Senate Brief

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The Senate and Legislation

The Senate in session, 2010

Bills

A proposal for a law, or legislation, that is introduced into Parliament is called a bill. Bills are considered consecutively by the two houses of the Federal Parliament, the House of Representatives and the Senate. The two houses must agree to a bill in identical terms before it can be transmitted to the Governor-General for *assent*, which marks its passage into law.

Government bills

Most bills that the Parliament agrees to are proposed by the ministry formed by the party or coalition of parties holding a majority in the House of Representatives (the government) to implement its policies. These policies may relate to the raising of revenue through taxation bills or the expenditure of money through appropriation bills, which include those bills giving effect to the expenditure proposals announced each May by the Treasurer in the Budget. Bills introduced to the Federal Parliament may cover any policy area over which the Commonwealth has jurisdiction. These policy areas are generally outlined in section 51 of the Constitution and include such matters as international and interstate trade and commerce, postal, telegraphic and telephonic services, defence, currency, banking, quarantine, copyright, migration, marriage and divorce,

pensions, external affairs, and conciliation and arbitration of interstate industrial disputes. Many bills amend laws already in existence.

While the role of the ministry or executive government is to develop and administer policy, the role of the Parliament or legislature is to examine and approve proposals for legislation and to monitor the effectiveness of its operation, often through the work of committees (see Senate Brief No. 4, Senate Committees).

Private senators' and members' bills

The right to propose legislation is not restricted to the government of the day. Any senator or member of the House of Representatives may introduce a bill and, in the Senate, a private senator's bill is dealt with in exactly the same way as a government bill. While comparatively few private senators' and members' bills are agreed to by both houses, some significant proposals have become law as a result of private senators' and members' initiatives. Compulsory voting at federal elections was introduced as a result of Senator Payne's *Electoral (Compulsory Voting) Act 1924*. The banning of tobacco advertising in the print media was achieved through Senator Powell's *Smoking and Tobacco Products Advertisements (Prohibition) Act 1989*. From the Parliament's perspective, the most significant piece of legislation sponsored by a private senator or member was the *Parliamentary Privileges Act 1987* which was introduced by the President of the Senate and which codified the Parliament's legal immunities and its powers to protect the integrity of its processes.

When is legislation required?

Not every policy proposal requires legislation to implement it. Any proposal to raise or spend money requires legislation, as does any proposal creating rights or imposing obligations in relation to individuals or corporate bodies. Generally speaking, new powers may be conferred on government departments or agencies only by legislation.

Development of a bill

Between the conception of an idea to be implemented through legislation and the introduction of a bill to Parliament, there are extensive consultative and approval processes, described in the *Legislation Handbook* and a companion volume, the *Cabinet Handbook* published by the Department of the Prime Minister and Cabinet.

Most government bills require the approval of Cabinet. When Cabinet has approved the proposal in principle, the bill is drafted by lawyers within the Office of Parliamentary Counsel, in accordance with instructions about the detailed matters to be included in the bill prepared by the responsible minister's department (drafting instructions). The department is also charged with writing the explanatory memorandum which is a plain English outline of the bill in broad terms, followed by a clause by clause description of the details of the bill. This provides members of Parliament and the public with a guide to interpreting the bill.

Introduction to Parliament

When a bill is ready to be introduced to Parliament, copies are printed so that they may be widely available once the bill is in the public domain. Until its introduction, a bill is subject to conventions of confidentiality which protect the privacy of the deliberations of government. After introduction, however, bills are public documents and are available in electronic form through the Parliament House website, BillsNet, as are copies of current laws passed by the Federal Parliament.

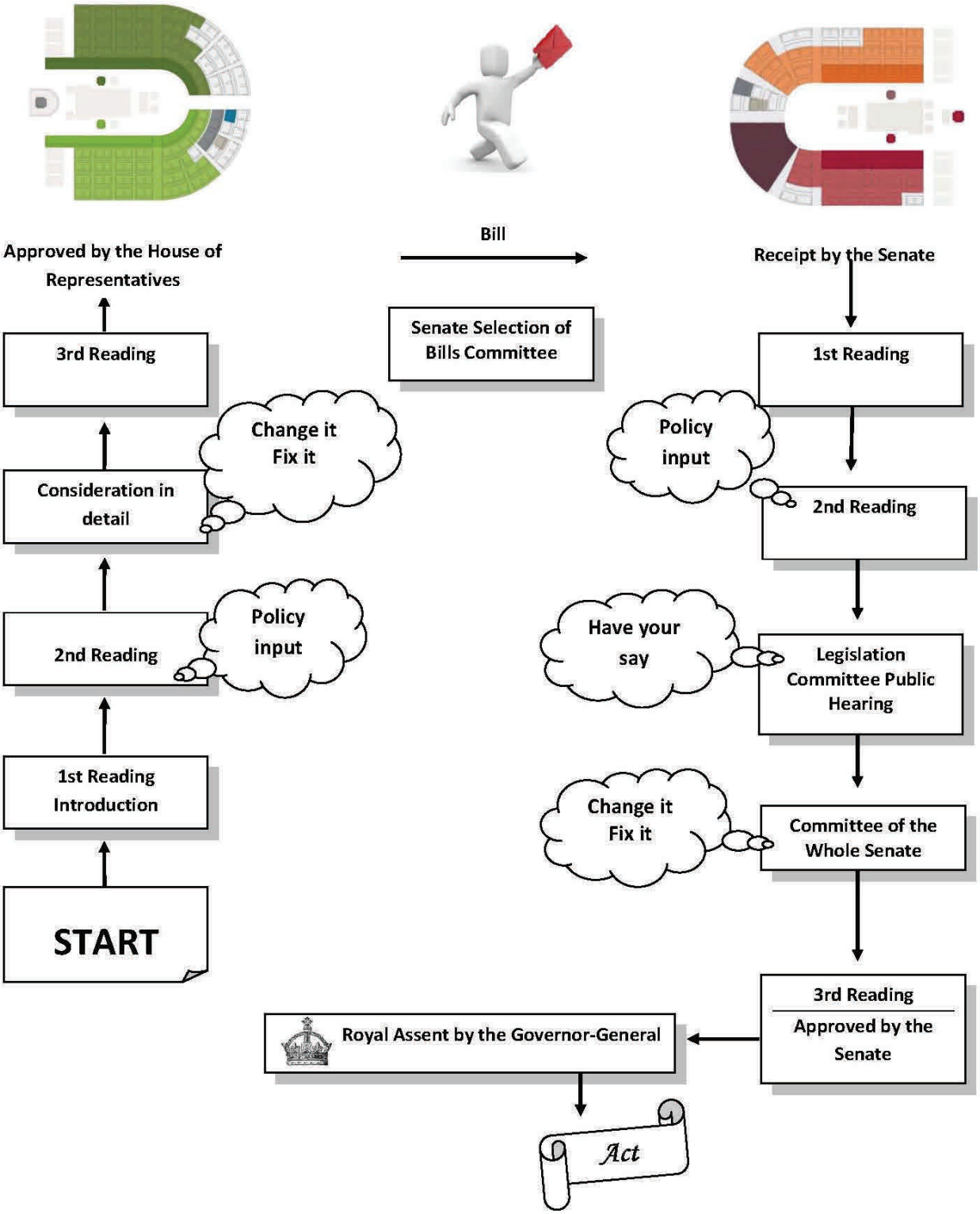
Most bills are introduced first in the House of Representatives because most ministers are there. But bills may also be introduced first in the Senate, perhaps because the responsible minister is a senator or because the House of Representatives is not sitting at the time.

New business in Parliament generally occurs only after notice of it is given. A minister responsible for a bill will normally give notice the day before he or she intends to introduce a particular bill. This is a formal procedure called giving a notice of motion. The motion, moved by the minister on a subsequent day, is that a certain bill be introduced. When that motion is agreed to by the originating house, the bill is formally introduced and read a first time. There is usually no debate on the bill's first or introductory reading.

Consideration of legislation

By the time they pass each house, bills will have been read three times. The terminology is of ancient origin going back to times before highly mechanised printing and widespread literacy, when the Clerk of a house would read the bill aloud from cover to cover at each stage of the deliberations. Nowadays, only the title of the bill is read aloud. The first reading is followed by debate on the principle or policy of the bill (the second reading debate).

Progress of Legislation*



* A simplification of the process for illustrative purposes

Agreement to the bill in principle is indicated by a second reading, after which the detailed provisions of the bill are considered by one of a number of methods (see below). Bills may also be referred by either house to their specialised standing or select committees. Agreement to the policy and the details is confirmed by a third and final reading. These processes ensure that a bill is systematically considered before being agreed to.

Second reading

The debate which occurs before a bill is read a second time represents the major policy debate on the bill. It is opened by the minister responsible for the bill—or in the case of a private senator or member's bill, by the senator or member sponsoring the bill. The minister's second reading speech describes the principle of the bill and the government's purpose in proposing it. The minister is followed in the debate by opposition and other government speakers who have an interest in the bill. Senators and members may speak only once in the debate on the second reading, for up to either 20 or 30 minutes in accordance with the relevant standing orders.

Detailed consideration, Federation Chamber and third reading

Following the second reading, or agreement to the bill in principle, each house considers the bill in detail, although this stage is often dispensed with, by agreement, in the House of Representatives. In the Senate, this stage is called committee of the whole. Proceedings are conducted by the Chairman of Committees rather than by the President of the Senate who presides over the plenary or parent house. The Chair takes the seat immediately below that of the presiding officer. Decisions of the committee are subject to ratification by the plenary body but, in practice, the two bodies comprise the same members. When the committee of the whole has worked through the bill, considering and deciding on any amendments that are moved, the Chair reports the committee's actions to the President and the plenary body then determines whether to adopt the committee's report and any amendments it has made.

Ratification by the plenary body provides an opportunity prior to the final passage of the bill to initiate any further action that is necessary to conclude proceedings or that arises from consideration of the bill. For example, it may be necessary to reconsider parts of the bill or certain amendments and the bill is therefore recommitted; that is, referred back to the committee for further consideration. Alternatively, it may be desirable to refer part of the bill or amendments or an issue arising from the bill to a standing or select committee for examination. This action can be initiated at this stage of proceedings. It is also possible to debate a motion to adopt the committee's report.

Under new procedures adopted by the House of Representatives in February 1994, the House replaced consideration in committee of the whole with consideration in detail by the plenary itself. During consideration in detail, members may speak any number of times for up to five minutes each, as senators may speak during committee of the whole for up to 15 minutes on any number of occasions. This enables a dialogue to develop between the minister responsible for the bill and other senators or members who may have questions about the bill or suggestions for changing it.

It is during committee of the whole or consideration in detail that amendments to the bill may be moved. Amendments are proposals to alter the bill and may be moved by any senator or member in their respective houses. Amendments not moved by the government have a much greater chance of success in the Senate where the government does not usually enjoy a party majority as a result of the system of proportional representation introduced for Senate elections from 1949. Any amendments made by the Senate must, however, be agreed to by the House of Representatives. Likewise any amendments made by the House to a bill first introduced in the Senate must be agreed to by the Senate. The aim is for both houses to agree to the bill in identical terms so that it can then become a law.

As part of the new procedures adopted in 1994 the House of Representatives established a second, parallel chamber, called the Federation Chamber, to consider legislation and certain other types of business. The second reading debate and consideration in detail of non-controversial bills or bills over which there is agreement may occur in the Federation Chamber, presided over by the Deputy Speaker. Bills may be amended in the Federation Chamber provided there is full agreement. Formal votes or divisions may not be taken in the Federation Chamber; any disagreement must be reported to the House for resolution. Likewise, reports from the Federation Chamber indicating that bills have been considered and amended are subject to adoption by the House in plenary.

On the adoption of the report from the committee of the whole in the Senate, or from the Federation Chamber, or at the conclusion of the consideration in

detail stage by the House of Representatives, the bill is read a third time, signifying final agreement to it by that house. The process is then repeated, with appropriate variations, in the other house.

Deadline for receipt of bills from the House of Representatives

In previous years the Senate experienced an end-of-sittings rush of legislation from the House of Representatives which resulted in some bills being passed without adequate time for proper consideration. In February 1997, to remedy this situation, the Senate incorporated standing order 111 (an order agreed to in 1994) which ensures that consideration in the Senate of a bill introduced in either house in any period of sittings will be automatically adjourned to the following period of sittings. The Senate may also make a deliberate decision to exempt the bill from this requirement. Thus the Senate has imposed a deadline for receiving bills from the House.

Money bills

The powers of the two houses to initiate and amend bills are identical except in relation to bills that impose taxation or appropriate money. Section 53 of the Constitution provides that such bills may originate only in the House of Representatives. Bills which impose taxation or appropriate money for the ordinary annual services of government may not be amended by the Senate. Thus if the Senate wishes to amend such a bill, it must request the House of Representatives to make the amendment. When this occurs, the bill is not read a third time in the Senate until the House advises it has made the requested amendment or, in the case of the House declining to make the amendment, until agreement between the houses has been reached.

Disagreements between the houses

When the two houses do not initially agree on the contents of a bill, it is usual for negotiations to continue. Amendments to amendments may be made or alternative amendments proposed until an acceptable compromise is reached. Very occasionally, the impasse cannot be broken and a bill is laid aside and not proceeded with.

A disagreement between the two houses can trigger a simultaneous dissolution of both houses, or double dissolution, leading to a general election for both houses. The most recent double dissolution was in 1987 when the two houses could not agree on the Australia Card Bill. The conditions to be satisfied for a double dissolution are set out in section 57 of the Constitution. Briefly, if the Senate fails to pass a bill agreed to by the House of Representatives and, after a minimum of three months has elapsed, again fails to pass the same bill to which the House of Representatives has again agreed, the Prime Minister may advise the Governor-General to dissolve both Houses of Parliament.

If, after the general election, the same bill is again passed by the House of Representatives but fails to pass the Senate, a joint sitting of both Houses may be held. There has been only one joint sitting of this kind since 1901. In 1974, six bills triggered a double dissolution and were considered at a joint sitting on 6 and 7 August 1974. On that occasion, the government's majority in the House of Representatives was sufficient to compensate for its lack of a majority in the Senate and the bills were passed by both Houses sitting as one. Special rules for the occasion were agreed to by both Houses.

For further details concerning simultaneous dissolutions see Senate Brief No. 7, Disagreement Between the Houses.

Royal assent

The final stage in the legislative process is assent to a bill by the Governor-General on behalf of the Queen. Under the Constitution, the Governor-General may assent to a bill or withhold assent, but in practice a bill passed by both houses is always assented to.

The Governor-General may also propose amendments to bills, but these must be returned to the houses for their agreement. If the houses do not agree, the bill is submitted again for assent in its original form. This kind of amendment is usually confined to minor drafting errors discovered only after the bill has passed both houses.

Once assented to, a bill becomes an Act of Parliament and is given an Act number.

Scrutiny of legislation by the Senate

As a house of review, the Senate subjects legislation to additional scrutiny. Each bill that comes before the Senate is examined by the Scrutiny of Bills Committee, which is concerned to ensure that legislation does not impinge unduly on the fundamental rights and liberties of citizens, and that it observes certain legislative proprieties. The committee is concerned to ensure, for example, that any delegation of power conferred by an Act is

subject to appropriate safeguards, that administrative decisions are made fairly and openly and subject to independent review, and that any new body set up by an Act is required to report regularly to Parliament.

When the committee identifies a potential problem with a bill, it alerts the Senate and follows the matter up with the responsible minister. Having considered the minister's response, the committee then reports to the Senate. It is not the committee's role to recommend particular action on a bill but to raise issues for the Senate's consideration. Individual senators often take up concerns raised by the committee and draft amendments to the bill accordingly. These amendments are subsequently dealt with in the committee of the whole stage.

In 1989 the establishment of the Selection of Bills Committee provided the Senate with a mechanism for regular examination of bills by its legislative and general purpose standing committees. The Selection of Bills Committee considers all bills before the Senate to identify any which are complex or controversial or which senators have indicated warrant further examination by a standing committee. Those bills so identified are referred for inquiry and report to a standing committee, usually within a short timeframe to avoid delaying passage of the bill.

Bills are usually referred to a legislative and general purpose standing committee which has responsibility for that particular portfolio area. The portfolios allocated to each of the eight legislative and general purpose standing committees can be found in Senate Brief No. 4, *Senate Committees*.

Standing committees have powers to call witnesses and to travel from place to place. When considering bills, the committees usually hold public hearings to question invited witnesses, including the minister, departmental officials and various interest groups representing people who may be affected by the bill or who may be able to provide expert advice on the subject matter. Through this process, previously unforeseen problems may be identified or misunderstandings about the impact of the bill resolved. Senators have an opportunity to question officials who may be responsible for implementing the bill when it is passed. Specific amendments may be considered by the standing committee. Evidence given at the hearing may also result in amendments being drafted subsequently.

The standing committee does not itself amend the bill but it may recommend particular amendments to the Senate. It may also recommend that the bill be passed without amendment. The standing committee's report is considered when the bill again comes before the Senate.

Since 1990 approximately 30 per cent of bills have been referred to standing committees by this process, enabling more detailed consideration of bills.

In 1994 the House of Representatives also began the practice of referring bills to its standing committees, on the motion of a minister, for advisory reports.

Scrutiny of legislative instruments

Many statutes do not attempt to comprehensively regulate the law in a particular area, but leave the details to be regulated through legislative instruments. These instruments are often also called delegated legislation because the power to legislate has been delegated by Parliament to the Governor-General (acting on the advice of the government) or to a minister or a statutory office holder. Legislative instruments carry the full force of the law—that is, they have the same legal effect as an Act of Parliament.

Much use is made of delegated legislation. Each year the federal Parliament passes around 200 bills. In contrast, the executive makes more than 2000 disallowable legislative instruments. Unless specifically exempted, legislative instruments must be tabled in the Senate (and the House of Representatives) and may be disallowed on a vote in either house (section 42 of the *Legislative Instruments Act 2003*).

To improve the effectiveness of the Senate's oversight of these laws, the Standing Committee on Regulations and Ordinances examines all disallowable legislative instruments against criteria similar to those used by the Scrutiny of Bills Committee. It takes up any problems in an instrument with the relevant minister. Unresolved problems may lead to the disallowance of the instrument by the Senate, particularly when it appears that an action empowered by a regulation would more properly be provided for in an Act under Parliament's direct scrutiny. An unresolved problem results in a notice of motion for the disallowance of the offending regulation. Most notices of motion for the disallowance of regulations are given by the Chairman of the Regulations and Ordinances Committee, but any senator may give such a notice. The Senate has 15 sitting days to deliberate and vote on whether the regulation should be disallowed. If the matter is not resolved within the 15 sitting days, the regulation is automatically disallowed. Through the work of this committee, the Senate monitors a significant area of legislation which Parliament does not directly approve.

Further reading

The Constitution of the Commonwealth of Australia

Harry Evans and Rosemary Laing (eds.), *Odgers' Australian Senate Practice* 13th edn, Department of the Senate, Canberra, 2012, available on the Internet: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers

Legislation Handbook, Department of the Prime Minister and Cabinet, Canberra, 2000, available on the Internet: http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf

Cabinet Handbook, 7th edn, Department of the Prime Minister and Cabinet, Canberra, 2012, available on the Internet: http://www.dpmc.gov.au/guidelines/index

Senate Briefs

1 *Electing Australia's Senators*
2 *The Opening of Parliament*
3 *Women in the Senate*
4 *Senate Committees*
5 *Consideration of Estimates by Senate Committees*
6 *The President of the Senate*
7 *Disagreement Between the Houses*
8 *The Senate and Legislation*
9 *Origins of the Senate*
10 *Role of the Senate*
11 *Parliamentary Privilege*
12 *Questions*
13 *Rights and Responsibilities of Witnesses Before Senate Committees*
14 *Ministers in the Senate*
15 *The Clerk of the Senate and Other Senate Officers*
16 *Usher of the Black Rod*

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