

Difficulties in applying the rule

- 2.1 This chapter considers difficulties in applying the rule generally, and specific difficulties in applying the rule during Question Time.

Inherent difficulties

Conflicting principles

- 2.2 The major cause of difficulty in applying the anticipation rule is finding a balance between the (apparently) conflicting values represented by the rule. In his statement to the House, Speaker Hawker identified the principle behind the rule as:

to protect from pre-emption matters which are on the agenda for deliberative consideration and decision by the House, and to make the maximum use of the time of the House.¹

- 2.3 As noted in paragraphs 1.8 to 1.14, the principle is one of a number which support the efficient conduct of the House's business by
- programming business
 - requiring debate on each item of business to be relevant to the question before the House, and

¹ H.R. Deb (6.12.2004) 24.

- insisting that once a matter has been addressed and the House has reached a decision, the matter should not be revisited during that session.
- 2.4 The principle has value for the conduct of the House's business but its application can undermine another great principle – the right of Members to speak freely subject to reasonable rules of debate.
- 2.5 The fact that the anticipation rule is most often raised to promote concepts that favour one side of the House (including by embarrassing the other side) means that the exercise of the Speaker's discretion in applying the rule will usually be hotly contested. In general, the rule has been used more as a tactic than as a procedure to support the good governance of the House. This puts the Chair in the position of creating a perception of bias in the general viewing or listening public, regardless of how he or she rules on the issue.

Use and abuse of the rule as a tactic

- 2.6 Abuse of the anticipation rule is as old as the rule itself. Redlich noted that

when the (United Kingdom) standing orders were amended in 1888 restrictions were placed on the power to raise a general debate on a motion for adjournment, and a resolution was passed, authorising, under conditions, motions for adjournment “for the purpose of discussing a definite matter of urgent public importance.” The resolution was converted into a standing order, and is now (1908) represented ... by Standing Order 10. Almost immediately after the passing of this resolution it was discovered that the power to raise a discussion on a particular subject by means of a motion for adjournment might be defeated by placing on the order book a notice of motion on the subject for a later day... It soon became a common practice to put down “blocking notices” for this purpose.²

- 2.7 The House of Representatives has nothing to learn from the House of Commons in the matter of using the “rule” for blocking purposes. A study of the application of the rule in the House of Representatives

2 J. Redlich, *The Procedure of the House of Commons*, vol. 3, p. 221.

shows that it is typically raised as a point of order during Question Time in order to prevent discussion of sensitive matters.³

- 2.8 In his introduction to the 23rd edition of Erskine May, Sir William McKay, former Clerk of the House of Commons, described the anticipation rule as “a trap for the unwary”.⁴ It is likely that successive Speakers of the House of Representatives would agree with him.

Difficulties in determining the “probability of the anticipated matter being brought (on) within a reasonable time”

- 2.9 The requirement that the Chair exercise discretion in applying the rule under standing order 77 is particularly difficult. Although the “reasonable time” rule is not specified in relation to questions (standing order 100 (f)), it applies to a Minister’s answer insofar as the answer is “discussion of a subject”.
- 2.10 The Chair cannot always know when a matter will be brought on or whether a discussion in fact anticipates another discussion which has not yet occurred. These difficulties are exacerbated when the application of the rule is debated during the hothouse atmosphere of Question Time.
- 2.11 Ms Gillard’s submission proposed a solution to the difficulty of determining if the “reasonable time” rule applies, by amending the application to matters “currently under debate in the House or scheduled for debate within the next 24 hours”.⁵
- 2.12 The 24 hour rule would certainly make it easier for the Chair by defining “reasonable time” (assuming that matters scheduled for debate on the “Blue” are more certain to be brought on than those merely appearing on the Notice Paper). However, prohibition of discussion on matters “currently under debate in the House” would still leave a sizeable amount of discretion. A bill once introduced and for which the Minister had given his or her second reading speech, could stay on the Notice Paper for months before the resumption of debate on the second reading.

3 See appendix 2.

4 *Erskine May’s Parliamentary Practice*, 23rd edn, p. 4.

5 J. Gillard, *Submission*, p. 2.

Inconsistent application of the rule

- 2.13 There are two aspects relating to consistency (and inconsistency) in applying the rule. First, because the rule is often raised as a point of order during sensitive times – particularly at Question Time, every application of the rule is open to the accusation that it is inconsistent with previous applications. Second, given the difficulty of applying a rule so reliant on the Chair’s discretion, it would be surprising if there were ever an application which could not be distinguished from some (but not all) previous applications of the rule. It could be argued that the exercise of discretion results in some degree of inconsistency no matter how carefully an individual Chair might approach the task. No Chair would want to support a precedent which appeared to apply the anticipation rule without regard to common sense – and this would be the necessary consequence of following some past precedents.

Difficulties in applying the rule strictly

- 2.14 It might seem that a strict application of the rule in all cases would at least remove complaints of apparent bias. However, an examination of the consequences of such an approach show that it can result in such an unfortunate outcome in terms of topics which are *not* prohibited from discussion that it would be a most impractical approach.
- 2.15 As shown below, a strict approach to applying the anticipation rule simply reinforces its usefulness as a tactical measure for blocking debate on sensitive issues.

House of Representatives example of a strict approach.

- 2.16 The following example of one extreme in the interpretation of both “likelihood” and “reasonable” is explored in some detail because it well illustrates the potential for the anticipation rule to be used to stifle debate.
- 2.17 In 1976 during a Grievance Debate, the Member for Hunter (Mr James) raised the issue of “a vexatious political action being pursued in the Queanbeyan court ... against the Leader of the Opposition (Mr E.G. Whitlam) ...”. The Member for Lowe (Mr William McMahan) raised as a point of order the fact that a motion on the matter was on

the Notice Paper and discussion was therefore prohibited by the anticipation rule.

- 2.18 Mr Scholes on a point of order reminded the Chair (Deputy Speaker Giles) of the second part of the rule relating to the likelihood of the matter being brought before the House in a reasonable time. The motion could not practically be brought on in under three or four weeks and in all likelihood would never be brought on.⁶ Indeed, it was several years (1972 in fact) since a matter of this nature had been brought forward.
- 2.19 In speaking to his point of order Mr Scholes pointed out that
- ... your ruling will prevent debate on any question that any honourable member wishes to place on the notice paper, even if the honourable member putting it there knows full well that it will never be debated. I can assure you that Opposition members will put on the notice paper matters which will prevent every Government member raising anything of any nature in this House, if that ruling is upheld.⁷
- 2.20 In speaking to the point of order Mr Howard pointed out that the Member for Hunter had put the motion on the Notice Paper himself and that his remedy was to withdraw the notice. He would then be able to speak on the matter during an adjournment debate or during the grievance debate.⁸
- 2.21 The Chair ruled that the anticipation rule applied and this prevented the Member for Hunter from referring to the matter. Mr Scholes moved that the ruling be dissented from. In the subsequent division the ruling was supported by voting along party lines. The “likelihood” concept had been reduced to the fact that by being on the Notice Paper there was a likelihood that a matter would one day be debated and the Chair could not know when that would be.⁹

Historic example of difficulties in a strict application of the rule

- 2.22 Redlich relates the following example of the unfortunate effects of a strict application of the rule in relation to a notice placed on the House of Commons Notice Paper in 1900. A Member put down a

⁶ H.R. Deb. (29.4.1976) 1754.

⁷ H.R. Deb. (29.4.1976) 1753.

⁸ H.R. Deb. (29.4.1976) 1753.

⁹ H.R. Deb. (29.4.1976) 1756.

notice of motion in general terms with reference to the conduct of the war in South Africa, and then sailed for Africa to take part in the war without fixing any day for his motion.

It was held that the mere retention of this notice on the order book prevented discussion of the terms of peace with the Boers on the motion for adjournment for the Easter recess. There was a general agreement that a rule, reasonable in its principle, had been unduly stiffened in its application, especially when notices of motions never expected, and often never intended, to be reached were allowed to block important discussions.¹⁰

- 2.23 This example is provided to demonstrate that the tendency for a strict application of the rule to be inherently problematic is not the invention of modern Members. It has been a problem since the earliest development of the rule and has not been solved since, despite changes to the Notice Paper to provide for automatic withdrawal of notices which are not brought on within a fixed period.

Problems in a flexible application of the rule

A more flexible approach

- 2.24 In the House of Representatives (and many other jurisdictions) the modern tendency has been towards a more flexible (and liberal) application of the anticipation rule. Speaker Childs' statement on the application of rule to matters of public importance illustrates this approach:

In approving Friday's matter [of public importance], which related to capital gains and fringe benefits tax proposals, I was well aware of the fact that there are Bills before the House which also relate to capital gains. Standing order 82 gives the Speaker a discretion in relation to the anticipation rule in that I have to take into account the probability of the matter anticipated being brought before the House within a reasonable time. In my view this discretion should be used in its widest sense where a matter of public importance is involved if our system is to continue in its present form. The

10 Redlich *The Procedure of the House of Commons*, vol. 3 pp. 221-2.

possibility that the Bills may be debated later this week had to be weighed against the immediacy of the matter put forward for discussion. I intend to continue to exercise my discretion in respect of the anticipation rule, as it relates to matters of public importance, in a very wide sense.¹¹

- 2.25 More flexibility places greater value on the rights of Members to speak freely and the greater right of the House to scrutinise the executive, than on the principles underlying the rule. Insofar as one of those principles is saving the time of the House, business which already has an identified period allocated to it – such as Question Time, grievance debates, Members’ statements and the adjournment debate – is likely to be subject to greater flexibility in the application of the rule.
- 2.26 The more flexible approach to the application of the anticipation rule in recent years might have avoided the problems outlined above, but other problems have arisen. The essence of a more flexible application of the rule rests on requiring the Chair to know what matters will be discussed during the substantive, scheduled, debate in order to recognise that these matters have been anticipated. The greater exercise of discretion tends to lead to greater criticism, particularly by those who feel the application detracts from the outcome they are seeking. This is understandable since the more liberal the application of the anticipation rule, the less advantageous the rule becomes as a tool for stifling discussion.

So flexible the rule disappears

- 2.27 It is possible that an extremely liberal application of the anticipation rule – one that promotes greater scrutiny and opportunity for explanation – could result in such a weakening of the rule that its original purposes are undermined. This may not be undesirable in all circumstances. It is arguable that this is happening in some jurisdictions, perhaps also within the House of Representatives.
- 2.28 Recent movements towards a more liberal approach in other jurisdictions may be seen in two rulings made in the New South Wales Legislative Assembly. In a considered ruling on the anticipation rule in 1997 Speaker Murray ruled that the anticipation rule should not be applied to the Appropriation Bill to avoid stifling

11 H.R. Deb. (26.5.1986) 3919.

debate.¹² In 1999 the same Speaker ruled that “a question may ask for information on bills before the House to enable better informed debate”.¹³ It is arguable that this ruling does not leave much of the anticipation rule relating to questions.

Flexibility and potential for confusion

2.29 The submission from the Manager of Opposition Business argued that recent rulings have the potential to lead to confusion in three areas:

- When is alluding to a particular subject matter not alluding to a particular bill, especially if the bill in question is a wide-ranging piece of legislation?
- Should the Speaker have any discretion about matters that anticipate House debate that is currently on-going or scheduled for the same day?
- How and where is notice of the day’s proceedings given?

2.30 There is no satisfactory answer to the first difficulty. When this issue arises during Question Time, recent Speakers have taken the approach of allowing a question to stand but listening carefully to the Minister’s answer in order to determine whether the discussion offends the anticipation rule. If the subject matter of a bill, for example, is wide ranging enough, almost any question and answer or any other discussion will breach the anticipation rule. Preventing such discussion has generally been regarded as unnecessarily restrictive.

2.31 Some Parliaments have addressed this difficulty by resolving to suspend the anticipation rule during debate on wide-ranging topics – for example, the budget debate.¹⁴

2.32 In relation to the second potential cause for confusion, restriction of the anticipation rule to matters scheduled for debate on the same day would be easier for the Chair to apply than current standing order 77. However, debate that is “currently going on” could be almost as elusive so far as knowledge of the timing is concerned, as any matter on the Notice Paper. Many debates are commenced with no intention

12 New South Wales Legislative Assembly, *Parliamentary Debates* 08/05/1997, p. 8317: “Unless otherwise directed by the House ... during the currency of the budget debate the anticipation-of-debate rule does not apply to any other procedure available to members.”

13 NSW *PD* 23/06/1999 p. 159.

14 See footnote 12 above and also NSW Legislative Assembly VP 8/5/97, pp. 855-6. The House of Representatives also exempts the budget debate.

of bringing them to a conclusion but some of them could be regarded as current.

- 2.33 The third point of confusion identified by Ms Gillard is related to the second. If it could be known exactly when an item of business was to be debated, the application of the anticipation rule would be much easier for Chairs.

Difficulties in applying the rule to Question Time

- 2.34 Most appeals to the Speaker to prevent discussion on the grounds of the anticipation rule are raised during Question Time.¹⁵ The specific standing order relating to Question Time is 100(f) “Questions must not anticipate discussion on an order of the day or other matter”. There are two immediate difficulties with the standing order itself – one is that it applies strictly only to questions and not to answers and the second is the meaning of “or other matter”. If this were strictly applied it would be difficult to ask any question relevant to public affairs.
- 2.35 One of the main practical difficulties in applying standing order 100(f) is that it is not easy for the Speaker to assess the potential for a question to breach the anticipation rule. As noted in para 2.30, recent Speakers have tended to allow questions and listen carefully to the answer to determine if the rule has been breached.¹⁶ This approach has left occupants of the Chair vulnerable to accusations of bias towards one side or the other because it is clearly not a strict application of standing order 100(f). In effect, Chairs are applying standing order 77 instead of 100(f) because of the impracticality of 100(f).
- 2.36 One of the core purposes of the anticipation rule is the need to have rules to support the efficient use of the House’s time.¹⁷ This argument holds little weight in relation to items of business which are already provided for in terms of House time. If the whole of Question Time (or for that matter the grievance debate or private Members’ business) were devoted to a matter which breached the anticipation rule, it

15 See appendix 2.

16 See appendix 2.

17 See paras 1.15 and 1.16 above.

might be an undesirable outcome in terms of pre-empting debate, but it would not take an extra minute of the House's time.

- 2.37 The other issue relating to the application of the rule during Question Time is the temptation for both sides of the House to use the rule as a tactic for prohibiting questions, answers and discussion generally, on matters of political sensitivity when the media is present (and presumably paying more attention than at other times). From a procedural perspective, the use of the rule as a tactic for preventing discussion is an unfortunate by-product of the rule and not its intention.
- 2.38 The issue of quarantining Question Time from the application of the rule will be considered in more detail in the next chapter.