legal proceedings against a senator	Notice of motion given for next day of sitting not less than 7 days after the day on which notice given — that Senate endorse findings 3/9/97 (J.2412) Findings endorsed 22/9/97 (J.2456)
Persons referred to in the Senate — Mr Ray Platt and Mr Peter Mulheron (No. 68) PP No. 158/1997	21/7/97 and 7/8/97	**President**	23/9/97 (J.4278)	**Recommendation** • that responses be incorporated in *Hansard*	Report adopted 23/9/97 (J.4278)
Person referred to in the Senate — Dr Clive Hamilton (No. 69) PP No. 183/1997	29/9/97	**President**	21/10/97 (J.2659)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 21/10/97 (J.2659)
Questions arising from proceedings of the Parliamentary Joint Committee on the National Crime Authority (No. 70) PP No. 68/1998	26/6/97 (J.2257)	**Senate: Advisory report** Motion moved, by leave, by Senator Ferris and agreed to 26/6/97	6/4/98 (J.3623)	**Recommendation** • that the NCA Committee consider seeking amendment to sections 51 and 55 of the National Crimes Authority Act or that parliament consider declaratory enactment	Report noted 28/5/98 (J.3882)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Further possible false or misleading evidence before Select Committee on Unresolved Whistleblower Cases (No. 71) PP No. 86/1998	5/12/97 (J.3240)	**Senate:** President determined precedence 4/12/97 Motion moved by Senator Woodley and agreed to 5/12/97	26/5/98 (J.3839)	**Finding** • no contempt has been committed	Finding endorsed 28/5/98 (J.3881)
Possible threat of proceedings against Dr William De Maria (No. 72) PP No. 117/1998	4/9/97 (J.2438)	**Senate:** Documents tabled by President 25/8/97 Motion moved, by leave, by Senator Bourne and agreed to 4/9/97	30/6/98 (J.4110)	**Findings** • the University of Queensland, in taking action against Dr William De Maria as a direct consequence of his communication with the Senate through Senator Woodley, committed a contempt • the committee would regard it as unsafe to conclude that Dr De Maria should be found in contempt of the Senate **Recommendation** • that no penalty be imposed	Notice of motion given for next day of sitting not less than 7 days after the day on which notice given — that Senate endorse findings 30/6/98 (J.4110-11) Findings endorsed and recommendation adopted 1/12/98 (J.225)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible improper interference with a potential witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (No. 73) PP No. 118/1998	2/10/97 (J.2611)	**Senate:** President determined precedence 1/10/97 Motion moved by Senator Bolkus and agreed to 2/10/97	30/6/98 (J.4111)	**Finding** • no contempt has been committed **Recommendations** • that the statutory powers and functions of the Australian Law Reform Commission be referred to the Legal and Constitutional Legislation Committee for inquiry and report • that Senate resolution of 21 October 1993 (see report no. 42 above) be reaffirmed and that the Senate seek a specific report, in a year's time, from each Commonwealth department, on how the terms of the resolution have been complied with.	Finding endorsed and recommendations adopted 1/12/98 (J.225)
Possible Unauthorised Disclosure of Parliamentary Committee Proceedings (No. 74) PP No. 180/1998		**Advisory Report (incorporating reports on six contempt matters referred to the Committee – see below)**	9/12/98 (J.360)	**General Recommendation** • that the question of publication of committee deliberations be referred to Procedure Committee	Notice of motion given for next day of sitting not less than 7 days after the day on which notice given — that Senate endorse findings and adopt recommendations 9/12/98 (J.360) Findings endorsed and recommendations adopted 15/2/99 (J.428)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
➢ Possible unauthorised disclosure of documents of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund	27/10/97 (J.2717)	**Senate:** President determined precedence 23/10/97 Motion moved by Senator Evans, at the request of Senator Bolkus, and agreed to 27/10/97	9/12/98 (J.360)	**Finding** • no contempt has been committed	Finding endorsed 15/2/99 (J.428)
➢ Possible unauthorised disclosures of a report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund	29/10/97 (J.2759)	**Senate:** President determined precedence 28/10/97 Motion moved by Senator Abetz (also on behalf of Senator Ferris) and agreed to 29/10/97	9/12/98 (J.360)	**Finding** • contempt of the Senate has been committed **Recommendation** • that no penalty be imposed	Finding endorsed and recommendation adopted 15/2/99 (J.428)
➢ Possible unauthorised disclosure of a document of the Parliamentary Joint Committee on the National Crime Authority	26/11/97 (J.2991)	**Senate:** President determined precedence 19/11/97 Motion moved by Senator McGauran and agreed to 26/11/97	9/12/98 (J.360)	**Finding** • The circumstances do not warrant a finding that a contempt has been committed	Finding endorsed 15/2/99 (J.428)
➢ Possible unauthorised disclosure of a report of the Environment, Recreation, Communications and the Arts Legislation Committee	26/11/97 (J.2991)	**Senate:** President determined precedence 25/11/97 Motion moved by Senator Evans, at the request of Senator Schacht, and agreed to 26/11/97	9/12/98 (J.360)	**Finding** • that no contempt has been committed by certain persons but that a contempt has been committed by an unidentified officer, or officers, of a public service department **Recommendation** • that no penalty be imposed	Finding endorsed and recommendation adopted 15/2/99 (J.428)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
➢ Possible unauthorised disclosure of a draft report of the Economics References Committee	12/3/98 (J.3379)	**Senate:** President determined precedence 11/3/98 Motion moved by Chair of Economics References Committee (Senator Jacinta Collins) and agreed to 12/3/98	9/12/98 (J.360)	**Finding** • a contempt of the Senate has been committed by a person or persons who disclosed a draft report of the Economics References Committee, but the Committee is unable to discover the source of the improper disclosure	Finding endorsed 15/2/99 (J.428)
➢ Possible unauthorised disclosure of the report of the Parliamentary Joint Committee on the National Crime Authority on the Committee's third evaluation of the National Crime Authority	2/7/98 (J.4162)	**Senate:** President determined precedence 30/6/98 Motion moved by Senator McGauran and agreed to 2/7/98	9/12/98 (J.360)	**Finding** • it is likely that a contempt of the Senate has been committed, but the Committee has determined not to take matter further	Finding endorsed 15/2/99 (J.428)
Execution of Search Warrants in Senators' Offices (No. 75) PP No. 52/1999	1/12/98	**Advisory report** Reference received from the Senate Procedure Committee 1/12/98	22/3/99 (J.581)	**Recommendation** • that the general guidelines between the Australian Federal Police and the Law Council of Australia should form the basis for discussion between the Presiding Officers and the Attorney-General	Recommendation adopted 25/3/99 (J.633)
Parliamentary Privilege — Precedents, Procedures and Practice in the Australian Senate 1966-1999 (No. 76) PP No. 126/1999	—	**General report**	22/6/99 (J.1061)	—	Report noted 26/8/99 (J.1585)
Persons Referred to in the Senate — Certain Faculty Members of Greenwich University (No. 77) PP No. 151/1999	27/5/99	**President**	28/6/99 (J.1350)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 28/6/99 (J.1350)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible improper use of proceedings of Community Affairs References Committee (No. 78) PP No. 183/1999	27/5/99 (J.947)	**Senate:** President determined precedence 27/5/99 Motion moved by Chair of the Community Affairs References Committee (Senator Crowley) and agreed to 27/5/99	1/9/99 (J.1626)	**Findings** • Terms of reference (a) and (b) — No adjudication required • Term of reference (c) — No contempt committed • Term of reference (d) — No contempt found	Findings endorsed 23/9/99 (J.1739)
Possible false or misleading statements tabled in the Senate — Discontinuation of inquiry (No. 79) PP No. 196/1999	7/5/97 (J.1855-56)	**Senate:** President determined precedence 6/5/97 Motion moved by Leader of the Opposition in the Senate (Senator Faulkner), at the request of Senators Bolkus and Margetts, and agreed to 7/5/97 [Inquiry not to commence until conclusion of investigations and any legal proceedings]	29/9/99 (J.1792)	**Recommendation** • that the inquiry be not further pursued	Report adopted 30/9/99 (J.1811)
Persons referred to in the Senate — Board members and staff of Electronic Frontiers Australia Inc. (No. 80) PP No. 358/1999	13/10/99	**President**	21/10/99 (J.1986)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 21/10/99 (J.1986)
Persons referred to in the Senate — Dr Chris Atkinson and Dr Chris Harper (No. 81) PP No. 373/1999	9/11/99	**President**	30/11/99 (J.2159)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 30/11/99 (J.2159)
Person referred to in the Senate — Ms Christine Bourne (No. 82) PP No. 374/1999	10/11/99	**President**	30/11/99 (J.2159)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 30/11/99 (J.2159)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Persons referred to in the Senate — Mr Raymond Rose, Principal, Bridge Business College (No. 83) PP No. 375/1999	10/11/99	**President**	30/11/99 (J.2159)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 30/11/99 (J.2159)
Possible unauthorised disclosure of draft parliamentary committee report (No. 84) PP. No. 35/2000	2/9/99 (J.1636)	**Senate:** President determined precedence 1/9/99 Motion moved by Senator O'Brien, at the request of Chair of Employment, Workplace Relations, Small Business and Education References Committee (Senator Collins), and agreed to 2/9/99	7/3/2000 (J.2374)	**Findings** • that persons disclosed without authority draft report of a committee • that persons to whom the report was disclosed should have been aware, and probably were aware, of the status of the document • that departmental training was inadequate • that the handling of the draft report constituted culpable negligence and therefore a contempt was committed **Recommendations:** • that arrangements be made for ministerial and shadow ministerial staff to attend seminar on parliamentary procedure • that committees mark and transmit draft reports appropriately • that no penalty be imposed	Notice of motion given for next day of sitting not less than 7 days after the day on which notice given that Senate endorse findings and adopt recommendations 7/3/2000 (J.2374) Findings endorsed and recommendations adopted 15/3/2000 (J.2447)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible intimidation of a witness before the Employment, Workplace Relations, Small Business and Education References Committee. (No. 85) PP No. 36/2000	12/8/99 (J.1481)	**Senate:** President determined precedence 11/8/99 Motion moved by Senator O'Brien, at the request of Chair of Employment, Workplace Relations, Small Business and Education References Committee (Senator Collins), and agreed to 12/8/99	7/3/2000 (J.2374)	**Findings** • that an officer of a Shire Council improperly interfered with and penalised another officer as a consequence of participation in committee proceedings • that therefore a contempt was committed **Recommendation**: • that no penalty be imposed	Notice of motion given for next day of sitting not less than 7 days after the day on which notice given — that Senate endorse findings and adopt recommendations 7/3/2000 (J.2374) Findings endorsed and recommendations adopted 15/3/2000 (J.2448)
Alleged threats to a witness before the Select Committee on A New Tax System. (No. 86) PP No. 39/2000	7/12/99 (J.2189)	**Senate:** President determined precedence 6/12/99 Motion moved by Senator Allison and agreed to 7/12/99	13/3/2000 (J.2424)	**Finding** • the circumstances do not warrant a finding that a contempt has been committed	Finding endorsed 16/3/2000 (J.2485)
Person referred to in the Senate — Mr R.T. Mincherton (No. 87) PP No. 40/2000	8/3/2000	**President**	13/3/2000 (J.2424)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 13/3/2000 (J. 2424-5)
Person referred to in the Senate — Mr N. Crichton-Browne (No. 88) PP No. 71/2000	30/3/2000	**President**	10/4/2000 (J.2585)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 10/4/2000 (J.2585)
Senior Public Officials' Study of Parliamentary Processes — Report on Compliance with Senate Order of 1 December 1998 (No. 89) PP No. 79/2000	—	**Advisory report**	13/4/2000 (J.2632)	—	Report noted 13/4/2000 (J.2632)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Person referred to in the Senate — Dr Malcolm Colston (No. 90) PP No. 113/2000	19/4/2000	**Deputy President**	5/6/2000 (J.2723)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 5/6/2000 (J.2723)
Person referred to in the Senate — Mr Noel Crichton-Browne (No. 91) PP No. 119/2000	30/5/2000	**President**	19/6/2000 (J.2797)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 19/6/2000 (J.2797)
Matters arising from 67th Report of the Committee of Privileges (No. 92) PP No. 150/2000	—	**Advisory report**	29/6/2000 (J.2997)	Chair's statement *Hansard* 29/6/2000 (p. 16040)	Report noted 17/8/2000 (J.3114)
Possible unauthorised disclosure of in camera proceedings of the Economics References Committee (No. 93) PP No. 179/2000	11/5/2000 (J.2704-5)	**Senate:** President determined precedence 11/5/2000 Motion moved by Senator Calvert, at the request of Senator Gibson, and agreed to 11/5/2000	28/8/2000 (J.3126)	**Finding** • the circumstances do not warrant a finding that a contempt has been committed	Finding endorsed 31/8/2000 (J.3181)
Matters arising from 67th Report of the Committee of Privileges(2) – Possible Senate representation in court proceedings (No. 94) PP No. 198/2000	—	**Advisory report**	4/9/2000 (J.3192)	**Recommendation** • that the Senate authorise the President, if required, to engage counsel as *amicus curiae* if either the action for defamation against Mr David Armstrong or a similar action against Mr William O'Chee is set down for trial.	Recommendation adopted 4/9/2000 (J.3192)
Penalties for Contempt — Information Paper (No. 95) PP No. 199/2000	—	**Advisory report**	4/9/2000 (J.3193)	—	Report noted 5/10/2000 (J.3321)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible misleading evidence to and improper interference with witnesses before the Employment, Workplace Relations, Small Business and Education Legislation Committee (No. 96) PP No. 118/2001	28/2/2001 (J.3980)	**Senate:** President determined precedence 27/2/2001 Motion moved by Senator Collins and agreed to 28/2/2001	25/6/2001 (J.4393)	**Finding** • no evidence to support any conclusion that a contempt has been committed	Finding endorsed 9/8/2001 (J.4650)
Person referred to in the Senate — Mr Terence O'Shane (No. 97) PP No. 131/2001	28/6/2001	**President**	28/6/2001 (J.4458)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 28/6/2001 (J.4458)
Person referred to in the Senate —Alderman Dr John Freeman (No. 98) PP No. 166/2001	7/8/2001	**President**	27/8/2001 (J.4765)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 27/8/2001 (J.4765)
Possible unauthorised disclosure of a submission to the Parliamentary Joint Committee on Corporations and Securities (No. 99) PP No. 177/2001	27/6/2000 (J.2908)	**Senate:** President determined precedence 26/6/2000 Motion moved by Chair of Corporations and Securities Committee (Senator Chapman) and agreed to 27/6/2000	30/8/2001 (J.4834)	**Findings** • that person(s) who disclosed in camera evidence to a journalist, and Nationwide News Pty Ltd, as the organisation responsible for the actions of the journalist, have committed contempt **Penalty** • if person(s) discovered – possible fine or prosecution under the *Parliamentary Privileges Act 1987*; • Nationwide News Pty Ltd – that Senate administer a serious reprimand	Findings endorsed and penalty imposed 18/9/2001 (J.4866)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible unauthorised disclosure of draft report of Legal and Constitutional Legislation Committee (No. 100) PP No. 195/2001	26/6/2001 (J.4405)	**Senate:** President determined precedence 25/6/2001 Motion moved by Senator Calvert, at the request of Chair of Legal and Constitutional Legislation Committee (Senator Payne), and agreed to 26/6/2001	19/9/2001 (J.4882)	**Findings** • that person(s) who disclosed a draft report to a journalist, and Nationwide News Pty Ltd, as the organisation responsible for the actions of the journalist, have committed contempt **Penalty** • no penalty should be imposed	Findings endorsed 26/9/2001 (J.4974)
Persons referred to in the Senate — Staff and faculty of Greenwich University (No. 101) PP No. 215/2001	17/9/2001	**President**	26/9/2001 (J.4976)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 26/9/2001 (J.4976)
Counsel to the Senate (No. 102) PP No. 307/2002	20/3/2002 (J.244)	**Senate:** Motion moved by Chair of the Privileges Committee, Senator Ray, and agreed to 20/3/2002	26/6/2002 (J.492)	**Conclusion** • that a proposal to appoint counsel on a retainer, while desirable, is not efficacious	Report noted 22/8/2002 (J.646)
Possible improper influence and penalty on a senator (No. 103) PP No. 308/2002	7/8/2001 (J.4597)	**Senate:** President determined precedence 6/8/2001 Motion moved by Leader of the Government (Senator Hill), at the request of Senator Tambling, and agreed to 7/8/2001	26/6/2002 (J.492)	**Findings** • that the Northern Territory Country Liberal Party purported to direct a senator as to how he should exercise a vote in the Senate and imposed a penalty on him in consequence of his vote • that while these actions were reckless and ill-judged, on balance a contempt should not be found	Findings endorsed 22/8/2002 (J.646)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible false or misleading evidence before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (No. 104) PP No. 309/2002	19/9/2001 (J.4879)	**Senate:** President determined precedence 18/9/2001 Motion moved by Senator McGauran, at the request of Chair of Native Title Committee (Senator Ferris), and agreed to 19/9/2001	26/6/2002 (J.492)	**Finding** • that while misleading evidence was given to the Native Title Committee, it is unlikely that it was given with deliberate intent; therefore no contempt was committed	Finding endorsed 22/8/2002 (J.645)
Execution of search warrants in Senators' offices — Senator Harris (No. 105) PP No. 310/2002	14/2/2002 (J.91-2)	**Senate:** President determined precedence 14/2/2002 Motion moved by Senator Harris and agreed to 14/2/2002	26/6/2002 (J.492)	**Finding** • that no contempt of the Senate was involved in the execution of the warrant, and police acted appropriately in relation to the claim of parliamentary privilege	Finding endorsed 22/8/2002 (J.645)
Possible improper interference with a witness before the Senate Select Committee on a Certain Maritime Incident (No. 106) PP No. 344/2002	16/5/2002 (J.359)	**Senate:** President determined precedence 15/5/2002 Motion moved by Chair of the Select Committee on a Certain Maritime Incident (Senator Cook) and agreed to 16/5/2002	27/8/2002 (J.671)	**Finding** • that there was no evidence of attempt or intention to influence the witness, and therefore no contempt of the Senate was committed	Finding endorsed 29/8/2002 (J.712)
Parliamentary Privilege — Precedents, Procedures and Practice in the Australian Senate 1966-2002 (No.107) PP No. 345/2002	—	**Advisory report**	27/8/2002 (J.672)		Report noted 29/8/2002 (J.712)
Persons referred to in the Senate — Mr John Hyde Page (No. 108) PP No. 388/2002	16/9/2002	**President**	15/10/2002 (J.875)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 15/10/2002 (J.875)
Persons referred to in the Senate — Mr Tony Kevin (No. 109) PP No. 497/2002	14/10/2002	**President**	22/10/2002 (J.949)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 22/10/2002 (J.949)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Persons referred to in the Senate — Dr Geoffrey Vaughan, Dr Peter Jonson and Professor Brian Anderson (No. 110) PP No. 601/2002	15/11/2002, 20/11/2002 and 2/12/2002	**President**	10/12/2002 (J.1285)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 10/12/2002 (J.1285)
Persons referred to in the Senate — Mr Bob Moses, on behalf of Board and Management of National Stem Cell Centre (No. 111) PP No. 2/2003	12/12/2002	**President**	5/2/2003 (J.1458)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 5/2/2003 (J.1458)
Possible unauthorised disclosure of draft report of Environment, Communications, Information Technology and the Arts Legislation Committee (No. 112) PP No. 11/2003	27/6/2002 (J.524)	**Senate:** President determined precedence 27/6/2002 Motion moved by Chair of the Environment, Communications, Information Technology and the Arts Legislation Committee (Senator Eggleston) and agreed to 27/6/2002	6/2/2003 (J.1475)	**Findings** • that there was a deliberate and unauthorised disclosure and publication of recommendations in a draft report • that the discloser of the proceedings is prima facie in contempt of the Senate but that no contempt can be found against The Age publisher, editor and journalist	Findings endorsed 6/2/2003 (J.1475)
Australian Press Council and Committee of Privileges Exchange of Correspondence (No. 113) PP No. 135/2003		**Advisory report**	25/6/2003 (J.1983)	Chair's statement on motion to take note of report, *Hansard*, 25/6/2003 (pp 12529-12531)	Report noted 25/6/2003 (J.1983)
Execution of search warrants in senators' offices – Senator Harris Matters arising from the 105th report of the Committee of Privileges (No. 114) PP No. 175/2003	5/2/2003 (J. 1457)	Statement by Chair, Committee of Privileges (Senator Ray) *Hansard*, 5/2/2003 (pp 8573-4)	20/8/2003 (J.2245)	**Recommendation** • that the Presiding Officers and the Attorney-General finalise draft protocols for the execution of search warrants in senators' and members' offices and that the committee be given opportunity to comment on the draft	Report noted 20/8/2003 (J.2245)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Persons referred to in the Senate — Board members of Electronic Frontiers Australia Inc. (No. 115) PP No. 292/2003	17/9/2003	**President**	18/9/2003 (J.2447)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 18/9/2003 (J.2447)
Possible improper interference with a witness before the Rural and Regional Affairs and Transport Legislation Committee (No. 116) PP No. 53/2004	2/12/2003 (J.2810)	**Senate:** President determined precedence 1/12/2003 Motion moved by Senator McGauran, at the request of the Chair of the Rural and Regional Affairs and Transport Legislation Committee (Senator Heffernan) and agreed to 2/12/2003	2/3/2004 (J.3052)	**Finding** • on the basis of the evidence before the committee a contempt should not be found	Finding endorsed 4/3/2004 (J.3092)
Person referred to in the Senate — Dr I.C.F. Spry, Q.C. (No. 117) PP No. 77/2004	23/3/2004	**President**	30/3/2004 (J.3277)	**Recommendation** • that response be incorporated in *Hansard*	Report adopted 30/3/2004 (J.3277)
Certain matters arising from the joint meetings of the Senate and the House of Representatives on 23 and 24 October 2003 (No. 118) PP No. 80/2004	29/10/2003 (J.2645)	**Senate: Advisory report** Motions moved by Senator Brown, and agreed to 29/10/2003	1/4/2004 (J.3321)	**Recommendation** • that the Senate agree to a resolution, along the lines proposed by the Procedure Committee in its Third Report of 2003, that future addresses by foreign heads of state should be received by a meeting of the House of Representatives in the House chamber, to which all senators are invited as guests	Report noted 5/8/2004 (J.3836)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible false or misleading evidence before the Environment, Communications, Information Technology and the Arts Legislation Committee (No. 119) PP No. 177/2004)	24/3/2004 (J.3215)	**Senate:** President determined precedence 23/3/2004 Motion moved by Senator Mackay and agreed to 24/3/2004	3/8/2004 (J.3791)	**Finding** • in the absence of any evidence of an intention to mislead, no contempt should be found **Recommendation**: • that there be laid on the table by no later than 1 March 2005 a statement of measures taken by Telstra to ensure that senior officers are appropriately trained in their obligations to Parliament, including the number and level of officers who have undergone such training and the dates of any such training	Finding endorsed and recommendation adopted 5/8/2004 (J.3836)
Possible unauthorised disclosure of private deliberations or draft report of Select Committee on the Free Trade Agreement between Australia and the United States of America (No. 120) PP No. 52/2005	5/8/2004 (J.3829)	Senate: President determined precedence 4/8/2004 Motion moved by Senator Ridgeway, and agreed to 5/8/2004	8/3/2005 (J.432)	Finding • in the circumstances of the case no contempt should be found	Finding endorsed 10/3/2005 (J.477)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible unauthorised disclosures of draft reports of Community Affairs References Committee (No. 121) PP No. 58/2005	12/5/2004 (J.3403) 24/6/2004 (J.3699-3700)	Senate: President determined precedence 11/5/2004 Motion moved by Senator Ferris, at the request of Senators Knowles and Humphries, and agreed to 12/5/2004 Senate: President determined precedence 24/6/2004 Motion moved by Chair of the Community Affairs References Committee (Senator McLucas) and agreed to 24/6/2004	15/3/2005 (J.507)	Finding • that, given the inability of the committee to discover the source of the unauthorised disclosures, no contempt should be found	Finding endorsed 17/3/2005 (J.568)
Parliamentary privilege – unauthorised disclosure of committee proceedings (No. 122) PP No. 137/2005	16/3/2005 (J.544)	Senate: Motion moved by Chair of the Privileges Committee (Senator Faulkner) and agreed to 16/3/2005	21/6/2005 (J.781)	Recommendation • that proposed revised procedures for dealing with unauthorised disclosures of committee documents be referred to the Procedure Committee for consideration	Recomm-endation adopted 11/8/2005 (J.934)
Possible failure by a senator to comply with the Senate's resolution relating to registration of interests (No. 123) PP No. 224/2005	16/6/2005 (J.706)	Senate: President determined precedence 15/6/2005 Motion moved by Senator George Campbell, at the request of the Leader of the Opposition in the Senate (Senator Evans), and agreed to 16/6/2005	5/10/2005 (J.1174)	Finding • that although there were failures to comply with the resolution there was no evidence of an intention not to comply and, therefore, no contempt should be found	Finding endorsed 6/10/2005 (J.1204)
Person referred to in the Senate – Professor David Peetz (No. 124) PP No. 405/2005	29/11/2005	President	6/12/2005 (J.1652)	Recommendation • that response be incorporated in *Hansard*	Report adopted 6/12/2005 (J.1652)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Parliamentary privilege – Precedents, procedures and practice in the Australian Senate 1966-2005 (No. 125) PP No. 3/2006	—	General report	Presented to the President under standing order 38(7) on 19/12/2005 tabled 7/2/2006 (J.1787)	—	
Person referred to in the Senate – Professor Barbara Pocock (No. 126) PP No. 41/2006	6/2/2006	President	27/2/2006 (J.1883)	Recommendation • that response be incorporated in *Hansard*	Report adopted 27/2/2006 (J.1883)
Persons referred to in the Senate – Certain persons on behalf of the Exclusive Brethren (No. 127) PP No. 122/2006	8/6/2006	President	21/6/2006 (J.2328)	Recommendation • that response be incorporated in *Hansard*	Report adopted 21/6/2006 (J.2328)
Person referred to in the Senate – Mr Karl J. O'Callaghan, APM Commissioner of Police, Western Australia (No. 128) PP No. 155/2006	3/8/2006	President	16/8/2006 (J.2514)	Recommendation • that response be incorporated in *Hansard*	Report adopted 16/8/2006 (J.2514)
Person referred to in the Senate – Dr Clive Hamilton (No. 129) PP No. 388/2006	30/10/2006	President	8/11/2006 (J.3027)	Recommendation • that response be incorporated in *Hansard*	Report adopted 8/11/2006 (J.3027)
Person referred to in the Senate – Mr Darryl Hockey (No.130) PP No. 131/2007	29/3/2007	President	7/8/2007 (J.4081)	Recommendation • that the response be incorporated in *Hansard*	Report adopted 7/8/2007 (J.4081)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible false or misleading evidence and improper refusal to provide information to the Finance and Public Administration Committee (No.131) PP No. 171/2007	7/2/2007	Senate: President determined precedence 6/2/2007 Motion moved by Senator Forshaw and agreed to 7/2/2007	11/9/2007 (J.4328)	Findings • there was a refusal to provide information, but in view of repeated refusal to provide it committee unable to find that false or misleading evidence given • unable to find a contempt against the person who refused to provide information as this would have involved allowing him to examine a member of the House of Representatives Recommendation • that the Senate accept that the matter not amenable to further pursuit by exercise of formal inquiry powers	Findings endorsed, recomm-endation agreed to 20/9/2007 (J.4463)
Unauthorised disclosure of committee proceedings (oral report)	—	—	13/9/2007 (J.4369)	Recommedation • that the order of 6/10/2005 relating to unauthorised disclosure of committee proceedings operate as an order of continuing effect	Recomm-endation adopted 17/9/2007 (J.4388)
Persons referred to in the Senate – Indonesian Forum for Environment (No.132) PP No. 173/2007	10/9/2007	President	17/9/2007 (J.4389)	Recommendation • that response be incorporated in *Hansard*	Report adopted 17/9/2007 (J.4389)
Possible false or misleading evidence before the Legal and Constitutional Affairs Committee (No. 133) PP No.260/2008	18/09/07	**Senate:** President determined precedence 17/09/07. Motion moved by Senator Nettle and agreed to 18/9/2007	15/5/2008 (J.427) Additional information tabled 26/6/2008 (J.662)	Finding • no contempt was committed	Motion to endorse finding moved 15/5/2008 (J.427)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Effective Repetition (No. 134) PP No.275/2008	—	Advisory report	18/6/2008	Recommendation • that the Senate endorse the principles outlined in paragraph 1.18 to guide any amendment of the *Parliamentary Privileges Act 1987* to address the issue of effective repetition	Recommendation adopted 18/6/2008 (J.527)

(See Supplement)

* Before passage of Privilege Resolutions on 25 February 1988 all matters were referred to the Committee of Privileges by the Senate.

Appendix 4

MATTERS OF PRIVILEGE RAISED AND RULINGS OF THE PRESIDENT

DATE AND JOURNAL REFERENCE	SENATOR	SUBJECT	RULING RE DETERMINATION OF PRECEDENCE
15.3.88 J.544	Chaney	Circulation of petition	Given
17.5.88 J.711	Walters	Alleged publication of Joint Select Committee on Video Material proceedings	Not Given
20.10.88 J.1040 1.11.88 J.1045 2.11.88 J.1067	Chaney	Possible interference with witnesses in consequence of their giving evidence before Senate Select Committee on Administration of Aboriginal Affairs	Given
7.11.88 J.1089	Chaney	Possible false or misleading evidence and manipulation of evidence before Senate Committees — Travel by Aboriginal community representatives	Given
10.11.88 J.1123 22.11.88 J.1129	Chaney	Freedom of speech and protection of citizens' rights	Drew attention to resolution 9 and was considering submission under resolution 5.
5.12.88 J.1237	MacGibbon	Possible false or misleading evidence before a Senate Estimates Committee — Department of Defence Project Parakeet	Given
8.12.88 J.1276	Black	Possible improper interference with a witness — Drugs in Sport inquiry	Given
9.3.89 J.1458	Peter Baume	Possible adverse treatment of a witness before the Select Committee on the Administration of Aboriginal Affairs	Given
30.5.89 J.1737	McGauran	Alleged unauthorised recording of a meeting in a committee room	Not Given

DATE AND JOURNAL REFERENCE	SENATOR	SUBJECT	RULING RE DETERMINATION OF PRECEDENCE
16.8.89 J.1942 17.8.89 J.1946	Hamer Teague Newman	Possible unauthorised disclosure of Senate Committee report	Given
5.12.89 J.2313	Crowley	Possible unauthorised disclosure of Senate Committee submission	Given
23.8.90 J.232	Newman	Possible misleading evidence before a Senate Estimates Committee — Department of Defence — asbestos in RAN ships	Given
17.10.90 J.349	Crowley	Possible improper influence or penalty on a witness in respect of evidence given before a Senate Committee	Given
8.11.90 J.395	Hill	Possible improper interference with a witness and possible misleading evidence before the National Crime Authority Committee	Given
2.4.92 J.2178	Zakharov	Possible improper interference with witnesses before the Community Affairs Committee	Given
8.10.92 J.2845	Reid Spindler	Possible adverse treatment of a witness before the Corporations and Securities Committee	Given
4.5.93 J.11	Walters	Alleged threats against Senators in relation to decisions concerning x-rated videos	Given
4.5.93 J.11	Reynolds	Alleged threat to a Senate Committee or to Senators in relation to the performance of their duties	Given
19.5.93 J.193	Watson	Possible improper interference with a witness before the Public Accounts Committee	Given
19.5.93 J.193	Watson	Possible false or misleading evidence given to the Senate or a Senate Committee — Midford Paramount inquiry	Given

DATE AND JOURNAL REFERENCE	SENATOR	SUBJECT	RULING RE DETERMINATION OF PRECEDENCE
30.8.93 J.405	Cooney	Possible improper interference with or misleading reports of proceedings of Senate Legal and Constitutional Affairs Committee	Given
29.9.93 J.528	Ferguson	Possible false or misleading information given to Senate or Estimates Committee	Given
27.10.93 J.715 18.11.93 J.811	Childs	Possible improper interference with a witness before the Standing Committee on Industry, Science, Technology, Transport Communications and Infrastructure	Given
25.11.93 J.901	McKiernan	Possible unauthorised disclosure of Joint Standing Committee on Migration document or proceedings	Given
16-17.12.93 J.1072	West	Possible improper interference with witnesses in consequence of their giving evidence to the Senate Select Committee on Superannuation	Given
3.3.94 J.1359	Vanstone	Possible unauthorised disclosure of a submission to the Joint Committee on the National Crime Authority	Given
30.5.94 J.1692	Crane	Possible improper interference with a witness in consequence of his giving evidence to the Senate Committee on Employment, Education and Training	Given
12.5.94 J.1683-4 22.6.94 J.1831	Kernot Spindler	Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, including refusal of Minister for Trade (Senator McMullan) to produce documents, and Auditor-General's report thereon	Not applicable
19.9.94 J.2151 22.9.94 J.2219	Vanstone	Alleged unauthorised disclosures and false and misleading accounts of Joint Committee of the National Crime Authority proceedings	Not given

DATE AND JOURNAL REFERENCE	SENATOR	SUBJECT	RULING RE DETERMINATION OF PRECEDENCE
19.10.94 J.2328	Parer	Alleged threats to a Senator	Given
9.3.95 J.3069	Murphy Newman	Alleged false or misleading information given to the former Select Committee on Public Interest Whistleblowing	Given
28.3.95 J.3175-6 29.3.95 J.3182-4	Evans	Whether the action of a Senator in tabling a document containing the tax file number of a person could be held to constitute a contempt of the Senate	Not applicable
29.6.95 J.3585-6	Chapman	Alleged unauthorised disclosure of documents and private deliberations of the Select Committee on the Dangers of Radioactive Waste	Given
29.6.95 J.3594	Murphy	Alleged improper interference with a witness as a result of that witness giving evidence to the Select Committee on Unresolved Whistleblower Cases	Given
22.8.95 J.3640-1	O'Chee Boswell	Alleged threats to persons and to a senator for provision of information	Given
30.11.95, 1.12.95am J.4323	Vanstone	Alleged unauthorised disclosure of draft response of Joint Committee on the National Crime Authority	Given, but President recommended that matter not be proceeded with
24.6.96 J.364-5	Murphy	Alleged false or misleading evidence given to the Select Committee on Unresolved Whistleblower Cases	Given
22.8.96 J.491	Patterson	Alleged false or misleading evidence given to the Environment, Recreation, Communications and the Arts Legislation Committee	Given
6.5.97 J.1830	Margetts Bolkus	Alleged false or misleading statements tabled in the Senate	Given

DATE AND JOURNAL REFERENCE	SENATOR	SUBJECT	RULING RE DETERMINATION OF PRECEDENCE
1.10.97 J.2582	Bolkus	Possible improper interference by the Attorney-General and his officers with potential witnesses before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund	Given
23.10.97 J.2685	Bolkus	Possible unauthorised disclosure of documents of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund	Given
28.10.97 J.2733	Abetz Ferris	Possible unauthorised disclosures of a report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund	Given
19.11.97 J.2917-8	Ferris McGauran	Possible unauthorised disclosure of a document of the Parliamentary Joint Committee on the National Crime Authority	Given
25.11.97 J.2966	Schacht	Possible unauthorised disclosure of a draft report of the Environment, Recreation, Communications and the Arts Legislation Committee	Given
4.12.97 J.3206	Woodley	Possible misleading evidence before the Select Committee on Unresolved Whistleblower Cases	Given
11.3.98 J.3361	Collins J.	Possible unauthorised disclosure of a draft report of the Economics References Committee	Given
25.3.98 J.3449-50	Brown	Alleged failure of Senator Parer to register and declare relevant interests in accordance with the resolutions of the Senate of 17 March 1994 relating to senators' interests	Given, but motion to refer matter to committee negatived (26/3/1998, J.3462-3)

DATE AND JOURNAL REFERENCE	SENATOR	SUBJECT	RULING RE DETERMINATION OF PRECEDENCE
30.6.98 J.4105	McGauran	Possible unauthorised disclosure of the report of the Parliamentary Joint Committee on the National Crime Authority on the committee's third evaluation of the National Crime Authority	Given
27.5.99 J.947	Crowley	Possible injury or harm to witnesses and possible misrepresentation or unauthorised disclosure of committee proceedings and documents	Given
11.8.99 J.1457	Collins	Possible injury or harm to witnesses in consequence of their giving evidence before the Employment, Workplace Relations, Small Business and Education References Committee	Given
1.9.99 J.1615	Collins	Possible unauthorised disclosure of, and dealings with, a draft report of the Employment, Workplace Relations, Small Business and Education References Committee	Given
6.12.99 J.2171	Allison	Alleged threats against persons who made submissions to the Select Committee on A New Tax System	Given
11.5.2000 J.2704	Gibson	Possible unauthorised disclosure of in camera proceedings of the Economics References Committee	Given
26.6.2000 J.2888	Chapman	Possible unauthorised disclosure of a submission to the Joint Committee on Corporations and Securities	Given
27.2.2001 J.3948	Collins	Possible improper interference with witnesses and possible false or misleading evidence before the Employment, Workplace Relations, Small Business and Education Legislation Committee	Given

DATE AND JOURNAL REFERENCE	SENATOR	SUBJECT	RULING RE DETERMINATION OF PRECEDENCE
25.6.2001 J.4388	Payne	Possible unauthorised disclosure of a draft report of the Legal and Constitutional Legislation Committee	Given
6.8.2001 J.4547	Tambling	Possible improper interference with and penalty on a senator	Given
18.9.2001 J.4854	Ferris	Possible misleading evidence before Native Title Committee	Given
14.2.2002 J.91-2	Harris	Execution of search warrants in senators' offices	Given
15.5.2002 J.352	Cook	Possible improper influence and interference with a witness	Given
27.6.2002 J.524	Eggleston	Unauthorised disclosure of draft report	Given
1.12.2003 J.2777	Heffernan	Possible improper interference with a witness	Given
24.3.2004 J.3215	Mackay	Possible misleading evidence before Environment, Communications, Information Technology and the Arts Legislation Committee	Given
11.5.2004 J.3363	Knowles and Humphries	Unauthorised disclosure of draft report	Given
24.6.2004 J.3699	McLucas	Unauthorised disclosure of draft report	Given
4.8.2004 J.3808	Ridgeway	Unauthorised disclosure of draft report	Given
10.5.2005 J.574	Evans	Alleged failure of Senator Lightfoot to provide a statement to the Registrar of Senators' Interests relating to sponsored trip to Iraq	Given, but motion withdrawn following apology by Senator Lightfoot (11/5/2005, J.610)
15.6.2005 J.684	Evans	Alleged failure of Senator Lightfoot to provide a statement to the Registrar of Senators' Interests relating to share ownerships and transactions	Given

DATE AND JOURNAL REFERENCE	SENATOR	SUBJECT	RULING RE DETERMINATION OF PRECEDENCE
16.8.2005 J.953	Brown	Conduct by Senator McGauran in the chamber on 11 August 2005	Not given
5.9.2005 J.997	Finance and Public Administration References Committee	Apparent conflict between an answer to a question given by a witness and the facts as subsequently disclosed to the committee	Given, but motion to refer matter to committee rejected (7/9/2005, J.1050)
7.2.2007 J.3382	Forshaw and Murray	Whether false or misleading evidence was given to the Finance and Public Administration Committee and whether there was an improper refusal to provide information to the committee	Given
18.9.2007 J.4415	Nettle	Whether false or misleading evidence was given to the Legal and Constitutional Affairs Committee or any other Senate committee concerning the government's knowledge of the rendition of Mr Mamdouh Habib to Egypt	Given

(See Supplement)

Appendix 5

PRIVATE SENATORS' BILLS PASSED INTO LAW SINCE 1901

Commonwealth Conciliation and Arbitration Bill 1908

Purpose: To extend the protection against dismissal provided by the principal Act to members of organisations.
Senate: Introduced by Senator Needham 24.9.08; bill lapsed at prorogation; Senate agreed to proceed with bill at stage reached in previous session 27.5.09; read a third time 2.9.09.
HoR: Introduced 3.9.09; agreed to with amendments and read a third time 8.12.09.
Senate agreed to amendments made by the HoR 8.12.09.
Assent: 13.12.09; Act no. 28 of 1909 (Act cited as *Commonwealth Conciliation and Arbitration Act 1909*).

Commonwealth Electoral Bill 1924

Purpose: To make provision for compulsory voting.
Senate: Introduced by Senator Payne 16.7.24; read a third time 23.7.24.
HoR: Introduced 23.7.24; read a third time 24.7.24.
Assent: 31.7.24; Act no. 10 of 1924.

Australian Capital Territory Evidence (Temporary Provisions) Bill 1971

Purpose: To make temporary provision for the law of evidence in the Australian Capital Territory after the disallowance of an Ordinance.
Senate: Introduced by Senator Murphy 25.8.71; read a third time 26.8.71 a.m..
HoR: Introduced and read a third time 26.8.71.
Assent: 26.8.71; Act no. 66 of 1971.

Wireless Telegraphy Amendment Bill 1980

Purpose: To give the minister a discretion to direct the return to the owner of otherwise forfeited equipment.
Senate: Introduced by Senator Rae 29.4.80; read a third time 16.5.80.
HoR: Introduced 20.5.80; read a third time 22.5.80.
Assent: 3.6.80; Act no. 91 of 1980.

Senate Elections (Queensland) Bill 1981

Purpose: To make provision for Queensland senators to be chosen by the people of Queensland voting as one electorate — section 7 of the Constitution.
Senate: Introduced by Senator Colston 26.3.81; read a third time 29.4.82.
HoR: Introduced 29.4.82; read a third time 5.5.82.
Assent: 21.5.82; Act no. 31 of 1982 (Act cited as *Senate Elections (Queensland) Act 1982*).

Income Tax Assessment Amendment Bill 1984 (No.2)

Purpose: To prevent taxes being evaded under s23F provisions for superannuation benefits 'cherrypicking scheme' to date from Treasurer's announcement.
Senate: Introduced by Senator Jack Evans 2.5.84; read a third time 4.5.84.
HoR: Introduced 7.5.84; read a third time 10.10.84.
Assent: 17.10.84; Act no. 115 of 1984 (Act cited as *Income Tax Assessment Amendment Act (No.5) 1984*).

Parliamentary Privileges Bill 1986

Purpose: To clarify, and make certain changes to, the law of parliamentary privilege.
Senate: Introduced by Senator Douglas McClelland 7.10.86; passed with amendments and read a third time 17.3.87.
HoR: Introduced 19.3.87; read a third time 6.5.87.
Assent: 20.5.87; Act no. 21 of 1987.

Smoking and Tobacco Products Advertisements (Prohibition) Bill 1989

Purpose: To prohibit certain advertisements relating to smoking and tobacco products in the print media.
Senate: Introduced by Senator Powell 31.8.89; read a third time 7.12.89.
HoR: Introduced 21.12.89; read a third time 22.12.89.
Assent: 28.12.89; Act no. 181 of 1989.

Parliamentary Presiding Officers Amendment Bill 1992

Purpose: To amend the Principal Act in relation to the Deputy Presiding Officer of each House of the Parliament.
Senate: Introduced by Senator Colston 25.6.92; read a third time 8.10.92.
HoR: Introduced 12.10.92; agreed to with amendments and read a third time 25.11.92. Senate agreed to HoR amendments 26.11.92.
Assent: 11.12.92; Act no. 163 of 1992.

Parliamentary Service Amendment Bill 2005

Purpose: To amend the Principal Act to provide for the statutory position of Parliamentary Librarian and to give statutory status to the Parliamentary Library and the Security Management Board.
Senate: Introduced by Senator Calvert 9.3.05; read a third time 10.3.05.
HoR: Introduced 14.3.05; read a third time 16.3.05.
Assent: 1.4.05; Act no. 39 of 2005.

Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU486) Bill 2005

Purpose: To repeal a provision requiring ministerial approval for use of the drug RU486.
Senate: Introduced by Senators Allison, Moore, Nash and Troeth 8.12.05; read a third time 9.2.06.
HoR: Introduced 13.2.06; read a third time 16.2.06.
Assent: 3.3.06; Act no. 5 of 2006.

Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006

Purpose: To amend the *Prohibition of Human Cloning Act 2002* and *Research Involving Human Embryos Act 2002* to retain existing prohibitions on certain human reproductive cloning and other assisted reproductive technology activities, and permit certain human embryo research under licence.

Senate: Introduced by Senator Patterson 19.10.06; read a third time 7.11.06.
HoR: Introduced 27.11.06; read a third time 6.12.06.

Assent: 12.12.06; Act no. 172 of 2006.

PRIVATE SENATORS' BILLS WHICH HAVE PASSED THE SENATE SINCE 1901

Parliamentary Witnesses 1905 [*previously* **Parliamentary Evidence 1904 [1905]]**

Introduced by: Senator Nield
Date passed by Senate: 13 October 1905

Papua 1906
Introduced by: Senator Stewart
Date passed by Senate: 14 September 1906

Commonwealth Conciliation and Arbitration 1908 [1909]

Introduced by: Senator Needham
Date passed by Senate: 2 September 1909

Commonwealth Banking Companies Reserve Liabilities 1910

Introduced by: Senator Gould on behalf of Senator Walker
Date passed by Senate: 15 September 1910

Constitution Alteration (Trade and Commerce) 1913

Introduced by: Senator McGregor
Date passed by Senate: 9 December 1913

Constitution Alteration (Corporations) 1913

Introduced by: Senator McGregor
Date passed by Senate: 9 December 1913

Constitution Alteration (Trusts) 1913

Introduced by: Senator McGregor
Date passed by Senate: 9 December 1913

Constitution Alteration (Industrial Matters) 1913

Introduced by: Senator McGregor
Date passed by Senate: 9 December 1913

Constitution Alteration (Railway Disputes) 1913

Introduced by: Senator McGregor
Date passed by Senate: 9 December 1913

Constitution Alteration (Nationalization of Monopolies) 1913

Introduced by: Senator McGregor
Date passed by Senate: 9 December 1913

Constitution Alteration (Trade and Commerce) 1914

Introduced by: Senator McGregor
Date passed by Senate: 11 June 1914

Constitution Alteration (Corporations) 1914

Introduced by: Senator McGregor
Date passed by Senate: 11 June 1914

Constitution Alteration (Trusts) 1914

Introduced by: Senator McGregor
Date passed by Senate: 11 June 1914

Constitution Alteration (Industrial Matters) 1914

Introduced by: Senator McGregor
Date passed by Senate: 11 June 1914

Constitution Alteration (Railway Disputes) 1914

Introduced by: Senator McGregor
Date passed by Senate: 11 June 1914

Constitution Alteration (Nationalization of Monopolies) 1914

Introduced by: Senator McGregor
Date passed by Senate: 11 June 1914

Commonwealth Electoral 1924

Introduced by: Senator Payne
Date passed by Senate: 23 July 1924

Life Insurance 1930

Introduced by: Senator McLachlan
Date passed by Senate: 10 July 1930

National Security 1943

Introduced by: Senator McLeay
Date passed by Senate: 18 February 1943

Constitution Alteration (Prices) 1950

Introduced by: Senator McKenna
Date passed by Senate: 1 November 1950

Death Penalty Abolition 1968

Introduced by: Senator Murphy
Date passed by Senate: 4 June 1968

Australian Capital Territory Evidence (Temporary Provisions) 1971

Introduced by: Senator Murphy
Date passed by Senate: 26 August 1971 a.m.

Death Penalty Abolition 1970

Introduced by: Senator Murphy
Date passed by Senate: 9 March 1972

Parliament 1973 [1974]

Introduced by: Senator Wright
Date passed by Senate: 29 November 1973

Wireless Telegraphy Amendment 1980

Introduced by: Senator Rae
Date passed by Senate: 16 May 1980

Insurance (Agents and Brokers) 1981

Introduced by: Senator Evans
Date passed by Senate: 29 October 1981

Repatriation Acts (Tuberculosis Pensions) Amendment 1981

Introduced by: Senator Macklin
Date passed by Senate: 26 November 1981

Industrial Democracy 1981

Introduced by: Senator Siddons
Date passed by Senate: 26 November 1981

Institute of Freshwater Studies 1981

Introduced by: Senator McLaren
Date passed by Senate: 25 February 1982

Queensland Aboriginals and Torres Strait Islanders (Self-Management and Land Rights) 1981

Introduced by: Senator Ryan
Date passed by Senate: 18 March 1982

Senate Elections (Queensland) 1981

Introduced by: Senator Colston
Date passed by Senate: 29 April 1982

Constitution Alteration (Fixed Term Parliaments) 1981

Introduced by: Senator Evans
Date passed by Senate: 17 November 1982

World Heritage Properties Protection 1982

Introduced by: Senator Mason
Date passed by Senate: 14 December 1982

Constitution Alteration (Parliament) 1983

Introduced by: Senator Macklin
Date passed by Senate: 13 October 1983

Income Tax Assessment Amendment 1984 (No. 2)

Introduced by: Senator Jack Evans
Date passed by Senate: 4 May 1984

Flags Amendment 1984 [1985]

Introduced by: Senator Durack
Date passed by Senate: 28 February 1985

Parliamentary Privileges 1986

Introduced by: Senator Douglas McClelland
Date passed by Senate: 17 March 1987

Family Law Amendment 1985

Introduced by: Senator Durack
Date passed by Senate: 14 May 1987

Referendum (Machinery Provisions) (Informal Ballot-papers) Amendment 1988

Introduced by: Senator Short
Date passed by Senate: 24 August 1988

Australian Bureau of Statistics Amendment 1988

Introduced by: Senator Sheil
Date passed by Senate: 6 April 1989

Income Tax Assessment (Tax Agents' Fees) Amendment 1989

Introduced by: Senator Watson
Date passed by Senate: 25 May 1989

National Health (Pharmaceutical Benefits Determination Revocation) Amendment 1989 [*previously* **National Health (Pharmaceutical Benefits Determination Revocation and Tribunal Membership) Amendment 1989]**

Introduced by: Senator Puplick
Date passed by Senate: 7 September 1989

End of War List 1989

Introduced by: Senator McGauran
Date passed by Senate: 2 November 1989

Smoking and Tobacco Products Advertisements (Prohibition) 1989

Introduced by: Senator Powell
Date passed by Senate: 7 December 1989

End of War List 1990

Introduced by: Senator Boswell
Date passed by Senate: 18 September 1990

Income Tax Assessment (Substantiation Requirements) Amendment 1990

Introduced by: Senator Watson
Date passed by Senate: 8 November 1990

Australian Bureau of Statistics (Parliamentary Supervision of Proposals) Amendment 1990

Introduced by: Senator Walters
Date passed by Senate: 15 November 1990

Income Tax Assessment (Valueless Shares) Amendment 1991

Introduced by: Senator Watson
Date passed by Senate: 17 October 1991

Flags Amendment 1990

Introduced by: Senator Parer
Date passed by Senate: 30 April 1992

Parliamentary Presiding Officers Amendment 1992

Introduced by: Senator Colston
Date passed by Senate: 8 October 1992

Australian National University Amendment (Autonomy) 1992

Introduced by: Senator Tierney
Date passed by Senate: 8 October 1992

Income Tax Assessment (Isolated Area Zone Extension) Amendment 1992

Introduced by: Senator Panizza
Date passed by Senate: 5 November 1992

Social Security Amendment (Listed Securities) 1993

Introduced by: Senator Patterson
Date passed by Senate: 12 May 1993

Audit (Auditor-General an Officer of the Parliament) Amendment 1993

Introduced by: Senator Watson
Date passed by Senate: 28 October 1993

Superannuation Guarantee (Administration) (Exemption of Council Allowances) Amendment 1993

Introduced by: Senator Ian Macdonald
Date passed by Senate: 28 October 1993

Sales Tax (Exemptions and Classifications) (Two Wheel Drive Vehicles with Jeep, Platform, Pick-Up or Utility Body Type) Amendment 1994

Introduced by: Senator Watson
Date passed by Senate: 2 June 1994

Public Service (Abolition of Compulsory Retirement Age) Amendment 1995

Introduced by: Senator Patterson
Date passed by Senate: 30 June 1995

Human Rights (Mandatory Sentencing of Juvenile Offenders) 1999

Introduced by: Senators Brown, Bolkus and Greig
Date passed by Senate: 15 March 2000

Kyoto Protocol Ratification Bill 2003 [No. 2]

Introduced by: Senators Lundy and Brown
Date passed by Senate: 1 April 2004

Parliamentary Service Amendment 2005

Introduced by: Senator Calvert
Date passed by Senate: 10 March 2005

Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU486) Bill 2005

Introduced by: Senators Allison, Moore, Nash and Troeth
Date passed by Senate: 9 February 2006

Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006

Introduced by: Senator Patterson
Date passed by Senate: 7 November 2006

(See Supplement)

LIST OF BILLS IN WHICH THE SENATE HAS MADE REQUESTS FOR AMENDMENTS AND RESULTS OF SUCH REQUESTS, 1901–2008

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
61	14.06.01	**Consolidated Revenue (Supply) Bill 1901-02 (No. 1)** — Request that the House of Representatives amend the bill to show the items of expenditure comprised in the sums which the bill purports to grant	Bill not returned by House of Representatives, but a second bill forwarded, showing items as requested
67	21.06.01	**Consolidated Revenue (Supply) Bill 1901-02 (No. 2)** — Request to alter bill so that Supply should be joint grant of two Houses	Request complied with by House of Representatives, with a modification which was accepted by the Senate
472-481 and 522-524	24.07.02 and 03.09.02	**Customs Tariff Bill 1901-02** — Requests for alterations of duties, additions to free list, etc.	Certain requested amendments made by House of Representatives, others made with modifications, remainder not made. Certain requests pressed by Senate and others modified. Bill returned by House of Representatives with question raised as to right of Senate to press requests, and with certain requested amendments made, others not made, others made with modifications, etc. Motion passed by Senate that action of House of Representatives in receiving and dealing with reiterated requests was in compliance with the undoubted constitutional position and rights of the Senate. Modification of requests agreed to by Senate, and requests not made by House of Representatives not further pressed

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
68	23.07.03	**Sugar Bounty Bill 1903** — Amendment earlier disagreed to by House of Representatives reformulated as a request for amendment as to bounty to be paid	Requested amendment made by House of Representatives with a modification which was agreed to by the Senate
172	14.10.03	**Appropriation Bill 1903-04 (No. 1)** — Requests for restoration of salaries of Senate officers which had been reduced by House of Representatives, etc.	One requested amendment made, others not made. Senate pressed requests. House of Representatives laid aside bill, but gave effect to Senate's requests in a new bill, which was agreed to by Senate without requests
158, 169 and 173	03.10.06 and 10.10.06	**Excise Tariff (Spirits) Bill 1906** — Requests for amendments concerning application of certain duties	Some requested amendments made by House of Representatives, others not made, and one made with modifications. Senate pressed requests. One requested amendment made, others made with modifications. Senate further pressed requests. Requested amendments made as originally requested
166	05.10.06	**Excise Tariff (Stripper Harvesters, etc.) Bill 1906** — Requests for omission of paragraphs from proviso as to application of duties	Requested amendments made
172 and 174	10.10.06 and 11.10.06	**Customs Tariff (British Preference) Bill 1906** — Requests for alteration of date of operation of certain provisions, and a request for re-insertion of item previously omitted by House of Representatives	Two requested amendments made (including request for re-insertion of item), one not made, and further amendments made by House of Representatives. Amendments disagreed to by Senate as not being modification of requests, and request pressed. House of Representatives made requested amendment

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
302	02.04.08	**Excise Tariff Bill 1908** — Request for alteration of duty	Requested amendment made
303-369 and 459-478	02.04.08 and 21.05.08	**Customs Tariff Bill 1907** — Requests for alterations of duties, and for additions to free list, etc.	Some requested amendments made by House of Representatives, others not made, others made with modifications, and consequential amendments made in bill. Certain requests pressed, others pressed in part, or modified. Bill returned by House of Representatives with protest as to right of Senate to make further requests, and with modified requests made, and requests not made. Motion passed by Senate that the action of House of Representatives in receiving and dealing with reiterated requests was in compliance with the undoubted constitutional position and rights of the Senate. Requests not pressed by Senate, and modifications agreed to
107	11.12.08	**Appropriation Bill 1908-09** — Requests for amendments to salaries schedule	Requested amendments not made. Senate did not press requests
95	26.08.10	**Surplus Revenue Bill 1910** — Request for amendment regarding the period of payment of subsidy to Western Australia	Requested amendment made
251-252	25.11.10	**Customs Tariff Bill 1910** — 22 requests for alterations of duties, alterations in wording, etc.	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
202-203	20.12.11	**Customs Tariff Bill 1911** — 31 requests for alterations in duties, altered wording of items, etc.	Some requested amendments made, one not made, one made with modification. Requests not made not pressed by Senate and modification agreed to
136	15.12.14	**Land Tax Bill 1914** — Six requests for amendments in rates of tax	Requested amendments made
537	15.12.16	**Supply Bill (No. 3) 1916-17** — Request for reduction of total amount of vote with consequential amendments in Schedule	Requested amendments not made. Senate pressed requests. Bill laid aside. Another bill brought in, giving effect to requested reduction, and passed by both Houses
145	26.09.17	**Income Tax Bill 1917** — Two requested amendments which would have the effect of exempting certain persons from tax	Requested amendments made
344	06.11.18	**Entertainments Tax Bill 1918** — Requested amendment to exempt certain children's payments from Entertainment Tax	Requested amendment made
429	20.12.18	**Income Tax Bill 1918** — Requested amendment to reduce tax in certain cases	Requested amendment made
183	21.05.20	**War Gratuity Bill 1920 (No. 2)** — Requested amendments to alter rate of gratuity in certain cases	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
713-732 and 810-817	13.10.21 and 05.12.21	**Customs Tariff Bill 1921** — 92 requested amendments for alterations in the tariff	Some requested amendments made, some made with modifications, and others not made. Certain requests pressed or modified by Senate. Bill returned by House of Representatives with question raised as to right of Senate to press requests, and with original requested amendments made, made with modifications, made as modified by Senate, and not made. President made statement re unusual terms of Message, and Senate passed motion that action of House of Representatives in receiving and dealing with reiterated requests was in compliance with constitutional rights of Senate. Modifications made by House of Representatives agreed to and remaining requests not further pressed by Senate
771	11.11.21	**Excise Tariff Bill 1921** — Request for alteration in an item	Requested amendment made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
855 and 863	09.12.21 and 10.12.21	**Appropriation Bill 1921-22** — Request to increase a salary vote and to reduce another salary vote	One requested amendment not made, but Senate's request for the increase given effect to in new bill. Remaining request pressed by Senate, but not made by House of Representatives. Informal conference of representatives of both Houses appointed to deal with matter in disagreement; in view of this, request not further pressed[1]
126	15.09.22	**Meat Export Bounties Bill 1922** — Requests for amendments to extend payment of bounty	Requested amendments made
202	11.10.22	**Superannuation Bill 1922** — Requests for amendments to extend superannuation benefits (both requests and amendments were made in this bill)	Requested amendments made
391	09.09.24	**Wine Export Bounty Bill 1924** — Request for amendment to extend payment of bounty	Requested amendment made
199-201	25.06.26	**Customs Tariff Bill 1926** — 19 requests for alterations of duties, alterations in wording of items, etc.	Some requested amendments made, others made with modifications, and one not made. Senate agreed to modifications and did not press request not made
242	23.07.26	**Judiciary Bill 1926** — Requests to vary conditions of pensions of justices	Requested amendments made

[1] Appropriation Bill 1921-22: for an elaboration of this case, see *ASP*, 6th ed., pp 641-642.

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
520-521	23.03.28	**Customs Tariff Bill 1927** — Nine requests for alterations of duties, alterations in wording of items, etc.	Some requested amendments made, others made with consequential modifications. Senate agreed to consequential modifications
178	30.05.30	**Wine Export Bounty Bill 1930** — Request for amendment as to eligibility of certain returned soldiers to receive bounty (both a request and an amendment were made in this bill)	Requested amendment made
386	08.08.30	**Appropriation Bill 1930-31** — Request that the appropriation be reduced by the amount of £1 — as an intimation to the Government that, in the opinion of the Senate, the expenditure upon the Parliament, the government, and the Public Service should be reduced by at least £1 000 000	Requested amendment not made. Senate did not press request
465	12.12.30	**Income Tax Bill (No. 2) 1930** — Requested amendment to exempt shareholders of a company from certain super tax	Requested amendment made
757	21.07.31	**Customs Tariff (Canadian Preference) Bill 1931** — Request for minor drafting amendment	Requested amendment made
797	31.07.31	**Income Tax Bill 1931** — Request for drafting amendment	Requested amendment made
816-817	06.08.31	**Sales Tax Bills (Nos 1 to 9) 1931** — A request for a drafting amendment to each bill	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
740-752 and 828	25.10.33 and 30.11.33	**Customs Tariff Bill 1933** — 47 requested amendments for alterations in the tariff	Some requested amendments made, some made with modifications, and others not made. Senate did not press certain requests, agreed to certain modifications made by House, and pressed certain requests. Bill returned by House of Representatives with question raised as to right of Senate to press requests, and requested amendments of the Senate made with modifications. President made statement re terms of Message, and motion passed that action of House of Representatives in receiving and dealing with reiterated requests was in compliance with the undoubted constitutional position and rights of the Senate. Senate agreed to modifications made by House of Representatives
770	02.11.33	**Excise Tariff Bill 1933** — Requests for alteration in items	Requested amendments made, and made with modifications. Modifications agreed to by the Senate
802	22.11.33	**Customs Tariff (New Zealand Preference) Bill 1933** — Request for drafting amendment	Requested amendment made
876	08.12.33	**Flour Tax Bill (No. 1) 1933** — Request for drafting amendment	Requested amendment made
110	14.12.34	**Flour Tax Bill (No. 3) 1934** — Requested amendment to omit certain invalid and children’s foods from the list of goods subject to flour tax	Requested amendment made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
530	18.03.36	**Primary Producers Relief Bill 1936** — Requested amendments extending the date for lodging applications for fertiliser subsidy	Requested amendments made
612-614 and 630	21.05.36 and 22.05.36	**Customs Tariff Bill 1936** — Nine requested amendments for alterations in the tariff[2]	Some requested amendments made, others not made, one made with modification. Senate did not press certain requests, agreed to a modification made by House, and pressed one request. Bill returned by House of Representatives with question raised as to right of Senate to press requests, and pressed request not made. Deputy President made statement re terms of Message, and motion passed that action of House of Representatives in receiving and dealing with reiterated request was in compliance with the undoubted constitutional position and rights of the Senate. Request not further pressed
631	22.05.36	**Customs Tariff (Exchange Adjustment) Bill 1936** — Requested amendment regarding exchange adjustment in connection with cement duty	Requested amendment made

[2] Statement made by Chair of Committees concerning these requests, 5.5.36, J.186.

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
174	29.06.38	**National Health and Pensions Insurance Bill 1938** — Requested amendments to provide for the payment of sickness benefit on the fifth day of sickness, instead of on the seventh day (both requests and amendments were made in this bill)	Requested amendments made
333	08.12.38	**Apple and Pear Tax Bill 1938** — Requested amendment for alteration of date of operation of tax	Requested amendment made
358	29.05.42	**Widows' Pensions Bill 1942** — A request for a drafting amendment, and a requested amendment to provide that the rate of institutional pension shall be adjusted in accordance with the cost of living variation (both requests and amendments were made in this bill)	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
509 and 514	11.03.43 and 16.03.43	**Income Tax Bill 1943** — A requested amendment to leave out certain words which the Senate considered constituted a clear case of 'tacking' in that the inclusion of such words in a tax bill was an infringement of section 55 of the Constitution, and two requested amendments for alterations to the tax provisions relating to life assurance companies	Two requested amendments relating to life assurance companies made. Requested amendment for omission of provision which Senate claimed infringed section 55 of the Constitution not made. Senate pressed request. Bill returned by House of Representatives with question raised as to right of Senate to press requests, and pressed request made. Statement by President re terms of Message, and pointing out that Senate's action under standing order 252 was not in conflict with legal opinion circulated by Government that Senate can make a given request but once at any particular stage of a bill. Motion passed that action of House of Representatives in receiving and dealing with the reiterated request of the Senate was in compliance with the undoubted constitutional position and rights of the Senate
536-537	25.03.43	**Australian Soldiers' Repatriation Bill 1943** — Requested amendments relating to the conditions of payment of pensions (both requests and amendments were made in this bill)	Requested amendments made
518	24.10.52	**Customs Tariff Bill 1952** — Two requests for amendments of tariff	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
616	30.10.63	**Phosphate Fertilisers Bounty Bill 1963** — A request for amendment relating to the rate of bounty in respect of superphosphate	Requested amendment made
75	23.04.64	**Live-stock Slaughter Levy Bill 1964** — Requested amendments to impose a maximum on the levies that could be charged under the bill	Requested amendments made
235	17.11.64	**Television Stations Licence Fees Bill 1964** — Requested amendment relating to concessions for Australian content in television programs[3]	Requested amendment not made. Senate did not press request
601	12.05.66	**Customs Tariff Bill (No. 2) 1966** — Three requests for amendment of tariff on peas and beans in connection with the New Zealand-Australia Free Trade Agreement	Requested amendments not made. Senate did not press requests
140	19.05.67	**Homes Savings Grant Bill 1967** — Two requests that savings with credit unions be accepted for the purposes of the homes savings grant scheme	Requested amendments not made. Senate did not press requests
316	21.11.68 (22.11.68 am)	**Parliamentary Allowances Bill 1968** — Two requests: one to provide an allowance to the leader of the second non-government party in the Senate, and the second to increase by $150 the electorate allowance of senators	First requested amendment made, second not made. Senate did not press second request

[3] There is ground for arguing that this request should have been an amendment, because section 53 of the Constitution provides that a bill does not impose taxation by reason of provisions for the payment of fees for licences.

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
166	21.05.70	**Homes Savings Grant Bill 1970** — Request for an amendment to reduce from $7 000 to $5 000 the proposed minimum amount of a prescribed housing loan (the requested amendment had particular reference to credit unions)	Requested amendment made
200-201 and 210	10.06.70 and 11.06.70	**National Health Bill 1970** — Seven requests, the most important being to provide the Commonwealth benefit of $2 a day for all patients, whether or not the individual patient is insured (both requests and amendments were made in this bill)	One requested amendment made and six not made. Senate did not press requests, but made two further requests to provide for the payment of Commonwealth benefit of $2 a day to hospitals in all cases in which no charge is made to patients. These further requested amendments made
218	12.06.70	**States Grants (Special Financial Assistance) Bill 1970** — Request to correct a typographical error. A sum intended to be $1.5m appeared as $1 000 500	Requested amendment made
490	11.10.73	**Meat Export Charge Bill 1973** — Request to reduce the levy on exported meat from 1.6c a pound to 1c	Requested amendment not made. Senate did not press request
642-643	12.12.73	**States Grants (Schools) Bill 1973** — Request to give continued per capita grants to schools in addition to needs grants	Requested amendment made with modifications and a consequential amendment. Senate agreed to the modifications and the consequential amendment
544	06.03.75	**Refrigeration Compressors Bounty Bill 1975** — Request to increase the amount available for payment of bounty to include all locally made compressors (both a request and amendments were made in this bill)	Requested amendment made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
910	10.09.75	**Stevedoring Industry Charge Bill 1975** — Request for new clause to limit the operation of the Act	Requested amendment made with modifications, and House made further amendments. Senate suspended standing orders to enable consideration of further amendments. Senate agreed to modifications and agreed to the further amendments
942-943	02.10.75	**Customs Tariff (Coal Export Duty) Bill 1975** — Requests to exempt certain steaming coal from export duty	Requested amendments made
286	12.06.78	**Parliamentary Contributory Superannuation Amendment Bill 1978** — A requested amendment to clarify clause to the extent that it gives to senators equivalent rights to the rights of members of the House of Representatives for the same responsibilities	Requested amendment made
1460	01.05.80	**Liquefied Petroleum Gas (Grants) Bill 1980** — A requested amendment to increase the prescribed size of a cylinder by 1kg	Requested amendment made
1675-1676	17.09.80	**Honey Export Charge Amendment Bill 1980, Honey Levy (No. 1) Amendment Bill 1980 and Honey Levy (No. 2) Amendment Bill 1980** — A requested amendment to each bill to substitute a date for the commencement of the bill	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
589-593	14.10.81	**Sales Tax Amendment Bills (Nos 1A to 9A) 1981** — Requested amendments to each bill to delete a number of items from the taxable category	Requested amendments not made. Senate pressed requests. House of Representatives declined to consider Senate message. Bills discharged from House of Representatives Notice Paper
658	29.10.81	**Social Services Amendment Bill 1981 —** Requested amendments to remove clauses which reduced the right to unemployment benefits of spouses of strikers, and of spouses of unemployed persons who failed the work test	Requested amendments made
1208-1209	09.11.82	**Customs Tariff Bill 1982** — Requested amendments to limit ministerial discretion and provide for parliamentary scrutiny through the disallowance procedure	Requested amendments made
125	25.05.83	**Bounty (Steel Products) Bill 1983** — A requested amendment to clarify which steel products were eligible for receipt of bounty	Requested amendment made
131	25.05.83	**Taxation (Interest on Overpayments) Bill 1983** — Requested amendment to ensure equality in payment of interest by the Commissioner of Taxation on disputed amounts refunded as the result of a successful appeal or objection	Requested amendment made
929	05.10.84	**Judicial and Statutory Officers (Remuneration and Allowances) Bill 1984** — A requested amendment for inclusion of a new clause making provision for a "Canberra allowance" to be paid to the Solicitor-General	Requested amendment made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
327	23.05.85 (24.05.85 am)	**Dairy Industry Stabilization Levy Amendment Bill 1985** — A requested amendment to ensure that present domestic pricing arrangements continue for another two years and are then phased out in four equal steps by 1991	Requested amendment not made. Senate pressed request. House of Representatives declined to consider Senate message. Bill discharged from House of Representatives Notice Paper
532-533	13.11.85	**Interstate Road Transport Charge Bill 1985** — Requested amendments to set a ceiling on the licence fee for operators and to establish an admonishment system for persons contravening safety provisions	Requested amendments made
645 and 856-858	28.11.85 and 14.04.86	**Veterans' Entitlements Bill 1985** — Requested amendments relating to the retention of repatriation cover for new enlistees, service pensions for allied veterans, and removal of retrospectivity	Requested amendments not made. Senate pressed requests. Pressed requests not made, but the House informed the Senate that the requests would be acceptable in an alternative form. Senate rescinded previous requests and made requests in alternative form. Requested amendments made
231	18.11.87	**Income Tax Amendment Bill (No. 2) 1987** — A requested amendment to remove words that would make the imposition of income tax a standing measure	Requested amendment made
231	18.11.87	**Medicare Levy Amendment Bill 1987** — A requested amendment to remove words that would make the imposition of the Medicare levy a standing measure	Requested amendment made
277	26.11.87	**Commonwealth Borrowing Levy Bill 1987** — A requested amendment to clarify that the levy is imposed on an annual basis and is not a once only charge on each borrowing	Requested amendment made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
991 and 1014	21.12.88	**States Grants (Schools Assistance) Bill 1988** — Requested amendments to reinstate establishment grants for some non-government schools in 1989	Requested amendments not made. Senate pressed requests. Pressed requests made
1051-1052	06.03.89	**Ozone Protection (Licence Fees — Imports) Bill 1988 and Ozone Protection (Licence Fees — Manufacture) Bill 1988** — A requested amendment to each bill to rectify a drafting error	Requested amendments made
1138-1139	13.04.89	**Customs Tariff Amendment Bill (No. 3) 1988** — Six requested amendments to alter tariffs	Requested amendments made
120	31.05.90	**Sales Tax (Nos 1 to 9) Amendment Bills 1990** — A requested amendment to each bill to omit the commencement clause	Requested amendments not made. Amendments made in place thereof. Senate did not press requests and agreed to substitute amendments
275-276	18.10.90	**Medicare Levy Amendment Bill 1990 and Income Tax Amendment Bill 1990** — A requested amendment to each bill to make the imposition of the levy or tax, as the case may be, a standing charge	Requested amendments made
444-445	20.12.90	**Customs Tariff Amendment Bill 1990** — A requested amendment to apply an excise equivalent rate on the total alcohol content of the wine component for imported fruit juices, ciders, wines and spirits	Requested amendment made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
460-464	20.12.90	**Cattle Transaction Levy Bill 1990, Beef Production Levy Bill 1990, Cattle Export Charge Bill 1990, Live-stock Slaughter Levy Amendment Bill 1990 and Live-stock Export Charge Amendment Bill 1990** — Requested amendments to change the commencement clause on each bill	Requested amendments made
700	18.04.91	**Superannuation Supervisory Levy Bill 1991** — A requested amendment to ensure industry consultation occurs before regulations are made	Requested amendment not made. Amendment made in place thereof. Senate did not press request and agreed to substitute amendment
907 and 920	20.06.91 and 21.06.91	**Wool Tax (Nos 1 to 5) Amendment Bills 1991** — A requested amendment to each bill to lower the wool tax rate	Requested amendments not made. Senate pressed requests. Pressed requests not made and amendments made in place thereof. Senate did not further press requests and agreed to substitute amendments
1004-1005	10.09.91	**Social Security (Disability and Sickness Support) Amendment Bill 1991** — Requested amendments relating to the mobility allowance, impairment ratings and gynaecological conditions	Requested amendments made
1588	24.06.92	**Migration Agents Registration (Application) Levy Bill 1992** — Two requested amendments to reduce the application fees of applicants and agents who gave paid immigration assistance in relation to five or fewer cases during the period of registration and to exempt certain persons from the scope of the bill	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
1589	24.06.92	**Migration Agents Registration (Renewal) Levy Bill 1992** — Two requested amendments to reduce the renewal fees of applicants and agents who gave paid immigration assistance in relation to five or fewer cases during the period of registration and to exempt certain persons from the scope of the bill	Requested amendments made
1590	24.06.92	**Customs Tariff Amendment Bill 1992** — Four requested amendments to take account of changes in status of countries and places which qualify for preferential treatment	Requested amendments made
1628	25.06.92 (26.06.92 am)	**Local Government (Financial Assistance) Amendment Bill 1992** — House earlier declined to consider an amendment to increase the upper limit of funding allocated to Tasmania — earlier amendment reformulated as a request (though the Senate did not concede that it should have been a request)	Requested amendment made
1993	17.12.92	**Customs Tariff Amendment Bill (No. 2) 1992** — A requested amendment to broaden concessional entry of aids and appliances for people with disabilities	Requested amendment made
364-366	18.10.93	**Sales Tax (Customs) (Deficit Reduction) Bill 1993, Sales Tax (Excise) (Deficit Reduction) Bill 1993 and Sales Tax (General) (Deficit Reduction) Bill 1993** — Five requested amendments to each bill regarding an increase in sales tax rates and in tax rates on wine	Requested amendments nos 1, 2 and 5 not made, and requested amendments nos 3 and 4 made. Senate did not press requests nos 1, 2 and 5

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
405	21.10.93	**Excise Tariff (Deficit Reduction) Bill 1993** — Six requested amendments regarding excise increases for certain types of fuel	Requested amendments nos 1, 3, 4, 5 and 6 not made, and requested amendment no. 2 made. Senate did not press requests nos 1, 3, 4, 5 and 6
407	21.10.93	**Customs Tariff (Deficit Reduction) Bill 1993** — Four requested amendments regarding increases in customs duty on certain types of fuel	Requested amendments nos 1, 2, 3 and 4 not made. Senate did not press requests
417-421	26.10.93	**Taxation (Deficit Reduction) Bill (No. 1) 1993** — 13 requested amendments relating to treatment of lump sum payments of unused leave, travel allowances and expenses, and credit unions	Requested amendments made
639	17.12.93	**Excise Tariff Amendment Bill (No. 2) 1993** — A requested amendment to decrease the excise imposed on beer produced by micro-breweries	Requested amendment made
835-836	02.03.94	**Social Security (Home Child Care and Partner Allowances) Legislation Amendment Bill 1994** — Two requested amendments to maintain payment of the home child-care allowance to certain persons receiving dependent spouse rebate	Requested amendments not made. Senate did not press requests
885-900	24.03.94	**Taxation Laws Amendment Bill (No. 4) 1993** — Four requested amendments regarding payments of instalments by companies and certain trustees and deductions allowable to life companies and registered organisations (both requests and amendments were made in this bill)	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
1035 and 1109	30.05.94 and 27.06.94	**Student Assistance Amendment Bill 1994** — Two requested amendments to exempt certain families from the assets test when applying for Austudy (both requests and amendments were made in this bill)	Requested amendments not made. Senate pressed requests. Bill laid aside
1601	17.11.94	**ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994** — One requested amendment to increase the amount to be credited to the Land Fund in the second year of operation by increasing the base figure of the relevant formula (both a request and amendments were made in this bill)	Requested amendment not made. Senate request and amendments referred to a Senate select committee. Senate did not press request and made amendments in place thereof and made amendments in substitution for certain amendments previously agreed to. House of Representatives agreed to certain amendments, disagreed to remainder and laid bill aside
1624-1625	05.12.94	**Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Bill (No. 2) 1994** — One requested amendment to allow payment by the Commonwealth of certain expenses incurred by applicants to the Specialist Medical Review Council	Requested amendment made
1648-1649	07.12.94	**Social Security (1994 Budget and White Paper) Amendment Bill 1994** — Four requested amendments relating to assessment of certain fringe benefits for certain social security payments and three requested amendments relating to extension of eligibility for certain allowances	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
1705-1709	08.12.94	**Student Assistance (Youth Training Allowance) Amendment Bill 1994** — 23 requested amendments principally relating to eligibility for the allowance	22 requested amendments made and one requested amendment not made, with an amendment made in place thereof. Senate did not press request and agreed to substitute amendment
1710-1713	08.12.94	**Student Assistance (Youth Training Allowance — Transitional Provisions and Consequential Amendments) Bill 1994** — 22 requested amendments principally relating to eligibility for the allowance	21 requested amendments made and one requested amendment not made, with an amendment made in place thereof. Senate did not press request and agreed to substitute amendment
2273-2274	30.06.95	**Sales Tax (Exemptions and Classifications) Modification (Excise) Bill 1995, Sales Tax (Exemptions and Classifications) Modification (Customs) Bill 1995 and Sales Tax (Exemptions and Classifications) Modification (General) Bill 1995** — Two requested amendments to each bill to delete certain building items from the taxable category	Requested amendments made
2359	31.08.95	**Social Security Legislation Amendment Bill (No. 1) 1995** — One requested amendment to validate social security payments made pursuant to a social security agreement with Italy (not yet ratified at the time of passing of this bill) (both a request and amendments were made in this bill)	Requested amendment made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
2360	31.08.95	**Social Security (Non-Budget Measures) Legislation Amendment Bill 1995** — One requested amendment to change the commencement date in relation to the suspension and restoration of fringe benefits payable to disability support pensioners (both a request and amendments were made in this bill)	Requested amendment made
2429	27.09.95	**Student and Youth Assistance Amendment (Youth Training Allowance) Bill 1995** — One requested amendment to provide that low income earners who have obtained a health care card are not required to meet an assets test to obtain Austudy for dependents (both a request and amendments were made in this bill)	Requested amendment not made. Senate reported message
2491-2493	19.10.95	**Health and Other Services (Compensation) Care Charges Bill 1994** — Six requested amendments relating to the recovery of Medicare or nursing home benefits	Requested amendments made
2503-2504	19.10.95	**Primary Industries and Energy Legislation Amendment Bill (No. 2) 1995** — One requested amendment to restore the payment of the exotic animal disease levy to the Exotic Animal Disease Preparedness Trust Account and to enable the funds in the account to be invested (both a request and amendments were made in this bill)	Requested amendment made
2664-2665	29.11.95	**Customs Tariff Legislation Amendment Bill 1995** — Three requested amendments to reduce the customs duty paid on avgas by the general aviation industry	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
2665	29.11.95	**Excise Tariff Amendment Bill (No. 2) 1995** — Three requested amendments to reduce the excise duty paid on avgas by the general aviation industry	Requested amendments made
266	19.06.96	**Housing Assistance Bill 1996** — One requested amendment to appropriate funds for 1997-98 and 1998-99 for state public housing capital works programs to provide transitional funding while the Commonwealth switches from capital to recurrent funding (both a request and amendments were made in this bill)	Requested amendment not made. Senate did not press request
348-349	27.06.96	**Taxation Laws Amendment Bill (No. 1) 1996** — House of Representatives disagreed to an earlier amendment. Three requested amendments to set a formula for the provisional tax uplift factor made in substitution for earlier amendment[4]	Requested amendments made
350-351 and 358	27.06.96 (and 28.06.96 am)	**Customs Tariff Amendment Bill (No. 1) 1996** — Three requested amendments to exempt certain capital equipment and consumption goods from a three per cent tariff rate increase for tariff concession goods	Requested amendments made. Senate recommitted bill and made two further requests to reduce the level of duty on certain imported goods to zero. Further requested amendments made

[4] Statement made by Chair of Committees concerning these requests, 27.6.96, J.432.

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
937-938	02.12.96	**Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996** — One requested amendment to expand the category of persons holding a qualifying residence exemption[5]	Requested amendment made
983	05.12.96	**Higher Education Legislation Amendment Bill 1996** — One requested amendment to increase the allowable loan amount to students under the Open Learning Deferred Payment Scheme	Requested amendment made
1108-1111	11.02.97	**Customs Depot Licensing Charges Bill 1996** — Six requested amendments to introduce a two tier annual licence charge for depots[6]	Requested amendments made
1245	05.03.97	**Education Services for Overseas Students (Registration Charges) Bill 1996** — One requested amendment concerning determination of total enrolments in a course for the purposes of the annual registration charge scheme	Requested amendment made
1253-1254	05.03.97	**Private Health Insurance Incentives Bill 1997** — Three requested amendments to index the maximum level of income a person can earn and still remain eligible for the incentives	Requested amendments not made. Senate did not press requests

[5] Statement made by Chair of Committees concerning this request, 26.11.96, J.1106.

[6] Statement made by Chair of Committees concerning these requests, 10.2.97, J.1391.

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
1255-1257 and 1447-1448	05.03.97 and 26.03.97 (27.03.97 am)	**Medicare Levy Amendment Bill (No. 2) 1996** — 13 requested amendments concerning indexation of the income threshold at which the Medicare surcharge comes into effect	Requested amendments not made. Senate did not press requests and made nine further requests to increase the income threshold for the Medicare surcharge for families. Further requested amendments made
1407	26.03.97	**Telecommunications (Carrier Licence Charges) Bill 1996** — Two requested amendments to incorporate in annual carrier licence charges a levy to fund consumer representation and social policy research	Requested amendments made
1407	26.03.97	**Telecommunications (Numbering Charges) Bill 1996** — Three requested amendments to exempt from the charge geographic numbers allocated to a carrier or service provider for the purposes of providing a standard telephone service	Requested amendments made
1422	26.03.97	**Telecommunications (Numbering Fees) Amendment Bill 1996** — Two requested amendments to exempt from the charge geographic numbers allocated to a carrier or service provider for the purposes of providing a standard telephone service	Requested amendments made
1472-1474	14.05.97	**Superannuation Contributions Surcharge Imposition Bill 1997 [Superannuation Contributions Tax Imposition Bill 1997]** — Two requested amendments to substitute references to “surcharge” with “tax”, two requested amendments concerning the rate of surcharge in certain circumstances and one requested amendment in relation to the surchargeable contributions threshold	Requested amendments made

V&P page(s) on which Senate schedule appears	Date	Title of Bill and Nature of Request	How Disposed Of
1475	14.05.97	**Termination Payments Surcharge Imposition Bill 1997 [Termination Payments Tax Imposition Bill 1997]** — Two requested amendments to substitute references to "surcharge" with "tax"	Requested amendments made
1527-1529	27.05.97	**Natural Heritage Trust of Australia Bill 1996** — Seven requested amendments to: increase the Trust capital by $100 million; to fix the Trust's minimum balance at $300 million; establish arrangements for interest earned by the Trust; and use of certain funds from the Trust (both requests and amendments were made in this bill)	Requested amendments made
1803-1807	27.06.97	**Tax Law Improvement Bill 1997** — 12 requested amendments to introduce tax rules dealing with change of use for trading stock[7] (both requests and amendments were made in this bill)	Requested amendments made
2127	20.10.97	**Social Security and Veterans' Affairs Legislation Amendment (Male Total Average Weekly Earnings Benchmark) Bill 1997** — Two requested amendments to remove the sunset clause in relation to the indexation of pensions and veterans' affairs payments based on 25 per cent of average male weekly earnings	Requested amendments made
2644-2645	04.12.97	**Live-stock Transactions Levy Bill 1997** — One requested amendment to include a two-year sunset clause	Requested amendment made

[7] Statement made by Chair of Committees concerning these requests, 26.6.97, J.2248.

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
1903-1904	30.03.98	**Social Security Legislation Amendment (Youth Allowance) Bill 1997** — 17 requested amendments principally relating to eligibility for youth allowance (both requests and amendments were made in this bill)	Requested amendments made
4160-4161	28.05.98	**Social Security Legislation Amendment (Youth Allowance Consequential and Related Measures) Bill 1998** — Four requested amendments relating to rates of Austudy payment and one requested amendment relating to qualification for child disability allowance[8] (both requests and amendments were made in this bill)	Requested amendments made
4871-4872, 4906 and 4907	04.06.98	**Authorised Deposit-taking Institutions Supervisory Levy Imposition Bill 1998, General Insurance Supervisory Levy Imposition Bill 1998, Life Insurance Supervisory Levy Imposition Bill 1998 and Retirement Savings Account Providers Supervisory Levy Imposition Bill 1998** — One requested amendment to each bill to determine an appropriate date for entities to measure their assets to calculate the levy payable	Requested amendments made

[8] Statement made by Chair of Committees concerning these requests, 13.5.98, J.3776.

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
5579-5580	29.06.98	**Social Security and Veterans' Affairs Legislation Amendment (Budget and Other Measures) Bill 1997** — Four requested amendments to extend the qualification for carer payment to carers of profoundly disabled children and two requested amendments to expand the qualification for mobility allowance (both requests and amendments were made in this bill)	Requested amendments made
4607	29.03.99	**Health Legislation Amendment Bill (No. 2) 1999** — One requested amendment to provide the Medicare rebate for procedures for which a facilities fee is set which can be covered by private health insurance (both a request and amendments were made in this bill)	Requested amendment not made. Senate did not press request and made alternative amendments
7736	29.06.99	**A New Tax System (Goods and Services Tax Transition) Bill 1998** — One requested amendment to ensure that a right granted after 2 December 1998 and before 1 July 2000 for exercise after 1 July 2000 is subject to GST[9] (both a request and amendments were made in this bill)	Requested amendment made

[9] Statement made by Chair of Committees concerning this request, 25.6.99, J.1250.

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
7736-7741	29.06.99	**A New Tax System (Compensation Measures Legislation Amendment) Bill 1998** — Ten requested amendments to: introduce a pension supplement of four per cent of the maximum basic pension rate; provide a seven per cent increase in the rent assistance rate; and modify the CPI adjustment provisions for social security and veterans' benefits and allowances (both requests and amendments were made in this bill)	Requested amendments made
–	29.06.99	**A New Tax System (Bonuses for Older Australians) Bill 1998** — Ten requested amendments to extend the self-funded retirees' supplementary bonus to persons aged 55 years and over on 1 July 2000 who meet certain qualification conditions (both requests and amendments were made in this bill)	Requested amendments made
7748-7749	29.06.99	**A New Tax System (Family Assistance) Bill 1999** — Nine requested amendments to: extend eligibility for and increase the rate of family tax benefit; and provide for CPI indexation of family tax benefit (both requests and amendments were made in this bill)	Requested amendments made

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
8649-8653	12.08.99	**A New Tax System (Commonwealth–State Financial Arrangements) Bill 1998** — One requested amendment to include in GST revenue to States and Territories local government assistance grants withheld from local authorities that do not comply with the GST system; one requested amendment to provide States and Territories with an entitlement to revenue replacement payments in 2000-2001 equal to the amount of business franchise fee safety net revenues; and three requested amendments in relation to distribution of GST revenue grants and transitional assistance to States and Territories (both requests and amendments were made in this bill)	Requested amendments made
10849-10850	29.09.99	**Aged Care Amendment (Omnibus) Bill 1999** — Six requested amendments to ensure that people who became charge exempt residents after 1 July 1999 but before the passage of the bill are covered by the provisions exempting the principal home and rental income earned on a principal home to pay for accommodation charges from the pension income and asset tests (both requests and amendments were made in this bill)	Requested amendments made

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
11321	12.10.99	**Further 1998 Budget Measures Legislation Amendment (Social Security) Bill 1999** — Two requested amendments to extend retrospective entitlement to Community Development Employment Projects Scheme participant supplement payments and two requested amendments relating to circumstances where a person will be considered to have sufficient reason to move to a new place of residence, even though the person's employment prospects will be reduced as a result of the move, thus continuing to receive allowance payments[10] (both requests and amendments were made in this bill)	Requested amendments made
12189	21.10.99	**Higher Education Funding Amendment Bill 1999** — One requested amendment to appropriate additional funds for the 2000 and 2001 funding years	Requested amendments made
13305-13306	09.12.99	**Textile, Clothing and Footwear Strategic Investment Program Bill 1999** — Two requested amendments to provide for advances on grants and loans to be paid out of the Consolidated Revenue Fund (both requests and amendments were made in this bill)	Requested amendments made

[10] Statement made by the Chair of Committees concerning these requests, 20.9.99, J.1690.

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
15756	12.04.00	**A New Tax System (Family Assistance and Related Measures) Bill 2000** — 2 requested amendments to exclude certain income support recipients from the child care benefit income test; and to include the pension supplement in the income cut-out amount formula[11] (both requests and amendments were made in this bill)	Requested amendments made
16255-8	11.05.00	**A New Tax System (Fringe Benefits) Bill 2000** — 19 requested amendments to provide for consistent FBT treatment of public and non-profit hospitals; clarify FBT capping changes; broaden the definition of 'remote area'; clarify GST-creditable benefits and the calculation of aggregate fringe benefits amounts[12]	Requested amendments made

[11] Statement made by Chair of Committees concerning these requests, 11.4.00, J.2602.

[12] Statement made by Chair of Committees concerning these requests, 10.5.00, J.2676.

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
15474-5, 16131-2, 18268-75	06.04.00, 10.05.00 and 26.06.00	**Youth Allowance Consolidation Bill 1999** — 2 requested amendments to extend the definition of 'full-time student'; and provide for payment of Austudy for masters studies (both requests and amendments were made in this bill)	Requested amendments not made, with an amendment made in place of first request. Senate did not press requests, agreed to substitute amendment and made four further requests (and a consequential amendment) to increase rates for certain youth allowance, Austudy and disability support pension recipients. Further requests made
18054-5, 18433	22.06.00 and 28.06.00	**Social Security and Veterans' Entitlements Legislation Amendment (Miscellaneous Matters) Bill 2000** — 1 requested amendment to exclude war time disability pensions from the income test for social security payments (both requests and amendments were made in this bill)	Requested amendment not made. Senate did not press request and made one further request[13] to remove disability pensions paid to certain World War II veterans from the social security income test. Further request not made. Senate did not press further request
18434	28.06.00	**Indirect Tax Legislation Amendment Bill 2000** — 3 requested amendments to remove the goods and services tax reverse charge on fees paid for the services of expatriate employees; and allow an input tax credit to financial supply providers where no fringe benefits tax is payable[14] (both requests and amendments were made in this bill)	Requested amendments made

[13] Statement made by Chair of Committees concerning this request, 27.6.00, J.2912.

[14] Statement made by Chair of Committees concerning these requests, 26.6.00, J.2885.

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
18725-6	30.06.00 am	**New Business Tax System (Alienation of Personal Services Income) Bill 2000** — 13 requested amendments to amend proposed new rules for the income tax treatment of certain personal services income; and provide for a report on the operation of the Act[15]	Requested amendments nos 2 to 5 and 7 to 12 made, requested amendments nos 1, 6 and 13 not made, with two amendments made in place of requested amendment no. 6. Senate did not press requests nos 1, 6 and 13 and agreed to substitute amendments
22767	27.11.00	**States Grants (Primary and Secondary Education Assistance) Bill 2000** — Two requested amendments to raise levels of assistance to government and non-government schools for special education (both requests and amendments were made to this bill)	Requested amendments not made. Senate pressed requests. Pressed requests not made. Senate further pressed requests. Further pressed requests not made. Senate did not further press requests
22942	29.11.00	**Veterans' Affairs Legislation Amendment (Budget Measures) Bill 2000** — One requested amendment to extend veterans' benefits to members of civilian medical or surgical teams who served in Vietnam	Requested amendment not made. Senate pressed request. Pressed request not made. Senate did not further press request
23738	7.12.00	**Taxation Laws Amendment Bill (No. 8) 2000** — One requested amendment to make the surrender of short-term crown leases in return for the grant of freehold or long-term leases GST-free[16] (both requests and amendments were made to this bill)	Requested amendment made

[15] Statement made by Chair of Committees concerning these requests, 29.6.00, J.3012.

[16] Statement made by Chair of Committees concerning this request, 7.12.00, J.3800.

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
26563-4	5.4.01	**Excise Tariff Amendment Bill (No. 1) 2001 —** Two requested amendments to reduce the rate of excise on certain beer products	Requested amendments made
26569-74	5.4.01	**Customs Tariff Amendment Bill (No. 2) 2001 —** Two requested amendments to reduce the rate of customs duty on certain beer products	Requested amendments made
28731	27.6.01	**Dairy Produce Legislation Amendment (Supplementary Assistance) Bill 2001 —** One requested amendment to increase amounts payable under the Supplementary Dairy Assistance Scheme by providing a lower threshold for a basic level of payment	Requested amendment not made, with nine amendments made in place of requested amendment. Senate did not press request and agreed to substitute amendments
30096-7	23.8.01	**Alcohol Education and Rehabilitation Account Bill 2001** — One requested amendment to provide for the Alcohol Education and Rehabilitation Foundation to receive interest on moneys collected for four financial years	Requested amendment made
31644-5	27.9.01	**States Grants (Primary and Secondary Education Assistance) Bill (No. 2) 2001** — One requested amendment to raise the levels of assistance to government schools	Requested amendment not made. Senate pressed request. House of Representatives reported message
7777	16.10.02	**Members of Parliament (Life Gold Pass) Bill 2002** — One requested amendment to expand the definition of ‘spouse’ to include defacto spouses	Requested amendment not made. Senate pressed request. Pressed request not made. Senate did not further press request

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
9485	3.12.02	**Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002** — One requested amendment to enable a Cleft Lip and Cleft Palate Scheme patient to undergo certain further treatment after 28 years of age	Requested amendment made
20815	8.10.03	**Superannuation (Government Co-contribution for Low Income Earners) Bill 2003** — One requested amendment to raise the income threshold for government co-contributions and one requested amendment to raise the cap on government co-contributions	Requested amendments made
21788-9	3.11.03	**Family Assistance Legislation (Amendment) (Extension of Time Limits) Bill 2003** — Eight requested amendments to extend the time limits for making past period claims for family assistance and top up payments of family assistance by 12 months	Requested amendments not made. Senate pressed requests. House of Representatives did not consider pressed requests. Senate did not further press requests
23456	5.12.03	**Higher Education Support Bill 2003** — Five requested amendments to increase the amounts available to fund grants under the bill	Requested amendments made
23456-7	5.12.03	**Higher Education Support (Transitional Provisions and Consequential Amendments) Bill 2003** — Two requested amendments to exclude the value of certain scholarships from certain income tests	Requested amendments made
26629	11.3.04	**Health Legislation Amendment (Medicare) Bill 2003** — Three requested amendments to reduce the thresholds for the Medicare safety-net for families and individuals	Requested amendments made

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
27667-8	31.3.04	**Military Rehabilitation and Compensation Bill 2003** — Eight requested amendments to extend eligibility for compensation, treatment and telephone allowances and to increase the amounts of certain compensation payable	Requested amendments nos 2 to 8 made and requested amendment no. 1 not made. Senate did not press request no. 1
27671-3	31.3.04	**Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003** — Two requested amendments to increase the rate at which certain pensions are payable	Requested amendments made
31075-87	22.6.04	**Veterans' Entitlements (Clarke Review) Bill 2004** — Two requested amendments to increase expenditure in relation to income support supplements, bereavement payments, remote area allowances, social security pensions and benefits; and provide for two new veterans' payments	Requested amendments made
57	16.6.05	**Family and Community Services Legislation Amendment (Family Assistance and Related Measures) Bill 2005** — Three requested amendments to widen eligibility for maternity payment for adopted children by increasing the upper limit of the age range of such children	Requested amendments not made. Senate did not press requests
131	7.12.05	**Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005** — Six requested amendments to provide for exemption from certain requirements for carers and higher maximum payments of certain allowances	Requested amendments made

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
111	16.8.06	**Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 —** Two requested amendments to remove a cap on rental payments for township leases and a restriction on other payments in relation to township leases	Requested amendments made
43-4	27.3.07	**Private Health Insurance (Reinsurance Trust Fund Levy) Amendment Bill 2006 —** Three requested amendments to set the rates of risk equalisation levy by administrative instrument rather than by legislative instrument	Requested amendments made
119	19.9.07	**Tax Laws Amendment (2007 Measures No. 5) Bill 2007** — Two requested amendments to increase the number of films that may be eligible for a refundable tax offset	Requested amendments made
34-5	25.6.08	**Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2008 Budget and Other Measures) Bill 2008** — One requested amendment to lower adjusted taxable income for family assistance payment purposes (both a request and amendments were made to this bill)	Requested amendment made

(See Supplement)

CASUAL VACANCIES IN THE SENATE 1977–2008

VACANCY			APPOINTMENT		
Senator	**Reason for Vacancy**	**Date**	**Senator**	**How Appointed**	**Date**
Hall, R.S.	Resignation	16.11.77	Haines, J.	SA Parliament	14.12.77
Cotton, R.C.	"	13.07.78	Puplick, C.J.G.	NSW Governor	26.07.78
McClelland, J.R.	"	21.07.78	Sibraa, K.W.	" "	09.08.78
Webster, J.J.	"	28.01.80	Neal, L.W.	Vic Parliament	11.03.80
Wriedt, K.S.	"	25.09.80	Hearn, J.M.	Tas Parliament	15.10.80
Sheil, G.	"	06.02.81	Bjelke-Petersen, F.I.	Qld Parliament	12.03.81
Rocher, A.C.	"	10.02.81	Martyr, J.R.	WA Governor	11.03.81
*Knight, J.W.	Death	04.03.81	*Reid, M.E.	Joint Sitting	05.05.81
Martin K.J.	Resignation	05.11.84	Parer, W.R.	Qld Parliament	22.11.84
Rae, P.E.	"	16.01.86	Newman, J.M.	Tas Parliament	13.03.86
Missen, A.J.	Death	30.03.86	Alston, R.K.R.	Vic Parliament	07.05.86
Chipp, D.L.	Resignation	18.08.86	Powell, J.F.	Vic Deputy Governor	26.08.86
McClelland, D.	"	23.01.87	West, S.M.	NSW Parliament	11.02.87
Grimes, D.J.	"	02.04.87	Not replaced by Tas Parliament		
*Ryan, S.M.	"	29.01.88	McMullan, R.F.	Joint Sitting	16.02.88
Gietzelt, G.T.	"	27.02.89	Faulkner, J.P.	NSW Parliament	04.04.89
Chaney, F.M.	"	27.02.90	Campbell, I.G.	WA Parliament	16.05.90
Haines, J.	"	01.03.90	Lees, M.H.	SA Parliament	04.04.90
Sanders, N.K.	"	01.03.90	Bell, R.J.	Tas Governor	07.03.90
Stone, J.O.	"	01.03.90	O'Chee, W.G.	Qld Parliament	08.05.90
Messner, A.J.	"	17.04.90	Olsen, J.W.	SA Parliament	07.05.90
Baume, P.E.	"	28.01.91	Tierney, J.W.	NSW Governor	11.02.91
McLean, P.A.	"	23.08.91	Sowada, K.N.	NSW Parliament	29.08.91
Vallentine, J.	"	31.01.92	Chamarette, C.M.A.	WA Parliament	12.03.92
Olsen, J.W.	"	04.05.92	Ferguson, A.B.	SA Parliament	26.05.92
Button, J.N.	"	31.03.93	Carr, K.J.	Vic Parliament	28.04.93
Tate, M.C.	"	05.07.93	Denman, K.J.	Tas Parliament	24.08.93

VACANCY			APPOINTMENT		
Senator	**Reason for Vacancy**	**Date**	**Senator**	**How Appointed**	**Date**
Archer, B.R.	Resignation	31.01.94	Abetz, E.	" "	22.02.94
Sibraa, K.W.	"	01.02.94	Neal, B.J.	NSW Parliament	08.03.94
Bishop, B.K.	"	24.02.94	Woods, R.L.	" "	08.03.94
Richardson, G.F.	"	25.03.94	Forshaw, M.G.	" "	10.05.94
Zakharov, A.O.	Death	06.03.95	Collins, J.M.A.	Vic Parliament	03.05.95
Loosley, S.	Resignation	21.05.95	Wheelwright, T.C.	NSW Parliament	24.05.95
Coulter, J.R.	"	20.11.95	Stott Despoja, N.J.	SA Parliament	29.11.95
Evans, G.J.	"	06.02.96	Conroy, S.M.	Vic Governor	30.04.96
*McMullan, R.F.	"	06.02.96	Lundy, K.A.	General election	02.03.96
Devereux J.	"	07.02.96	Mackay, S.M.	Tas Governor	08.03.96
Ferris, J.M.	"	12.07.96	Ferris, J.M.	SA Parliament	24.07.96
Coates, J.	"	20.08.96	O'Brien, K.W.K.	Tas Parliament	05.09.96
Baume, M.E.	"	09.09.96	Heffernan, W.D.	NSW Parliament	18.09.96
Panizza, J.H.	Death	31.01.97	Lightfoot, P.R.	WA Parliament	19.05.97
Woods, R.L.	Resignation	07.03.97	Payne, M.A.	NSW Parliament	09.04.97
Short, J.R.	"	12.05.97	Synon, K.M.	Vic Parliament	13.05.97
Childs, B.K.	"	10.09.97	Campbell, G.	NSW Parliament	17.09.97
Foreman, D.J.	"	15.09.97	Quirke, J.A.	SA Governor	18.09.97
Kernot, C.	"	15.10.97	Bartlett, A.J.J.	Qld Parliament	30.10.97
Collins, R.L.	"	30.03.98	Crossin, P.M.	NT Legislative Assembly	16.06.98
Neal, B.J.	"	03.09.98	Hutchins, S.P.	NSW Parliament	14.10.98
Parer, W.R.	"	11.02.00	Brandis, G.H.	Qld Parliament	16.05.00
Brownhill, D.G.C.	"	14.04.00	Macdonald, J.A.L.	NSW Parliament	04.05.00
Quirke, J.	"	15.08.00	Buckland, G.F.	SA Governor	14.09.00
Woodley, J.	"	27.07.01	Cherry, J.C.	Qld Parliament	31.07.01
Newman, J.M.	"	01.02.02	Colbeck, R.M.	Tas Governor	04.02.02
Gibson, B.F.	"	22.02.02	Barnett, G.	Tas Governor	26.02.02
Herron, J.J.	"	05.09.02	Santoro, S.	Qld Parliament	29.10.02
*Reid, M.E.	"	14.02.03	Humphries, G.J.J.	ACT Legislative Assembly	18.02.03

VACANCY			APPOINTMENT		
Senator	**Reason for Vacancy**	**Date**	**Senator**	**How Appointed**	**Date**
Alston, R.K.R.	Resignation	10.02.04	Fifield, M.P.	Vic Parliament	31.03.04
Tierney, J.W.	Resignation	14.04.05	Fierravanti-Wells, C.A.	NSW Parliament	05.05.05
Mackay, S.	"	29.07.05	Brown, C.L.	Tas Parliament	25.08.05
Hill, R.	"	15.03.06	Bernardi, C.	SA Parliament	04.05.06
Ferris, J.M.	Death	02.04.07	Birmingham, S.J.	SA Parliament	03.05.07
Santoro, S.	Resignation	11.04.07	Boyce, S.K.	Qld Parliament	19.04.07
Vanstone, A.	"	26.04.07	Fisher, M.J.	SA Parliament	06.06.07
Campbell, I.G.	"	31.05.07	Cormann, M.H.P.	WA Parliament	19.06.07
Calvert, P.H.	"	29.08.07	Bushby, D.C.	Tas Parliament	30.08.07
Ray, R.F.	"	05.05.08	Collins, J.M.A.	Vic Parliament	08.05.08

(See Supplement)

* ACT Senator

Note: Court of Disputed Returns found W.R. Wood had not been elected validly (12.05.88).
I.P. Dunn was elected on 21.07.88 pursuant to s. 360(1)(vi) of the Commonwealth Electoral Act.

Appendix 8

COMMITTEES ON WHICH SENATORS SERVED 1970–2008

Year	Domestic	Estimates	Legislative Scrutiny	Legislative and General Purpose	Select	Joint	Total
1970	7	5	1	2	5	7	27
1971	6	5	1	7	3	7	29
1972	6	5	1	7	2	7	28
1973	6	6	1	7	4	7	31
1974	6	7	1	7	3	9	33
1975	6	7	1	7	3	10	34
1976	6	6	1	7	1	8	29
1977	6	6	1	8	0	8	29
1978	6	6	1	8	0	8	29
1979	6	6	1	8	0	7	28
1980	6	6	1	8	2	7	30
1981	6	8	2	8	5	6	35
1982	4	8	2	8	4	7	33
1983	5	6	2	8	3	8	32
1984	7	6	2	8	6	9	38
1985	7	6	2	8	6	10	39
1986	7	6	2	8	4	11	38
1987	7	6	2	8	4	9	36
1988	6	6	2	8	5	10	37
1989	7	6	2	8	5	12	40
1990	7	6	2	8	4	9	36
1991	7	6	2	9	4	12	40
1992	7	6	2	9	5	12	41
1993	7	6	2	8	6	11	40
1994[(1)]	8	6	2	8	5	12	40
1994[(2)]	8	0	2	16	6	12	44

COMMITTEES ON WHICH SENATORS SERVED 1970–2008

Year	Domestic	Estimates	Legislative Scrutiny	Legislative and General Purpose	Select	Joint	Total
1995	8	0	2	16	9	12	47
1996	8	0	2	16	4	12	42
1997	8	0	2	16	5	12	43
1998	8	0	2	16	3	12	41
1999	8	0	2	16	4	14	44
2000	8	0	2	16	4	12	42
2001	8	0	2	16	2	12	40
2002	8	0	2	16	2	12	40
2003	8	0	2	16	3	12	41
2004	8	0	2	16	6	12	44
2005	8	0	2	16	1	13	40
2006	8	0	2	16	0	12	38
2007[3]	8	0	2	8	0	13	31
2008	8	0	2	8	6	13	37

(1) To 10 October 1994
(2) From and including 10 October 1994
(3) From and including 11 September 2006

Total number of senators
1970–1975 60
1975–1984 64
1984– 76

Appendix 9

SELECT COMMITTEES 1985–2008

Senate Select Committees:

Private Hospitals and Nursing Homes (Further reports — PP 159/1985 and 111/1987)

Human Embryo Experimentation Bill 1985 (Report — PP 437/1986)

Television Equalisation (Report — PP 106/1987)

Education of Gifted and Talented Children (Report — PP 111/1988)

Animal Welfare (Further reports — PP 109/1988, 396/1989, 397/1989, 94/1990, 480/1991, 481/1991, 484/1991 and 485/1991)

Administration of Aboriginal Affairs (Reports — PP 397/1988 and 474/1989)

Legislation Procedures (Report — PP 398/1988)

Health Legislation and Health Insurance (Reports — PP 219/1989, 445/1990 and 446/1990)

Agricultural and Veterinary Chemicals in Australia (Reports — PP 356/1989 and 102/1990)

Certain Aspects of the Airline Pilots' Dispute (Reports — PP 478/1989 and 2/1990)

Political Broadcasts and Political Disclosures (Report — PP 486/1991)

Community Standards Relevant to the Supply of Services Utilising Electronic [originally Telecommunications] Technologies (Reports — PP 482/1991, 135/1992, 178/1992, 73/1993, 196/1993, 275/1993, 131/1994, 9/1995, 153/1995, 170/1995, 463/1995, 464/1995, 99/1996, 141/1996, 9/1997, 115/1997)

Functions, Powers and Operation of the Australian Loan Council (Reports — PP 78/1993, 153/1993 and 449/1993)

Sales Tax Legislation (Report — PP 455/1992)

Subscription Television Broadcasting Services (Report — PP 534/1992)

Superannuation (Reports — PP 177/1992, 182/1992, 379/1992, 535/1992, 75/1993, 76/1993, 80/1993, 152/1993, 388/1993, 431/1993, 88/1994, 170/1994, 7/1995, 98/1995, 478/1995, 6/1996, 34/1996, 361/1996, 390/1996, 39/1997, 60/1997, 97/1997, 140/1997, 157/1997,

301/1997, 34/1998, 93/1998, 94/1998, 143/1998) (see also Superannuation and Financial Services, below)

Matters Arising from Pay Television Tendering Processes (Reports — PP 154/1993 and 391/1993)

Public Interest Whistleblowing (Report — PP 148/1994)

Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media (Report — PP 114/1994)

ABC Management and Operations (Report — PP 57/1995)

Amendments of the Land Fund Bill (Report — PP 8/1995)

Unresolved Whistleblower Cases (Report — PP 344/1995)

Aircraft Noise in Sydney (Report — PP 345/1995)

Radioactive Waste (Report — PP 7/1996)

Certain Land Fund Matters (Report — PP 346/1995)

Uranium Mining and Milling (Report — PP 63/1997 and /64/1997)

Victorian Casino Inquiry (Report — PP 359/1996)

Information Technologies (Reports — PP 175/1998, 102/1999, 47/2000, 80/2000, 389/2000, 445/2000)

Socio-economic Consequences of the National Competition Policy (Reports — PP 165/1999, 29/2000)

New Tax System (Reports — PP 26/1999, 80/1999, 82/1999)

Superannuation and Financial Services (Reports — PP 451/1999, 61/2000, 154/2000, 414/2000, 443/2000, 31/2001, 44/2001, 62/2001, 70/2001, 89/2001, 158/2001, 160/2001, 185/2001, 218/2001, 8/2002, 303/2002, 331/2002, 604/2002, 624/2002, 150/2003, 154/2003, 184/2003)

Lucas Heights Nuclear Reactor Contract (Report — PP 87/2001)

A Certain Maritime Incident (Report — PP 498/2002)

Medicare (Reports — PP 340/2003, 16/2004)

Ministerial Discretion in Migration Matters (Report — PP 81/2004)

Free Trade Agreement Between Australia and the United States (Report — PP 180/2004)

Lindeberg Grievance (Report — PP 226/2004)

Scrafton Evidence (Report — PP 359/2004)

Administration of Indigenous Affairs (Report — PP 53/2005)

Mental Health (Reports — PP 58/2006 and 82/2007)

Agricultural and Related Industries

Housing Affordability in Australia (Report — PP 304/2008)

State Government Financial Management

Regional and Remote Indigenous Communities

Fuel and Energy

National Broadband Network

Joint Select Committees:

Electoral Reform (Reports — PP 227/1983, 198/1984, 1/1986 and 1/1987)

Australia Card (Report — PP 175/1986)

Telecommunications Interception (Report — PP 306/1986)

Video Material (Reports — PP 403/1988 and 404/1988)

Corporations Legislation (Report — PP 117/1989)

Tenure of Appointees to Commonwealth tribunals (Report — PP 289/1989)

Migration Regulations (Reports — PP 172/1990 and 173/1990)

Certain Aspects of the Operation of the Family Law Act (Reports — PP 288/1991 and 326/1992)

Certain Family Law Issues (Report — PP 100/1993)

Retailing Industry (Report — PP 174/1999)

Republic Referendum (Report — PP 157/1999) **(See Supplement)**

Appendix 10

A CHRONOLOGY OF THE SENATE 1901–2008

Date	Event
1 January 1901	Australian Constitution came into force, vesting legislative power in a federal Parliament consisting of the Queen, a Senate, and a House of Representatives
February–March 1901	Writs issued for the election of 36 senators
29-30 March 1901	Senators elected at elections throughout Australia
9 May 1901	Opening of Parliament at the Melbourne Exhibition Building and swearing in of senators First meetings of the Senate held in the chamber of the Legislative Council of Victoria Election of the first President of the Senate, Senator Richard Baker
5 June 1901	Appointment of the first Senate committee: the Standing Orders Committee
June 1901	Senate had first supply bill amended to show items of expenditure Senate changed second supply bill to reflect Australian rather than British constitutional arrangements
26 July 1901	First Senate select committee appointed: steamship communication with Tasmania
August 1901	First senior officials called to give evidence before a Senate committee, including the Clerk of the Senate and the Secretary of Defence Private citizens also called to give evidence

Date	Event
1902	Senate first insisted on requests for amendments to a bill it could not amend
1902	Commonwealth Electoral Act passed, including the right of women to vote and stand for election
1 September 1903	Adoption of Senate Standing Orders
16 March 1904	Senate amended Acts Interpretation Bill to insert provision for disallowance of regulations
April 1904	First case of privilege investigated by a Senate Committee
11 October 1906	Senate rejected Customs Tariff (British Preference) Amendment Bill 1906 and disagreed to Governor-General's amendment to Customs Tariff (British Preference) Bill 1906
1907	Committee of Disputed Returns and Qualifications inquired into election of Senator Vardon
1909	Senators' terms ceased on 30 June, rather than 31 December as previously, under constitutional amendment of 1907
13 December 1909	Private senator's bill, the Commonwealth Conciliation and Arbitration Bill 1908, extending employees' protection against dismissal, passed into law
30 July 1914	For the first time, the Senate and the House of Representatives dissolved simultaneously under section 57 of the Constitution
February–March 1917	Senate forced government to abandon proposal to extend the life of the House of Representatives by an act of the British Parliament

Date	Event
12–13 November 1918	Senator Gardiner presented a 12 hour address in the Senate on the Commonwealth Electoral Bill
1919	Preferential voting introduced for the Senate
15 August 1919	Time limits imposed on speeches in the Senate
December 1921	First conference held between the Senate and the House of Representatives
31 July 1924	Private senator's bill, the Commonwealth Electoral Bill, to provide compulsory voting, passed into law
9 May 1927	Senate met in Canberra for the first time
1929	Senate established a select committee to consider a system of standing committees
10 July 1930	First reference of a bill, the Central Reserve Bank Bill, to a select committee
6 May 1931	Chairman of Commonwealth Bank called before the Senate to give evidence on economic crisis
11 March 1932	Regulations and Ordinances Committee established to scrutinise delegated legislation
1 July 1941	Voting between two candidates for Presidency of the Senate tied, and decided by lot
21 August 1943	Senator Dorothy Tangney first woman elected to the Senate
10 July 1946	Parliamentary proceedings first broadcast on ABC Radio

Date	Event
1949	Introduction of proportional representation for Senate elections
1950	From 30 June, the states represented by 10 senators each
19 March 1951	Second simultaneous dissolution under section 57 of the Constitution
9 May 1953	For the first time, a Senate election was held separately from that of the House of Representatives
27 September 1961	Senate adopted procedures to examine estimates before appropriation bills had passed the House of Representatives
1965	Compact of 1965 between the Senate and the government, on the content of appropriation bills
1966	Senator Annabelle Rankin first woman to administer a government department
5 April 1967	Select committees on container cargo and metric system appointed
19 May 1967	Senate first adopted procedures for recall of Senate at request of majority of senators
October 1967	Senate forced government to disclose documents relating to Air Force VIP squadron
1968	Senator Ivy Wedgwood first woman senator to chair a committee
11 June 1970	Standing committee system established
	Estimates committees established

Date	Event
13 May 1971	Senate first found persons guilty of contempt, for unauthorised release of draft committee report
11 June 1971	First Aboriginal Senator, Neville Bonner, sworn in
9 December 1971	Senate declared that statutory authorities are accountable for all expenditures of public funds
14 March 1973	Senate required government to respond to Senate committee reports within three months
11 April 1974	Third simultaneous dissolution under section 57 of the Constitution
6 and 7 August 1974	Joint sitting convened to resolve a deadlock following simultaneous dissolution election
16 July 1975	Senior officials called before the Senate to investigate overseas loans affair; government claimed crown privilege
October–November 1975	Senate declined to pass appropriation bills, resulting in fourth simultaneous dissolution under section 57 of the Constitution
1975	Australian Capital Territory and Northern Territory elected senators for the first time
1977	Section 15 of the Constitution, governing casual vacancies in the Senate, amended by referendum
1981	Select Committee on Parliament's Appropriations and Staffing recommended separation of parliamentary and government appropriations
19 November 1981	Establishment of the Standing Committee for the Scrutiny of Bills

Date	Event
25 March 1982	Establishment of the Appropriations and Staffing Committee
4 February 1983	Fifth simultaneous dissolution under section 57 of the Constitution
22 October 1984	Senate first authorised publication of tabled documents out of sittings Senate asserted its right to meet after dissolution of House of Representatives
1984–86	Senate conducted first inquiry under section 72 of the Constitution into allegations concerning a judge
1985	Senators increased to 12 for each state
1985	Group ticket (above the line) voting introduced for Senate elections
1985-86	Senate amended loan bills to ensure annual approval of government authority to borrow
1986	Senator Janine Haines the first woman to lead a parliamentary party
14 April 1986	Deadline for the receipt of government bills first adopted
1987	*Parliamentary Privileges Act 1987* initiated in the Senate by the President and passed into law, to codify parliamentary immunities
5 June 1987	Sixth simultaneous dissolution under section 57 of the Constitution
October 1987	Senate forced abandonment of Australia Card Bill, which was the subject of the simultaneous dissolution

Date	Event
25 February 1988	Privilege resolutions passed by the Senate, codified the rights of witnesses at committee hearings and granted right of reply to persons referred to in debate
28 September 1988	30 day rule for questions on notice adopted
8 November 1988	Senate declared principles under which it would consider retrospective tax legislation
29 November 1988	Senate required government to explain any delay in proclaiming bills passed by Parliament
December 1988	Select Committee on Legislation Procedures recommends new procedures for referring bills to committees
21 November 1989	New Standing Orders adopted
5 December 1989	Selection of Bills Committee established to refer bills to committees
14 December 1989	Annual reports of departments and agencies referred to standing committees
31 May 1990	Televising Senate question time authorised
23 August 1990	Senate committees authorised to televise their proceedings
1993	Senate committees reported on constitutional and other problems with government's major tax legislation, resulting in its restructuring

Date	Event
24 August 1994	Standing committee system restructured to reflect composition of the Senate and share chairs Estimates and standing committees amalgamated Performance of government departments and agencies referred to standing committees
9 June 1995	Senate first divided a bill into two bills
30 May 1996	Senate required government departments to publish indexed lists of their files
20 August 1996	First territory and woman President of the Senate, Senator Margaret Reid, elected
2 December 1998	Reference of New Tax System bills simultaneously to a select committee and three standing committees
31 August 1999	Senate authorised publication of its proceedings live on the Internet
22 November 1999	Senate declared all questions going to operations or finances of departments and agencies relevant to estimates hearings Procedures for urgent bills amended to ensure that non-government amendments are put
29 June 2000	Senate declared that it would not pass tariff increases to validate certain tariff proposals
20 June 2001	Senate required government departments and agencies to publish details of contracts on the Internet
2001-02	Senate resolved cases of seizure of documents under search warrant, to determine immunity from seizure

Date	Event
2002	Action against a senator by his party considered as a matter of privilege
19 March 2002	Senate censured a senator for an attack on a High Court justice
15 May 2003	Resolution calling for removal of Governor-General
12 August 2003	Customs and excise tariff bills deferred until documents produced
30 October 2003	Resolution declaring basis on which Senate would consider claims of commercial confidentiality
11 February 2004	Select committee established on a treaty, the free trade agreement between Australia and the United States
9 March 2005	Agreement with the government over the execution of search warrants in senators' premises tabled
21 October 2005	High Court judgment in *Combet v Commonwealth* placed responsibility of Parliament for ensuring that appropriations are properly expended
9 November 2005	Senate adopted procedures allowing any senator to take action in the Senate in relation to unanswered estimates questions on notice or orders for documents
14 August 2006	Standing committee structure changed to return to pre-1994 structure
24 June 2008	Senate made orders requiring information, in time for estimates hearings, on government grants and appointments

List of Court Judgments

NOTE:

Cases are Australian except where marked:

(CAN): Canada
(NZ): New Zealand
(UK): United Kingdom
(US): United States.

References to Standing Orders

INDEX

Reference to specific committees are listed under the heading **Committees, by name**.
An index of **court judgments** cited in this volume appears on pp. 729-31.
An index to references to specific **Standing Orders** of the Senate appears on pp. 733-38.

—A—

—B—

—C—

—D—

—G—

—L—

—M—

—N—

—O—

—P—

—Q—

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