

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.¹

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).

1 See Chapter 1, The Senate and its Constitutional Role.

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 and a motion for the suspension of standing orders moved without notice require an absolute majority to be carried. In the past the standing orders provided for special majorities for other questions.²

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.³

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.⁴ It has since been accepted by the Senate that those standing orders are in force.⁵ 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.⁶

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.⁷

2 SO 87, 209.

3 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.

4 Ruling of President Laucke, 17/9/1980, J.1549; of President Young, 22/9/1982, J.1096-7.

5 For a more detailed account of the controversy over section 23 of the Constitution and special majorities, see ASP, 6th ed., pp. 393-9. Also see, *Annotated Standing Orders of the Australian Senate*, under SOs 5, 51, 142, 144, 150, 199 and 209.

6 See Chapter 8, Conduct of Proceedings, under Suspension of standing orders.

7 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.⁸

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.⁹ 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.¹⁰

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.¹¹

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.

8 SO 84(5), 98(1), (2).

9 SO 100(1).

10 SO 102(2); 21/9/1906, J.147.

11 See statement by President Beahan, SD, 30/5/1995, pp. 524-5.

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.¹² 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.¹³ 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.¹⁴ 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.¹⁵

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.¹⁶ Normally party whips are appointed as tellers.¹⁷

The divisions lists are published in the Journals.¹⁸

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.¹⁹ 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

12 SO 98(3).

13 SO 101(3).

14 SO 101(1) and (2).

15 SO 101(4), (6); 19/2/1908, J.296.

16 SO 102(1).

17 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.

18 SO 102(3).

19 SO 104.

Senate should not be made by misadventure.²⁰

A proposal to amend SO 104 to provide for divisions to be held automatically in these circumstances was referred to the Procedure Committee on 29 September 2010.²¹ In its Third report of 2010,²² the committee affirmed current practice but agreed to reconsider the matter if any incident raised specific concerns. Current practice reflects the principle that the Senate, as master of its own proceedings, should have the right to determine the circumstances in which divisions are held again, if necessary on case-by-case basis.²³

A senator who has called for a division must not leave the chamber until the division has been completed, and a senator must vote in a division in accordance with the senator's vote by voice.²⁴ 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.²⁵

There is no provision for absentee voting; a senator must be in the chamber to vote.²⁶

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.²⁷ 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

20 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; 28/10/2010, J.236 and J.238-9.

21 J.91.

22 PP No. 203/2010, adopted 28/10/2010, J.246.

23 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.

24 SO 100(2), 100(3).

25 Ruling of President McMullin, 2/10/1957, J.99; see also 20/11/1957, J.155; 5/12/1960, J.200.

26 SO 100(4); ruling of President Gould, SD, 11/2/1908, p. 7973.

27 SO 101(5).

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.²⁸ 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.²⁹

No decision is taken to have been reached by a division if a quorum of senators has not voted in the division.³⁰

If a senator wishes to raise a point of order during a division, the senator may do so while sitting.³¹ 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.³² For observations on the method of resolving points of order during divisions, see the Procedure Committee's First Report of 1997.³³

Divisions in committee of the whole are taken in the same manner as in the Senate.³⁴

A division cannot be held after 4.30 pm on Thursdays.³⁵ 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. 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. The temporary order for consideration of private senators' bills, adopted in 2010 provides for divisions to be deferred till after 12.30 pm on Mondays.³⁶ 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

28 SO 101(5); see Chapter 5, Officers of the Senate: Parliamentary Administration.

29 SO 99(2).

30 See Chapter 8, Conduct of Proceedings, under Quorum.

31 SO 103.

32 Ruling of President Baker, SD, 28/9/1906, p. 5644.

33 PP 22/1997.

34 SO 105.

35 SO 57(3); formerly 6 pm: 11/5/2004, J.2239; 10/3/2009, J.1657-8.

36 22/11/2010, J.375-6.

determined on the voices.³⁷

On 11 March 2010, a division on a motion for the closure on the second reading of a private senator's bill was deferred till the next day of sitting after the discovery of formal business. Subsequently, the closure was carried and the remaining stages of the bill were dealt with on the basis that the bill was being considered under the expedited proceedings and the vote had been deferred to a time not designated for any specific category of business.³⁸

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.³⁹

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.⁴⁰

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.⁴¹

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.⁴² 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

37 For a question put again by leave after a division was deferred, see 24/6/2010, J.3771, 3772.

38 11/3/2010, J.3302; 15/3/2010, J.3311-13.

39 For successive divisions the bells are rung for only one minute: see above.

40 See also Chapter 6, Senators, under Pecuniary interests.

41 For exceptions see SD, 21/4/1983, pp. 6-7; 20/8/1996, pp. 2676-92; see also statement by Senator Ludwig, SD, 17/3/2010, p. 2019.

42 Statement by President Calvert, SD, 7/11/2006, p. 1.

make statements concerning pairing arrangements. This practice has been upheld by a President's ruling.⁴³ 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,⁴⁴ 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.⁴⁵ 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.⁴⁶

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.⁴⁷

Debate may occur before a ballot is held.⁴⁸

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.

43 Ruling of President Cormack, SD, 10/5/1973, p. 1532, 15/5/1973, pp. 1560-1.

44 SO 7, 10.

45 SO 27(1).

46 SO 163; for a ballot held again pursuant to order (and which produced a different outcome) see 17/3/2010, J.3345, 3367.

47 For a precedent of a special exhaustive ballot, on the site of Canberra, see 6/11/1908, J.74.

48 Ruling of President Givens, SD, 1/3/1923, pp. 43-4; 24/3/1992, J.2099-2100.

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.⁴⁹

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.⁵⁰

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.⁵¹

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.⁵²

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.⁵³ 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.⁵⁴

A roll call may be ordered for any other purpose, but that procedure is not now used.

49 For historical material see *ASP*, 6th ed., p. 889.

50 SO 106.

51 SO 107.

52 SO 108.

53 SO 109.

54 SO 110; see also Chapter 12, Legislation, under Bills to alter the Constitution.

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 recommended that the Senate not make any decision on electronic voting at that time.⁵⁵ The matter has not been further considered by the Senate, although the paper was updated in 2004 at the request of senators.

55 See Second Report of 1990, PP 435/1990, presented in December 1990.

