

## 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 for much of its existence 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 2012”.

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.<sup>1</sup>

The Senate may give precedence to bills introduced by senators other than ministers, and may defer government bills until other bills are dealt with.<sup>2</sup>

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,<sup>3</sup> 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.

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1 The only exception to this principle is in relation to the limitation on debate on urgent bills, initiation of which is reserved to ministers; see under Limitation of debate, below.

2 For precedents, see below, under Control of bills.

3 See Chapter 8, Conduct of Proceedings, under Government and general business.

The only modification to this principle occurred during a period of minority government in the 43rd Parliament. However, private members' bills passed with the support of the ministry were then dealt with as government business in the Senate.<sup>4</sup> 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

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4 See Evidence Amendment (Journalists' Privilege) Bill 2010 introduced in the House by Mr Wilkie MP and ordered to be listed on the Notice Paper as government business, 15/11/2010, J.263; Auditor-General Amendment Bill 2011, introduced in the House by Mr Oakeshott MP, initially dealt with in the Senate as general business but finally designated as government business by order agreed to 21/11/11, J.1845; Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011, 10/11/11, J.1837.

- (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.<sup>5</sup>

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.

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5 SO 111(1).

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.<sup>6</sup> 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.<sup>7</sup> The President is required to report a message from the House of Representatives "as early as convenient".<sup>8</sup> 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.<sup>9</sup>

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

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6 SO 111(3), (4).

7 SO 128.

8 SO 155.

9 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.

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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> It is also possible for the Senate to reject the motion for the first reading of a bill under this procedure.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup> A senator may move at any time that bills which are being taken together be separated.<sup>17</sup> 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.<sup>18</sup>

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10 SO 113(1), (2).

11 SO 113(3).

12 For an instance of the motion in paragraph (a) being negatived and the bills proceeding by the deliberate method, see carbon pollution reduction scheme bills 17/11/2009, J.2728-30; subsequently altered, 26/11/2009, J.2884; and 22/2/2010, J.3171-73.

13 For an instance of the motion in paragraph (b) being negatived and the bills proceeding separately, see three private health insurance incentives bills 4/2/2010, J.3132; subsequently altered in respect of two of the bills, 22/2/2010, J.3157.

14 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; carbon tax bills, 12/10/2011, J.1616-7; steel transformation plan bill, 31/10/2011, J.1654-6.

15 Marriage Amendment Bill 2004, 13/8/2004, J.3927-8.

16 See Chapter 10, Debate, under Dividing the question.

17 8/6/1989, J.1842.

18 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.<sup>19</sup> Bills at different stages have been taken together by this means.<sup>20</sup> Bills not yet received from the House may be put together with bills already in the Senate in anticipation of their receipt.<sup>21</sup>

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.<sup>22</sup> 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 usually 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.<sup>23</sup> 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.<sup>24</sup>

The deadline does not apply to bills received again in the circumstances described in the first paragraph of section 57 of the Constitution.

19 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; 22/3/2011, J.717; 18/8/2011, J.1288; 14/9/2011, J.1453.

20 18/5/1993, J.175-6; 26/5/1993, J.267; 4/2/2010, J.3126; for a bill negatived at the second reading, revived and taken together with other bills, see 10/9/2003, J.2329.

21 12/9/2005, J.1073-4.

22 See SD, 12/9/2005, p. 9.

23 SO 111.

24 SO 111(6).

If the Senate changes its sitting pattern with prospective effect, before a deadline has operated, this changes the deadline,<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

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:

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25 11/9/2003, J.2348.

26 7/11/2003, J.2672.

27 See below, under Commencement of legislation.

<b>Sittings</b>	<b>Bills passed</b>	<b>Length of sittings in weeks</b>	<b>Bills passed during last 4 sitting weeks (% of bills passed)</b>	<b>Bills passed during last 2 sitting weeks (% of bills passed)</b>
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)

\* For the period covered by this table, the Budget was presented in August, the Budget sittings therefore describing the period from August to November/December. The Autumn sittings ran from February to June, there being only two periods of sitting each year rather than the current three.

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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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:

<b>Sittings</b>	<b>Bills passed</b>	<b>Length of sittings in weeks</b>	<b>Bills passed during last 4 sitting weeks (% of bills passed)</b>	<b>Bills passed during last 2 sitting weeks (% of bills passed)</b>
Autumn 1997	60	6	51 (85)	21 (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.

29 29/11/1994, J.2557-60.

30 J.3128.

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:

<b>Sittings</b>	<b>Bills passed</b>	<b>Length of sittings in weeks</b>	<b>Bills passed during last 4 sitting weeks (% of bills passed)</b>	<b>Bills passed during last 2 sitting weeks (% of bills passed)</b>
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)
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)
July—Dec 2008	66	8	55 (83.3)	32 (48.5)
Jan—June 2009	73	7	52 (71.2)	34 (46.6)
July—Dec 2009	67	7	47 (70.1)	18 (26.9)
Jan—June 2010	116	7	92 (79.3)	60 (51.7)
July—Dec 2010	40	4	40 (100)	24 (60)
Jan—June 2011	79	6	73 (92.4)	42 (53.2)
July—Dec 2011	109	9	67 (61.5)	58 (53.2)

The deadline has been recognised as an important aid to the scheduling and scrutiny of legislation.<sup>31</sup>

31 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup>

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.<sup>38</sup> If the bill is being dealt with under the expeditious procedure, which is normal, the motion for the second

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32 SO 112(1).

33 SO 112(1).

34 For an account of earlier bills rejected at the first reading, see *ASP*, 6th ed., pp. 436-7. For a bill negatived at the first reading in the modern era, see the Marriage Amendment Bill 2004, 24/6/2004, J.3752. This bill was subsequently revived: 13/8/2004, J.3927-8.

35 SO 112(2).

36 See Chapter 13, Financial Legislation.

37 13/11/1995, J.4087-8.

38 SO 112(4).

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.

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.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup> Clearly, however, there is nothing to prevent the Senate being asked to consider again a bill which it has dealt with;<sup>42</sup> such a rule would prevent the proper operation of section 57 of the

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39 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.

40 See Chapter 21, Relations with the House of Representatives, under Disagreements between the Houses.

41 Ruling of President Givens, 14/12/1916, J.493.

42 Ruling of Deputy President Drake-Brockman, SD, 29/9/1966, p. 863.

Constitution.<sup>43</sup> The same question rule is therefore not regarded as applying to questions for the passage of bills.<sup>44</sup>

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.<sup>45</sup>

Other amendments may be moved to the motion for the second reading provided that they are relevant to the bill.<sup>46</sup> In relation to relevance, as with relevance in debate, this requirement is interpreted liberally, and an amendment is accepted if it relates in any way to the subject matter of the bill.<sup>47</sup> 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 negating 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.<sup>48</sup>

A second reading amendment may also be used to defer consideration of a bill.<sup>49</sup>

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

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43 See Chapter 21, Relations with the House of Representatives, under Disagreements between the Houses.

44 See Chapter 9, Motions and Amendments, under Same question rule.

45 SO 114(2); for precedent of a bill deferred till “this day 12 months”, see 13/6/1984, J.986: this had the same practical effect.

46 SO 114(3).

47 See Chapter 10, Debate, under Relevance.

48 5/12/1973, J.568.

49 15/12/1987, J.430-1; 16/12/1992, J.3400; 20/9/1995, J.3815-6; 12/8/2003, J.2089-90.

readings of the bills are put separately.<sup>50</sup>

### 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.<sup>51</sup>

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, and similar amendments have been moved frequently since that time.<sup>52</sup> It was also thought that a bill could not be referred to a standing committee, as distinct from a select committee, by this method, but as a bill can be referred by motion on notice to a standing committee before the second reading, this superfluous distinction was also not subsequently followed.<sup>53</sup> Reference of a bill to a committee may occur before the second reading is moved.<sup>54</sup> Indeed, the Senate may make orders for the prospective referral of bills to committees before their introduction,<sup>55</sup> and for the referral of the provisions of a bill before its introduction into either House.<sup>56</sup> (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

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50 3/12/1985, J.6845, 6878; 4/12/1985, J.6945, 6968; 16,17,21/10/1986, J.1320, 1323, 13245, 13403; 19/6/1992, J.2520-2; 2/12/1992, J.3189-90, 3192.

51 23/8/1995, J.3667-8, 3670.

52 25/11/1959, J.225.

53 30/9/1971, J.709; 28/9/1978, J.387.

54 17/10/1988, J.1019-21; reference of provisions before second reading: 30/10/1989, J.2177-8.

55 For example, 4, 6/5/1992, J.2239, 2281.

56 For example, 26/3/1997, J.1799-1800; 11/5/2000, J.2702; 29/6/2000, J.2978; 25/6/2003, J.1978; 15/10/2008, J.1023-4; 14/5/2009, J.1957-8, 1966-7; 13/5/2010, J.3485.

committee under this reference.<sup>57</sup>

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.<sup>58</sup>

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.

Exposure drafts of government bills have also been referred to committees.<sup>59</sup>

A second reading amendment may be used to refer to a committee matters related to a bill, while allowing the bill to proceed.<sup>60</sup>

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.<sup>61</sup>

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.<sup>62</sup>

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

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57 14/9/2006, J.2706.

58 Report by the Finance and Public Administration Committee on proposed access card, PP 106/2007.

59 For example, wheat marketing bills, 12/3/2008, J.209; personal property securities bill, 13/11/2008, J.1193; Australian privacy amendment legislation, 24/6/10, J.3763, 30/9/10, J.160.

60 21/12/1988, J.1359.

61 31/1/1995, J.2799-2800.

62 SO 115(2).

is subject to a speaking time limit of 5 minutes per speaker and a total time limit of 30 minutes.<sup>63</sup> 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.<sup>64</sup>

The Senate may refer the clauses or provisions of a bill to a committee rather than the bill itself.<sup>65</sup> 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.<sup>66</sup>

The Senate may also refer different parts of bills to different committees.<sup>67</sup> Different aspects of the same bills may be referred to different committees, including a combination of select and standing committees.<sup>68</sup> Proposed amendments may also be referred to committees.<sup>69</sup>

Clauses of bills may be omitted in committee of the whole with a view to referring them to a committee subsequently.<sup>70</sup>

Having referred a bill to a committee, the Senate can withdraw the referral.<sup>71</sup>

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63 SO 115(6).

64 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.

65 8/4/1974, J.92; 30/10/1974, J.307; 31/3/1977, J.69; 25/6/1992, J.2639-40; 3/3/2011, J.669.

66 See below for the circumstances in which referral of provisions of a bill is taken to be the equivalent of referral of the bill.

67 28/9/1978, J.387-88; ruling of President Sibraa, 11/10/1990, J.322-3; 26/11/1990, J.476.

68 New Tax System bills, 24, 25/11/1998, J.143-50, 166.

69 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.

70 28/5/1986, J.1019; 7/10/1987, J.146; 8/12/1987, J.372; 9/12/1987, J.3767; 25/6/1992, J.2640.

71 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.<sup>72</sup> 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,<sup>73</sup> 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.<sup>74</sup>

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.

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72 SO 115(3).

73 For precedent, see the referral of the provisions of the temporary flood and reconstruction bills to the Economics References Committee, with other terms of reference, 3/3/2011, J.669-70.

74 See Chapter 13, Financial Legislation, under Consideration of appropriation bills by estimates committees and in committee of the whole.

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.<sup>75</sup>

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.

For particular challenges to parliamentary scrutiny posed by national scheme legislation, see chapter 15, under National uniform legislation and state referrals of power.

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75 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; National Rental Affordability Scheme Bill 2008 and an associated bill, 13/11/2008, J.1213.

## **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.<sup>76</sup> 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 with recent trends indicating that most referrals occur at the earliest possible stage (usually soon after introduction in either House but sometimes contingent on a bill's introduction).<sup>77</sup>

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.<sup>78</sup>

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

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76 SO 24A.

77 See above under Reference to standing or select committee.

78 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.

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.<sup>79</sup>

Till 2000, about 35 percent of all bills passed by the Senate were referred to committees under these procedures. Since then the percentage has risen steadily to over 60 percent on average.

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.<sup>80</sup> 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;<sup>81</sup>
- motion to adopt standing committee report, bill not referred on Selection of Bills Committee report;<sup>82</sup>
- motion to adopt standing committee report, amendment of motion to amend bill.<sup>83</sup>

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.

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79 SO 115(5).

80 27/11/2003, J.2747.

81 12/11/1990, J.422.

82 4/6/1991, J.1100.

83 4/6/1991, J.1111; 6/6/1991, J.1155.

Those suggestions led to the establishment in 1988 of a Select Committee on Legislation Procedures. This committee reported at the end of 1988.<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup> 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,<sup>87</sup> or require the committee on a bill to amend

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84 PP 398/1988.

85 See Chapter 16, Committees, under Scrutiny of Bills Committee.

86 SO 115(2).

87 SO 150(1).

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.<sup>88</sup>

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.<sup>89</sup>

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.

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88 SO 150(2).

89 See *ASP*, 6th ed., pp. 469-70, and under Committee of the whole: amendments, below.

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.<sup>90</sup> 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.<sup>91</sup> 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, 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.<sup>92</sup> 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.<sup>93</sup> 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

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90 J.3424-5.

91 30/10/2000, J.3429-30; 31/10/2000, J.3440-3.

92 J.3997-4001.

93 J.4538-40.

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.<sup>94</sup>

An attempt to divide non-amendable bills by request was made in 1993.<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup>

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.<sup>98</sup> 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

94 15/11/2002, J.1092-9; 12/12/2002, J.1363-81, 1413-33.

95 20/10/1993, J.646-8.

96 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.

97 SO 115(1).

98 5/11/1987, J.268-9.

future time.<sup>99</sup>

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.<sup>100</sup>

The standing orders provide that a bill is to be considered clause by clause.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup>

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.<sup>104</sup>

A complicated amendment may be divided, as with a complicated question.<sup>105</sup>

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

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99 See Chapter 14, Committee of the Whole Proceedings; for precedent, 13/6/1984, J.986.

100 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.

101 SO 117; a clause is a numbered paragraph of a bill which becomes a section of the resulting statute when the bill is passed.

102 See Chapter 11, Voting and Divisions.

103 SO 118(3).

104 See Chapter 9, Motions and Amendments, under Amendments.

105 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.

to the preamble or title.<sup>106</sup> An amendment of the title, however, need not necessarily arise from another amendment.<sup>107</sup> An amendment of the title is specially reported.<sup>108</sup>

The enacting words of a bill are not put to the committee,<sup>109</sup> but there are precedents for amendment of enacting words on an instruction.<sup>110</sup>

In the course of consideration of a bill, any clause may be postponed whether or not it has been amended.<sup>111</sup> 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.<sup>112</sup>

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 now done with virtually all bills.

It is also established practice to allow senators to move amendments together in groups, by leave, 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 negated with the votes equally divided, the amendment is negated 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.<sup>113</sup> 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

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106 SO 117(1).

107 8/3/1967, J.35; 24/8/1984, J.1049-50.

108 SO 118(4).

109 SO 116.

110 19/6/1901, J.37; 20/6/1901, J.42; 30/1/1902, J.268.

111 SO 117(5).

112 28/5/1992, J.2349-50.

113 14/11/1991, J.1709 and 1719; 18/12/1991, J.1960; 3/12/1992, J.3211, 3219.

particularly useful in dealing with amendments which are circulated in the course of the debate.<sup>114</sup>

## **Relevance of amendments**

An amendment must be relevant to the subject matter of the bill.<sup>115</sup> As with relevance in debate and in relation to amendments to the motion for the second reading, the requirement of relevance is interpreted liberally, so that senators have maximum freedom to move amendments.<sup>116</sup> 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.<sup>117</sup>

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.<sup>118</sup>

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.<sup>119</sup> 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.<sup>120</sup>

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114 Social Security (Budget and Other Measures) Bill 1996 and associated bill, 13/12/1996, J.1317-31.

115 SO 118(1).

116 See Chapter 10, Debate, under Relevance; and above under Second reading.

117 Rulings of President Baker, SD, 14/7/1904, p. 3243; 27/10/1905, pp. 4202-4; 14/11/1905, p. 5004.

118 5/5/1986, J.967-8; 4/12/1986, J.15589.

119 SO 118(2); 23/2/1944, J.44-5; for a suspension of this rule, see 23/6/1999, J.1228.

120 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.<sup>121</sup> There has been no occasion for these rules to be invoked in recent times.<sup>122</sup>

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.<sup>123</sup>

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.<sup>124</sup>

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.<sup>125</sup> This rule ensures that a committee is allowed to complete its work before the bill is again discussed in the Senate.

## Report from committee

A committee of the whole on a bill may report progress.<sup>126</sup> Progress may be reported for a particular purpose, for example, until a minister answers questions or provides information.<sup>127</sup>

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.<sup>128</sup>

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121 Rulings of President Baker, SD, 27/9/1906, p. 5591, of President Givens, 10/10/1918, p. 6776.

122 For amendments which significantly altered the effect of a bill: 4/6/1992, J.2432-3.

123 30/11/1932, J.188; 16/8/1972, J.1061; 10/12/1976, J.545-6.

124 See Chapter 16, Committees, under Scrutiny of Bills Committee.

125 SO 119.

126 See Chapter 14, Committees of the Whole, under Reporting progress.

127 20/5/1975, J.655-7.

128 SO 120(1).

On the motion for the bill to be reported an amendment may be moved to require the reconsideration of any clauses.<sup>129</sup> 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.<sup>130</sup>

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.<sup>131</sup> 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.<sup>132</sup> Rejection by the Senate of the question that the report of the committee be adopted would have the effect of recommitting the bill.<sup>133</sup>

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.<sup>134</sup> When bills have been reported separately in this way, some may be proceeded with and others deferred.<sup>135</sup> 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.<sup>136</sup>

The motion for the adoption of the committee's report may be debated, but it is not in order to

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129 SO 120(2); 18/6/1991, J.1216.

130 14/12/1989, J.2385; 22/3/1995, J.3114.

131 11/11/1981, J.643; 4/5/1992, J.2249; 15/12/1992, J.3370; 11/7/1998, J.4343.

132 See under Recommittal, below.

133 Statement by President Reid, SD, 11/7/1998, pp. 5708-9.

134 30/6/1995, J.3629-30; 25/9/2002, J.821.

135 29/8/2001, J.4808-10.

136 SO 120(2).

revive the discussion which took place in the committee.<sup>137</sup>

The motion may also be relevantly amended. An amendment may:

- express the Senate’s opinion concerning a matter associated with the bill;<sup>138</sup>
- declare the Senate’s intention in making requests;<sup>139</sup>
- seek to defer the bill;<sup>140</sup>
- refer it to a standing or select committee;<sup>141</sup>
- refer to a committee matters raised by amendments;<sup>142</sup>
- make a standing order for documents;<sup>143</sup>
- make an order for a report by a statutory authority;<sup>144</sup>
- provide for the urgent despatch of a message.<sup>145</sup>

### **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.<sup>146</sup> 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.<sup>147</sup> The recommittal motion may be debated and relevantly amended. A bill may be recommitted more than once.<sup>148</sup> A motion to recommit a bill

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137 Ruling of President Givens, SD, 18/3/1920, p. 506.

138 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.

139 24/3/1994, J.1504.

140 25/2/1977, J.595.

141 11/4/1986, J.884; 24/3/1994, J.1504; 13/12/1996, J.1337.

142 17/11/1993, J.800; 22/11/1993, J.843.

143 24/3/1994, J.1517.

144 25/3/1999, J.626.

145 31/5/1985, J.381.

146 SO 121.

147 15/8/1974, J.166; 15/6/1989, J.1895-6.

148 26/2/1932, J.19-20, 23.

may be moved instead of a motion to adopt the report of the committee.<sup>149</sup>

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.<sup>150</sup>

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, but if the expeditious method is being followed the motion for the third reading is moved at once.<sup>151</sup>

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.<sup>152</sup>

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

149 14/3/2005, J.493.

150 Ruling of President Gould, SD, 1/10/1909, p. 4022.

151 SO 122(1).

152 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.

the bill is disposed of with an indication of finality greater than if the motion for the third reading is simply rejected.<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> This could be done only where a bill had not been forwarded to the House of Representatives.<sup>158</sup>

Bills have also been recommitted after being negated and then revived.<sup>159</sup>

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.<sup>160</sup> 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.

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153 SO 122(3); 8/10/1985, J.490; 7/9/2000, J.3260.

154 SO 123.

155 Ruling of President Baker, 30/11/1904, J.159.

156 SO 122(4).

157 J.561-3.

158 For the same process effected by a simpler method, see 25/11/2003, J.2722-3;4/2/2010, J.3145-47.

159 See below under Revival of bills.

160 SO 124.

## **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.<sup>161</sup>

## **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.<sup>162</sup> 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.

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161 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.

162 For precedent, see the schedule of amendments made by the Senate to the Native Title Bill 1997 [No. 2], Govt (70), Opp (RN 34) and Opp (RN 35); VP, 9/4/1998, 2968-9, HRD, p. 2938.

In 1992 it was necessary to correct a Senate schedule of amendments to a bill which included amendments not agreed to by the Senate.<sup>163</sup>

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.<sup>164</sup>

## 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.<sup>165</sup>

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).<sup>166</sup>

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163 For an account of this case, see *OASP*, 8th ed., pp. 258-9.

164 13/3/2000, J.2428; 3/4/2000, J.2491, 2503.

165 29/11/1912, J.178.

166 SO 126(2).

As in the circumstance of Senate amendments disagreed to by the House, 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.<sup>167</sup>

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.<sup>168</sup>

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.<sup>169</sup> 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.<sup>170</sup>

A suspension of standing orders is required to allow the moving of new amendments to a bill not relevant to amendments made by the House.<sup>171</sup>

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.<sup>172</sup>

If the Senate amends the House amendments, the bill is returned to the House and its concurrence with the Senate's amendments is sought.<sup>173</sup>

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167 See below, under Disagreement of House with Senate amendments; Sydney Harbour Federation Trust Bill 2000, 6-7/2/2001, J.3860-1, 3885-93, 3902-3.

168 Broadcasting Legislation Amendment Bill 2001, 28/3/2001, J.4118-9.

169 SO 126(3).

170 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 for dealing with financial legislation.

171 See International War Crimes Tribunal Bill, 1/2/1995, J.2822.

172 SO 126(4).

173 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.<sup>174</sup>

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.<sup>175</sup> 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

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174 SO 126(6).

175 For precedent, see Wheat Marketing Amendment Bill 1985, 23/5/1985, J.308 (reasons drawn up by a committee); Broadcasting Legislation Amendment (Digital Television Switch-over) Bill 2008, 5/12/2008, J.1474 (reasons adopted by motion without notice); SO 126(7), (8).

House of Representatives has amended.<sup>176</sup>

These procedures, while focussing attention on the matters of disagreement between the Houses, give the Senate maximum freedom to seek agreement on those matters.<sup>177</sup>

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.<sup>178</sup>

### **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,
- (c) the bill and the House's message are considered in committee of the whole, and the Senate may:
- (d) insist, or not insist, on its amendments;
- (e) make further amendments to the bill consequent upon the rejection of its amendments;
- (f) propose new amendments as alternative to the amendments to which the House of Representatives has disagreed;
- (g) agree to the House of Representatives amendments on its own amendments, with or without amendment, making consequential amendments to the bill if necessary;
- (h) disagree to those amendments and insist on its own amendments which the House of Representatives has amended; or
- (i) order the bill to be laid aside.<sup>179</sup>

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176 SO 127(1).

177 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.

178 SO 127(1); for conferences, see Chapter 21, Relations with the House of Representatives, under Conferences.

179 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.<sup>180</sup>

If an equally divided vote results in an amendment not insisted on, a similar vote could prevent the final passage of the bill by negating 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.<sup>181</sup>

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

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180 Ruling of President Sibraa, 21/10/1993, J.690-2; Procedure Committee, Second Report of 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; customs and excise bills, 18/3/2009, J.1761-2; Fair Work Bill 2008, 19/3/2009, J.1866-8; Social Security and Other Legislation Amendment (Income Support for Students) Bill 2009, 24/11/2009, J.2842-4.

181 Statement by President Hogg in respect of the Social Security and Other Legislation Amendment (Income Support for Students) Bill 2009, 24/11/2009, J.2846.

by a majority of the Senate.<sup>182</sup> 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.<sup>183</sup>

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.<sup>184</sup>

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.<sup>185</sup>

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.<sup>186</sup>

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.<sup>187</sup>

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.<sup>188</sup>

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

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182 See Chapter 10, Debate, under Dividing the question.

183 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.

184 Broadcasting Legislation Amendment Bill 2001, 28/3/2001, J.4118-9.

185 30/11/2000, J.3649-52; see also Trade Practices Amendment Bill (No. 1) 2000, 18/6/2001, J.4314-5.

186 See Chapter 13, Financial Legislation, under Procedure for dealing with financial legislation.

187 See above, under Committee of the whole: amendments; 27/9/1999, J.1754-5.

188 Constitutional Convention (Election) Bill 1997, 28/8/1997, J.2354-5.

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.<sup>189</sup> A suspension of standing orders is necessary to allow an amendment contrary to this rule.<sup>190</sup>

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.<sup>191</sup>

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.<sup>192</sup> 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.<sup>193</sup>

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189 SO 134.

190 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 for dealing with financial legislation.

191 SO 133.

192 SO 135.

193 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.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup>

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.<sup>197</sup>

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.<sup>198</sup> 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.<sup>199</sup>

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 normally controlling the House of Representatives and also

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194 Ruling of President Baker, 11/10/1906, J.220.

195 Ruling by President Reid, 12/8/1999, J.1493-5.

196 5/12/1973, J.567.

197 14/3/1974, J.55.

198 SO 110; for roll calls, see Chapter 11, Voting and Divisions, under Roll call.

199 For observations on the propriety of this course, see speech by Senator Macklin, SD, 15/12/1983, pp. 3920-2.

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.<sup>200</sup> In the light of the exposition by the High Court of the meaning of failure to pass in *Victoria v Commonwealth* (1975) 134 CLR 81, 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.

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200 24/6/1914, J.98.

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.<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup>

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

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201 SO 138.

202 SO 138(5).

203 15/4/1986, J.898899; 16/4/1986, J.904912; 17/4/1986, 917, 918.

204 SO 136; for prorogation, see Chapter 7, Meetings of the Senate under Meetings after prorogation or dissolution of House.

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.<sup>205</sup>

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.<sup>206</sup>

An appropriation bill may be revived in the same way as other bills.<sup>207</sup>

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205 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.

206 23/8/1990, J.235; 13/9/1990, J.264; 18/9/1990, J.283.

207 See Chapter 13, Financial Legislation; 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.<sup>208</sup>

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.<sup>209</sup>

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.<sup>210</sup> 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.

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208 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; luxury car tax bills, 17/9/2008, J.872; Social Security Legislation Amendment (Employment Services Reform) Bill 2008, 4/2/2009, J.1525. 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.

209 1/12/2004, J.166.

210 VP, 3/7/1998, 3202-4.

Although for some purposes the standing orders refer to the senator in charge of an item of business,<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup>

Thus a government bill may be brought on by the non-government majority.<sup>214</sup> On 23 and 25 June 2009, the non-government parties in the Senate gave precedence over the government's Carbon Pollution Reduction Scheme legislation to several other government bills, and postponed the former to the next period of sittings, while specifying the day on which it would finally be dealt with.<sup>215</sup>

On 23 November 2009, the Health Insurance Amendment (Compliance) Bill 2009 was brought on by the non-government senators and given precedence over other business, against the wishes of the government, to allow amendments to be moved to it.<sup>216</sup> The message containing the government's rejection of the amendments was also brought on by the non-government senators on 26 November 2009.<sup>217</sup>

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.<sup>218</sup> 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.<sup>219</sup> Other private senators' bill have also been given precedence.<sup>220</sup>

211 For example, in standing orders 67 and 97(3) relating to postponing orders of the day.

212 The only exception is the procedure for the limitation of debate on urgent bills: see below.

213 See *ASP*, 6th ed., pp. 546-9; also Chapter 8, Conduct of Proceedings, under Rearrangement of business and Suspension of standing orders.

214 25/10/1989, J.2147-8; 26/10/1989, J.2156-7; 30/11/1995, J.4300; 1/12/1995, J.4345-6.

215 23/6/2009, J.2146; 25/6/2009, J.2195-8.

216 J.2810-11.

217 J.2896-7.

218 15/12/1988, J.1324.

219 13/3/2000, J.2428; 3/4/2000, J.2491, 2503.

220 Urgent Relief for Single Age Pensioners Bill 2008, 22/9/2008, J.889-90; Independent Reviewer of Terrorism Laws Bill 2008 [No. 2], 11/11/2008, J.1131-2.

Bills have been deferred until draft regulations were tabled,<sup>221</sup> and until the Selection of Bills Committee reported.<sup>222</sup> A government bill may be discharged from the Notice Paper on the motion of a non-government senator.<sup>223</sup>

In 2009 government legislation to establish the National Broadband Network was postponed until the government produced information required by an order of the Senate.<sup>224</sup>

### **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.<sup>225</sup> 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 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.<sup>226</sup>

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.<sup>227</sup> 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

221 5/11/1987, J.268; also see Procedure Committee, First report of 2010, PP 81/2010.

222 22/8/1990, J.227; 19/9/1990, J.294.

223 15/11/1995, J.4120.

224 13/5/2009, J.1934; 25/6/2009, J.2194.

225 See Chapter 10, Debate, under Right to speak.

226 See Chapter 10, Debate, under Closure of debate.

227 For background on the development of the procedure, see *Annotated Standing Orders of the Australian Senate*, under SO 142.

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, but may be moved on the motion for the allotment of time.<sup>228</sup>

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.<sup>229</sup>

Motions under this procedure may apply to a number of bills.<sup>230</sup>

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.<sup>231</sup>

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.<sup>232</sup>

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

228 SO 142(5).

229 Rulings of President Cormack, 14/9/1972, J.1106-7; of President Laucke, 16/5/1980, J.1351.

230 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.

231 Ruling of President Laucke, 25/2/1977, J.599.

232 Ruling of President McMullin, 11/11/1954, J.103.

the bill, the necessary questions are put by the chair. Both methods are used according to the particular circumstances. The second method 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.<sup>233</sup>

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.<sup>234</sup> 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.<sup>235</sup>

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.<sup>236</sup> 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.<sup>237</sup>

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233 Ruling of President Cormack, 6/6/1973, J.264.

234 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.

235 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.

236 See also Chapter 10, Debate, under Dividing the question.

237 SD, 14/9/2005, p.137. ([See supplement](#))

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.<sup>238</sup> Special orders may be made prescribing time limits for the consideration of bills.<sup>239</sup>

Special orders have also been made in relation to private senators’ bills.<sup>240</sup>

Such orders are drafted to apply as if they were limitations of debate under standing order 142. Motions to suspend standing orders pursuant to contingent notices based on standing order 142 have been accepted in relation to these special orders.<sup>241</sup> (See supplement)

### **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.<sup>242</sup>

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.<sup>243</sup> A similar procedure was followed to correct an error in a House bill in 2001.<sup>244</sup>

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238 12/12/1996, J.1288-9.

239 8/2/2006, J.1839; 12/10/2006, J.2799; 7/12/2006, J.3299; 23/6/2010, J.3690 (moved by an Opposition senator); 25/11/2010, J.435-7; 3/11/2011, J.1731-3; 21/11/2011, J.1841-5.

240 See 25/2/2010, J.3227-28; 22/6/2010, J.3650. (See supplement)

241 See proceedings on the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, 25-26/11/2010.

242 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.

243 *VP*, 15/2/1977, pp. 575-6.

244 *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 3A 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 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.<sup>245</sup>

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.<sup>246</sup>

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.

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245 See Chapter 15, Delegated Legislation.

246 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).

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,<sup>247</sup> until regulations were approved by the Senate,<sup>248</sup> and until a Senate committee reported,<sup>249</sup> and that a bill was to commence within three years unless that period was extended by the Houses.<sup>250</sup>

Until 1983 the Houses were not formally notified of proclamations relating to the commencement of legislation. On 31 May of that year a senator gave notice of motion for an address to the Governor-General asking that the Houses be notified of such proclamations.<sup>251</sup> The practice was then adopted of tabling the proclamations.<sup>252</sup> Since the passage of the Legislative Instruments Act 2003, proclamations have been tabled as legislative instrument

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247 13/6/1989, J.1869; 7/9/1989, J.2039.

248 12/12/1989, J.2358.

249 16/12/1992, J.3401.

250 10/10/1991, J.1554; 19/10/1994, J.2323.

251 J.157-8.

252 6/12/1983, J.546; SD, 6/12/1983, pp 3288-9.

## Passage of Legislation by Senate

