

## CHAPTER 12

### THE LEGISLATIVE PROCESS

The legislature under the *Constitution Act 1902* consists of 'His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly'.<sup>1</sup> Legislative power is granted to the Parliament of New South Wales 'to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever ...'<sup>2</sup> subject to the Commonwealth Constitution, as discussed in Chapter 1 and Appendix 1.

This chapter examines the legislative process in New South Wales, including the different types of bills, the stages in the consideration of bills, the resolution of disagreements between the Houses, the assent to bills and the commencement of Acts. The Council has legislative powers concomitant with those of the Assembly and, except as provided in sections 5A and 5B of the *Constitution Act 1902*, there is no qualification, express or implied, on the Council's power to amend bills.

#### BILLS

A bill is a draft of a legislative proposal. There are two types of bills: a bill to enact a new principal Act governing a new field or previously unregulated field; and a bill amending an existing Act or Acts, in which case the bill or schedule to the bill contains the actual amendments to the Act or Acts (often a different schedule is included for each Act amended).

There are also three categories of bills: public bills which deal with matters which affect public interests (SOs 136 to 163); private bills which principally affect private interests (SOs 164 to 171); and hybrid bills, which are public bills which affect a particular private interest in a manner different from the private interests of other persons or bodies.

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1 *Constitution Act 1902*, s 3.

2 *Ibid*, s 5.

## Public bills

A public bill is one which deals with a matter of public policy or general public interest.

Public bills originally developed from petitions. The petition was an innovation of King Edward I (1239-1307), providing a method of seeking redress from the King by virtue of his prerogative power where none could be sought through the ordinary course of the law. During the reign of King Edward I, the Commons began appointing a Committee of Grievances at the commencement of each Parliament, and the King, or Lord Chancellor on his behalf, would nominate Receivers of Petitions, together with auditors called Triers. Petitions were submitted to the Receivers, who examined and systematically sorted them, while the role of the Triers was to 'try out whether the remedies sought for were reasonable and fit to be propounded'.<sup>3</sup> Originally the Committee of Grievances consisted of a single member who, by virtue of their official position, could state the view of the Royal Court. The King's reply was usually entered on the back of the petition, which was then returned to the House. Most of the petitions in the early Parliaments came from individuals, and were not presented by the elected representatives, although the matter is somewhat obscured by the tendency of a petitioner with a grievance to describe himself as 'the people of England' or 'the commons of the realm'.<sup>4</sup>

By the early reign of King Edward III (1312-1377), the Commons in Parliament began to segregate the petitions which they were willing to support by putting them together on a separate roll with the heading *communes petitions* (common petitions). Over time common petitions from the Commons developed into bills, in that the Commons would petition the King to secure the enactment of their petition as a form of statute, and judges would draft the statute by combining the petition with the response. The grants of favours and rights to individuals and communities were basically private laws, while the grant of a petition on behalf of the whole kingdom became a public law.

During this period the House of Commons was only a body of petitioners, not of legislators, and the King had an unfortunate tendency to make laws which did not correspond to the petitions on which they were based. In 1414, the Commons issued a complaint about this practice and requested the King:

[T]hat there never be no law made and engrossed as statute and law neither by additions nor discriminations by no manner of term or terms which should change the sentence and the intent asked.<sup>5</sup>

The King agreed, and from that time it became customary to send the King a statute in draft form, rather than a petition, which could be accepted or rejected but not amended.

3 Wilding N and Laundry P, *An Encyclopaedia of Parliament*, Cassell & Company, London, 1958, p 562.

4 Plucknett T, *Taswell-Langmead's English Constitutional History*, 11th edn, London, 1960, p 152.

5 Wilding and Laundry, above n 3, p 620.

Most bills introduced in the Council today are public bills. The majority of public bills are introduced by a minister as part of the government's legislative program, and are dealt with as government business. In the Council, any minister, or a parliamentary secretary, may take carriage of a government bill, notwithstanding that the bill is not within their portfolio, and it is not uncommon for ministers to act on behalf of another member during the various stages of the passage of a bill.

A public bill introduced by a private member is called a private member's bill. A private member's bill is dealt with as private members' business and does not have precedence over other matters of private members' business. Time limits apply to the debate of a private member's bill at the introduction, second and third reading stages. The Council passes very few private members' bills, and even fewer have been agreed to by the Assembly. Between 2001 and 2006, 17 private members' bills were introduced in, and passed, by the Council. Of these, the Assembly agreed to eight<sup>6</sup> and nine were not dealt with by the Assembly or were interrupted by prorogation.<sup>7</sup>

### Private bills

A private bill, as distinct from a public bill introduced by a private member, confers particular powers or benefits on a private person or persons, public company or corporation, or some particular locality.<sup>8</sup> While public bills are introduced directly into the House by a member, a private bill is solicited by the parties promoting it, and is initiated on presentation of a petition. When the petition is received, a notice of motion is given for the introduction of the bill (SO 165).

Certain special procedures are involved in the introduction and passing of private bills. These procedures are designed not only to protect the interests of the promoters of a private bill but also to protect the welfare of the public. Anyone who wishes particular powers or benefits to be conferred on them may promote a private bill by submitting a petition requesting the Parliament to pass the bill. In

6 See the Crimes Amendment (Child Protection - Physical Mistreatment) Bill, *LC Minutes* (28/11/2001) 1304; the Workplace (Occupants Protection) Bill, *LC Minutes* (29/3/2001) 912; the Crimes (Sentencing Procedures) Amendment (General Sentencing Principles) Bill, *LC Minutes* (21/3/2002) 92; the Public Health (Juvenile Smoking) Bill (No 2), *LC Minutes* (21/11/2002) 527; the State Arms, Symbols and Emblems Bill, *LC Minutes* (26/2/2004) 556; the Sydney University Settlement Incorporation Amendment Bill, *LC Minutes* (10/6/2005) 1464; the Firearms Amendment (Good Behaviour Bonds) Bill, *LC Minutes* (19/10/2006) 285-286; and the Snowy Hydro Corporatisation Amendment (Parliamentary Scrutiny of Sale) Bill, *LC Minutes* (8/6/2006) 113-114.

7 See the Community Services (Complaints, Reviews and Monitoring) Amendment (Application) Bill (No 2) of 2001; the Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Bill of 2001; the Anti-Discrimination (Sexuality) Amendment Bill of 2002; the Local Government Amendment (No Forced Amalgamations) Bill of 2003; the Quarantine Station Preservation Trust Bill of 2003; the Save Orange Grove Bill of 2004; the Government School Assets Register Bill of 2005; the Legislation Review Amendment (Family Impact) Bill of 2005; and the Freedom of Information Amendment (Improving Public Access to Information) Bill of 2006.

8 Wilding and Laundry, above n 3, p 585.

order to alert potential opponents to the existence of the proposed bill, standing order 164 requires that notice of the intention to apply for a private bill must, within three months before the presentation of the petition for the bill, be published once a week, for four consecutive weeks, in the Government Gazette, as well as in at least one daily newspaper published in Sydney, and in one newspaper published in or nearest to the district affected by the bill.<sup>9</sup> The published notice must contain a true statement of the general objectives of the bill and state what private interests are likely to be affected by the bill. Proof of such advertisements must be supplied at the time of presenting the petition for the bill.

The petition for a private bill states that the required public notice has been given, contains a copy of the public notice and includes a request for leave to be given to bring in the bill (SO 165). The promoters of a private bill need to secure a member willing to present the petition and to sponsor the bill through all its various stages in the Council.<sup>10</sup> Sometimes, petitions opposing a bill may be presented to the House, setting out any objections to the bill and indicating how the interests of the opponents of the bill will be adversely affected.<sup>11</sup>

Once leave has been given for the introduction of a private bill, the bill can be presented and is printed at the expense of the parties promoting the bill. Before the bill can be read a first time the promoters must deposit \$50.00 with the legislature, towards meeting the costs associated with the passage of the bill (SO 166). A certificate of such payment is produced by the member sponsoring the bill when moving the first reading of the bill.

The promoters of a private bill meet all expenses incurred during its passage, including advertising, preparation of the petition, drafting of the bill and printing costs, as well as any costs arising from the investigation and report by the select committee appointed to consider the bill.<sup>12</sup> As additional costs are incurred, the promoters of the bill are required to deposit further sums of money with the Legislature, and further certificates of payment must be produced before the bill can proceed.

Every private bill must contain a preamble, reciting the circumstances on which the bill is founded and the reasons why the bill is required (SO 167).<sup>13</sup>

After a private bill has been read a first time, it is referred to a select committee (SO 168). The committee considers the objects of the bill, including the circum-

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9 In relation to the St Mark's Darling Point (Church Lands) Bill, the standing orders were suspended as a matter of necessity and without previous notice to allow the presentation of the petition for the bill to be presented after the period of three months had expired, *LC Minutes* (14/3/1944) 89.

10 In the Assembly the sponsoring member is usually the local member.

11 See, for example, the Petition against Sutherland Shire (Gannon's Road Sports Ground) Bill, *LC Minutes* (12/6/1951) 108.

12 For details of private bills introduced in the Legislative Council since 1856, see the *Consolidated Index to the Minutes of Proceedings*.

13 The Great Synagogue, Sydney (Amendment) Bill, when introduced, did not contain a preamble. The bill was withdrawn and a second bill containing a preamble introduced on the same order of leave, *LC Minutes* (29/9/1953) 53.

stances on which the bill is founded and the reasons for the legislation. Any petitions opposing the bill are also referred to the select committee for consideration during the inquiry process. The principal purpose of the select committee is to prove or disprove the preamble of the bill.

The select committee may take evidence from counsel, affected parties or expert witnesses, and, if it is considered necessary, may inspect the particular region involved. When the committee has concluded taking evidence it considers whether the preamble, with or without amendment, will stand part of the bill. Defeat of the question on the preamble is fatal to the bill. If the preamble is agreed to the committee considers the clauses of the bill together with any amendments (SO 168(4)).

Once the select committee has concluded its deliberations, the committee reports back to the House on the bill. Unless the preamble has been negatived, the bill then proceeds through its second reading and remaining stages in the same manner as a public bill (SO 169). Any amendments by the select committee may or may not be accepted by the committee of the whole House, which may also make further amendments to the bill. A copy of the report of the select committee accompanies the bill when it is forwarded to the Assembly for concurrence.

There have been bills introduced as public bills that have been subsequently ruled to be private bills. For example, the Bathurst Hospital Bill of 1875, introduced in the Assembly by the Government as a public bill, was ruled as a private bill by the Speaker, and was subsequently discharged and withdrawn. The bill was later reintroduced on petition as a private bill. The Tamworth Showground Bill of 1905 was received from the Assembly as a public bill, but treated in the Council as a private bill and referred to a select committee. The Saint Patrick's College (Manly) Bill of 1913 was introduced in the Council as a public bill but, following a point of order on the motion for the second reading, was ruled to be a private bill, and was subsequently discharged and withdrawn.

Private bills do not deal with public policy and have been traditionally sponsored by a private member. However, over the past 50 years or so, there has been a trend for governments to assist local community organisations, such as churches and clubs, in the passage of ostensibly private bills through Parliament as public bills, thus relieving these private organisations of the expenses involved in promoting, advertising, drafting, printing and passage of a private bill through Parliament.<sup>14</sup> On one occasion a bill introduced into the Council and dealt with as a private bill was taken up in the Assembly by the government and dealt with during government business, notwithstanding that it remained a private bill.<sup>15</sup>

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14 See the Mosman Anzac Memorial Hall (Amendment) Bill (Act No 15 of 1954); the Moss Vale Services Club Bill (Act No 24 of 1974); the Hunters Hill Congregational Church Bill of 1977; the Uniting Church in Australia Bill of 1977; the Greek Orthodox Archdiocese of Australia Consolidated Trust Bill of 1994; the Methodist Church of Samoa in Australia Property Trust Bill of 1998; and the Saint Andrew's College Bill of 1998.

15 *Sutherland Shire (Gannon's Road Sports Ground) Act*, assented to on 28 March 1952.

The last private bill passed by both Houses was the Tamworth Information Centre Bill 1992 which was introduced in the Assembly.<sup>16</sup>

Historically, many private bills were introduced to overcome the provisions of the former *Local Government Act 1919*. Under that Act, a council could not sell or exchange any public reserve, public place, cemetery or land subject to a trust.<sup>17</sup> Consequently, the only way a council could sell or exchange public land was through legislation introduced as a private bill. However, the enactment of the *Local Government Act 1993* removed the need for an Act of Parliament to sell or exchange public lands, since under section 27 of the Act the classification or reclassification of public land may now be made by a local environmental plan or a resolution of the council under sections 31, 32 or 33.

### Hybrid bills

A hybrid bill is a public bill which affects particular private interests in a manner different from the private interests of other people or bodies in the same category or class. As such it affects partly public and partly private interests. In general, hybrid bills are treated like a private bill. They are referred to a select committee before second reading, and an order is usually made that any petition against the bill be referred to the committee.

There have been few hybrid bills considered by the Council. The last bill regarded as a hybrid bill in the Council was the East Maitland Racecourse Enabling Bill in 1920, relating to the powers of the Trustees of the racecourse to deal with Crown land. It was introduced as a public bill, but on a point of order being taken, the President ruled the bill a hybrid bill.<sup>18</sup> Before that, only three other bills were ruled hybrid by the President.<sup>19</sup>

In 1974, during the second reading of the Pipelines (Amendment) Bill, which had also been introduced as a public bill, the question again arose as to whether the bill was in fact a hybrid bill. The President ruled that, although the bill related to the interests of certain applicants in regard to the issue of permits relating to the construction of pipelines, and licences to construct and operate pipelines, it was predominantly concerned with a matter of public policy. Accordingly, the President ruled that it was a public bill.<sup>20</sup>

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16 *LC Minutes* (27/11/1992) 497.

17 *Local Government Act 1919*, s 518(2)(b).

18 *LC Minutes* (2/12/1920) 126.

19 See the Petersham Land Purchase Bill of 1875; the Legalization of Certain Conditional and other Purchases Bill of 1876; and the Bishop of Grafton and Armidale Grant Forfeiture Bill of 1919.

20 Ruling: Budd, *LC Debates* (5/3/1974) 935.

## Cognate bills

Before 1978 there was no procedure to allow simultaneous consideration of bills in the Council.

Between 1978 and 1986, bills were taken as cognate on motion, by leave to allow for the bills to be considered together, and for one question to be put for the first, second and third readings. The bills still had to be considered separately in committee of the whole.

From 1986 until the adoption of the new standing orders in 2004, a sessional order was passed each session allowing that whenever a minister intimated to the House that certain bills were cognate they could be dealt with on one motion for introduction and subsequent reading stages, but the bills were to be considered separately in committee of the whole.

There was an interesting instance in 1989, on the House receiving the Coroners (Miscellaneous Amendments) Bill from the Assembly, where a cross-bench member moved, according to contingent notice, for the suspension of standing and sessional orders to allow the Coroners (Amendment) Bill, a private member's bill on the Notice Paper, to be called on forthwith, for the two bills to be considered together at every stage, but for the questions for the several stages of the passage of the bills to be put separately. The Government opposed the motion, but it was carried with the combined support of the opposition, the cross-bench, and the President's casting vote.<sup>21</sup> The notice that leave be given to bring in the Coroners (Amendment) Bill was also agreed to on the President's casting vote. The various questions were then moved on each bill, first by the minister on the Coroners (Miscellaneous Amendments) Bill and then by the cross-bench member on the Coroners (Amendment) Bill. However, notwithstanding the decision of the House to deal with the two bills concurrently, the Government bill was concluded and returned to the Assembly on the same day<sup>22</sup> while the private member's bill was adjourned for five calendar days following the mover's second reading speech, as required by the sessional orders, and was subsequently interrupted by prorogation.

Since 2004, standing order 139 has provided for the simultaneous consideration of related bills to proceed through the various stages together, except in committee of the whole where, unless there is unanimous agreement, they are considered separately. However, unlike the original sessional order adopted from 1986 to 2004, the standing order allows any member to request that the questions on the respective readings be put separately. This allows members to debate cognate bills concurrently, while still affording the opportunity to move amendments to the second reading motion on the individual bills.<sup>23</sup> There have also been occasions

<sup>21</sup> *LC Minutes* (7/12/1989) 1234-1237.

<sup>22</sup> *LC Minutes* (7/12/1989) 1249.

<sup>23</sup> See, for example, the Fair Trading Amendment Bill and Cognate Bills, *LC Minutes* (3/6/1998) 534.

when one bill from a series of cognate bills has been discharged, while the other bills have progressed.<sup>24</sup>

### **Multiple unrelated bills**

In 2002, toward the end of the sitting period, a procedure was employed whereby certain bills which had been received from the Assembly and read a first time in the Council as single bills were considered together at the second reading stage and then dealt with separately in the subsequent stages. Generally, the bills dealt with related subjects but were not considered cognate. For example, on 4 December 2002, standing and sessional orders were suspended and a motion agreed to that the Workers Compensation Legislation Amendment Bill, the Pay-roll Tax Legislation Amendment (Avoidance) Bill and the Industrial Relations Amendment (Industrial Agents) Bill be considered together at the second reading stage but that the question on the motions for the second reading of these bills and subsequent stages be dealt with separately.<sup>25</sup>

### **Drafting of bills**

#### *Government bills*

Government bills are initiated following policy approval by Cabinet. On receipt of that policy approval, the responsible government agency prepares an initiating letter requesting the preparation of the bill together with relevant briefing notes (also known as drafting instructions), which are then forwarded to the Parliamentary Counsel's Office. The briefing notes contain details about the legislative proposal, including:

- the principal objectives intended to be achieved by the bill;
- how it is proposed to achieve those objectives and how it is expected that the bill will operate in practice;
- all relevant background material relating to the proposals to be included in the bill, including all known legal implications and difficulties;
- the circumstances out of which the proposals to be included in the bill arose.

The process of drafting bills by the Parliamentary Counsel's Office includes the drafting of an explanatory note and a contents page that are included in the bill introduced into Parliament.

A government bill requires formal approval either by Cabinet or the Cabinet Standing Committee on Legislation. The role of the Committee is to ensure that bills have been drafted in conformity with Cabinet's in-principle approval.

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24 See, for example, the Public Finance and Audit Amendment Bill, *LC Minutes* (1/6/1999) 114.

25 *LC Minutes* (4/12/2002) 557; see also *LC Minutes* (3/12/2002) 546.



After a bill is approved, the Parliamentary Counsel's Office prints copies of the bill for introduction into Parliament. The *Manual for the Preparation of Legislation* published by the Parliamentary Counsel's Office provides a guide for the preparation of legislation.<sup>26</sup>

Electronic versions of bills formally exposed but not introduced into Parliament are available on the Parliamentary Counsel's Office internet site <www.pco.nsw.gov.au>. Sometimes exposure drafts are tabled in the House for public comment.<sup>27</sup> Legislation in force is available at <www.legislation.nsw.gov.au>.

### ***Non-government bills***

Since 1988, the services of the Parliamentary Counsel's Office have been made available to non-government parties, groups and members. This arrangement covers the drafting of bills as well as amendments, subject to limitation on the hours of core drafting work devoted to these services. Details are contained in a Parliamentary Counsel's Office publication entitled *Manual for the Drafting of Non-Government Legislation*.<sup>28</sup>

### **Printing of bills**

All Government bills introduced into Parliament are printed by the Parliamentary Counsel's Office. The terminology adopted for the various stages in the printing of bills is:

- (a) initiation of a bill by Cabinet instruction;
- (b) draft bill for Cabinet approval;
- (c) first print (for introduction into Parliament);
- (d) second and subsequent print (only required if a bill is substantially amended);
- (e) vellum print (for Governor's assent);
- (f) Act print.

### **Structure of bills**

A bill consists of a number of elements, some of which are essential, such as the title, and some of which are optional, such as the preamble. These are discussed below.

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26 Parliamentary Counsel's Office, *Manual for the Preparation of Legislation*, 8th edn, August 2000.

27 See, for example, the Workplace Surveillance Bill, *LC Minutes* (24/6/2004) 894; and the Parliamentary Contributory Superannuation Amendment Bill, *LC Minutes* (18/11/1999) 248.

28 Parliamentary Counsel's Office, *Manual for the Drafting of Non-Government Legislation*, 8th edn, April 2007.

### *Coat of Arms*

All bills (and Acts) since 1986 have borne the State Coat of Arms on the explanatory note, contents and title pages. Previously the Royal Coat of Arms ('St Edward's Crown') was used.

### *Explanatory note*

Most bills contain an explanatory note outlining the aims and objects of the bill and an outline of provisions.

### *Contents*

The contents list the respective clauses and schedules of a bill, including chapters, parts and divisions as appropriate.

### *Title*

The title is an essential element of a bill. Bills contain both a long title and a short title. The long title, which appears on the cover page immediately after the explanatory note, sets out the purpose of the bill in general terms and reflects its contents. The long title is also relevant to the question of the admissibility of amendments to the bill.<sup>29</sup>

### *Preamble*

The preamble is not an essential part of a bill except a private bill. It is an introductory passage appearing before the short title of a bill. The purpose of a preamble is to state the reasons for and the intended effects of the proposed legislation. This applies generally to public bills, although preambles are not often used for bills other than those of significant or constitutional importance.<sup>30</sup> As noted previously, private bills are required to contain a preamble giving the reasons why the bill is necessary.

### *Enacting words*

Every bill contains 'words of enactment' after the long title, usually in the form 'The Legislature of New South Wales enacts'.<sup>31</sup> Variations of this form of enact-

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29 See the discussion later in this chapter under 'Admissibility of amendments'.

30 See, for example, the *Australia Acts (Request) Act 1985*; the *Interpretation Act 1987*; the *Community Relations Commission and Principles of Multiculturalism Act 2000*; the *Intergovernmental Agreement Implementation (GST) Act 2000*; and the *Westpac Banking Corporation (Transfer of Incorporation) Act 2000*.

31 This wording of enactment commenced from 1988. Previously the wording was 'BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:'.

ment appear from time to time, such as in the case of a bill passed by the Assembly in accordance with section 5A of the *Constitution Act 1902*, or a bill submitted by way of referendum to the electors in accordance with section 5B. The enactment words in these cases are specified in section 5C as follows:

*Section 5A bill* – BE it enacted by the King’s Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of New South Wales in Parliament assembled, in accordance with the provisions of section 5A of the *Constitution Act 1902*, as amended by subsequent Acts, and by the authority of the same, as follows:

*Section 5B bill* – BE it enacted by the King’s Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of New South Wales in Parliament assembled, with the approval of the electors, in accordance with the provisions of section 5B of the *Constitution Act 1902*, as amended by subsequent Acts, and by the authority of the same, as follows:

The general rule that the words of enactment follow the long title does not apply in the case of private bills. Here the long title is followed by the preamble, wherein each recital is either preceded by the word ‘WHEREAS’ or numbered consecutively. The enacting words form the last portion of the preamble.

### **Clause**

A clause is a fundamental element of a bill. Known as sections once the bill has become an Act, clauses are numbered sequentially and may be divided into chapters, parts, divisions, sub-divisions and schedules, all of which are also numbered sequentially.

A bill usually contains preliminary clauses. Clause 1 is always the short title of the bill, and is used for citation purposes, although it does not necessarily cover all aspects of the bill. The short title is read by the Clerk when the bill passes each reading. Clause 2 is usually the commencement provisions. Some bills also have clauses outlining the objects of the Act and definitions. The provision for the repeal of an Act is always in one of the last clauses of a bill.

If a bill is considered in committee of the whole, each clause is considered separately and in detail.

### **Commencement**

Most bills contain a commencement clause, usually at clause 2, indicating when the Act will come into force. Commencement can be either on the date of assent, on a specified date or on a date to be proclaimed. It is possible for parts of an Act to commence on different dates. Under section 23 of the *Interpretation Act 1987*, where no commencement date is specified, an Act commences 28 days after the date of assent to the Act.

### *Definitions*

A bill sometimes includes definitions or rules of interpretation which provide a legal definition of the key expressions used in the legislation and how those expressions apply. Section 21 of the *Interpretation Act 1987* contains definitions for commonly used words and expressions in Acts and instruments generally. Sometimes words and expressions are defined in a dictionary at the end of a bill.

### *Schedules*

A bill may contain schedules which provide details that are essential to certain provisions of the bills. Schedules are often used to contain provisions amending various acts.

## **STAGES IN THE PASSAGE OF A BILL**

A bill must be passed in identical terms by both Houses of Parliament before it may be sent to the Governor for assent, with the exception of bills passed under the provisions of sections 5A and 5B of the *Constitution Act 1902*, as discussed later in this chapter. Accordingly, bills originating in one House 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. This process may continue several times until there is agreement over the provisions of the bill or the bill is abandoned. Bills which have been agreed to by both Houses are forwarded by the originating House to the Governor for assent.

There are several stages in the passage of a bill through the Council. These stages are:

- initiation, introduction and first reading;
- second reading – consideration of the principle of the bill;
- committee of the whole – consideration of the text of the bill in detail, including amendments (if necessary);
- third reading – final consideration of the bill as reported from the committee of the whole.<sup>32</sup>

In principle, only one stage on a bill may be dealt with on any one sitting day. However, several means are available to members to expedite the passage of a bill through one or more stages in a sitting day. For example, on a bill being introduced into the Council, the second reading may be moved immediately, with the debate adjourned for five calendar days immediately following the second reading speech by the mover. A bill received from the Assembly may be further expedited by the House agreeing to suspend standing orders to enable a bill to pass through all its stages during any one sitting of the House.

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<sup>32</sup> In February 2007, the Legislative Assembly adopted new standing orders approved by the Governor renaming the stages in the passage of bills through the Assembly.

Details of all bills introduced, reprinted and finally passed are available on the Parliament's internet site at <www.parliament.nsw.gov.au>.

### **Initiation, introduction and first reading**

Bills may originate in either House,<sup>33</sup> with the exception of bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost (so called 'money bills'), which must originate in the Assembly under the provisions of section 5 of the *Constitution Act 1902*.

#### ***Council bills***

A bill, other than a bill received from the Assembly, is initiated in the Council by giving a notice of motion seeking leave to introduce the bill. The notice states the long title of the bill (SO 136).

When the notice is called on, the member moves: 'That leave be given to bring in a bill for an Act to ...'.

If the House gives leave for the introduction of a bill a copy of the bill is presented and a motion then made: 'That this bill be now read a first time and printed'. The question is put by the President immediately after the bill has been presented, and determined without amendment or debate (SO 137). The bill is then available to members and the public. The long title must accord with the order of leave; any bill which is not in accordance with the order of leave will be ordered to be withdrawn (SO 136). After the first reading of a bill, the second reading may be moved immediately (SO 137). Following the second reading speech by the mover, the debate is adjourned until a future day which must be at least five calendar days ahead. This allows time for members to familiarise themselves with the contents of the bill and to consider possible amendments to be put forward.

A bill may be withdrawn and a new bill introduced under the original order of leave, but only after the order for the second reading or any subsequent stage of the original bill has been discharged (SO 136(6)).<sup>34</sup> The title of the second bill must also agree with the order of leave. However, it is possible to amend both the title and long title of a bill during the committee stage of the bill.

#### ***Assembly bills***

A bill received from the Assembly proceeds in the same manner as a bill introduced in the Council, except for initiation (SO 154). On the President reporting a

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33 The majority of public bills originate in the Assembly, although this varies from one sitting to the next. This is primarily because the majority of ministers are members of the Assembly. Between 1949 and 1988 no government bills originated in the Council. However, since the election of the Coalition Government under Premier Greiner in 1988, government bills have been routinely introduced into the Council.

34 See, for example, the Public Hospitals (Conscientious Objections) Bill, *LC Minutes* (14/10/1993) 305; and the Maintenance and Champerty Abolition Bill, *LC Minutes* (27/10/1993) 33.

message from the Assembly forwarding a bill for concurrence, the question on the first reading and printing is taken together as one motion immediately after the bill has been received, and is determined without amendment or debate (SO 137). However, a minister usually moves a contingent notice for the suspension of standing orders on bills received from the Assembly to allow the bill to proceed through all stages during any one sitting. This practice originally occurred towards the end of a sitting period, when time pressures often required bills to be dealt with promptly. However, in recent years the practice has become commonplace, so that standing orders are now routinely suspended on all bills received from the Assembly.

In order to overcome the requirement for members to give notice at a previous sitting of a motion to suspend the standing orders, ministers routinely give contingent notices to allow suspension on specific bills received from the Assembly.<sup>35</sup> In order to do this, ministers and members give a contingent notice of motion at the beginning of the session, to allow suspension of standing orders on any bill received from the Assembly.<sup>36</sup>

If several messages forwarding bills from the Assembly are received together, the President inquires if leave is granted for the first reading, printing, suspension of standing orders where applicable, and fixing of the day for the second reading of all the bills to be dealt with on one motion (SO 154(2)). The bills are then proceeded with separately, in the normal manner.

### ***Urgent bills***

A minister may declare a bill introduced in the Council to be an urgent bill (SO 138). When a bill is declared to be an urgent bill the question is put immediately, without amendment. When the House agrees that the bill is urgent, the second reading debate and subsequent stages may proceed immediately or at any time during any sitting. Copies of a bill that is declared urgent must have been circulated.

### ***Cut-off dates on bills***

In 2002, in response to the practice of successive governments to push a raft of bills through both Houses during the final days of a session, the Council adopted a sessional order implementing cut-off dates on the receipt of bills from the Assembly and introduction of bills into the Council. The sessional order, proposed by a member of the cross-bench, provided that where a bill was introduced by a minister, or was received from the Assembly after 18 June 2002 (during the Budget session) or after 12 November 2002 (during the Spring session), debate on the motion for the second reading was to be adjourned at the conclusion of the speech

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35 See, for example, *LC Notice Paper* (6/9/2006) 675.

36 See, for example, *LC Notice Paper* (29/8/2006) 390.

of the minister moving the motion, with resumption of the debate made an order of the day for the first sitting day of the next sitting.<sup>37</sup> An exception was given for any bill declared urgent by the minister, provided copies of the bill had been circulated and the House agreed to the motion for urgency.

After the adoption of the sessional order, the government made a serious attempt to meet the imposed deadlines, in some cases introducing bills in the Council rather than the Assembly to avoid running foul of the cut-off date. However, even after the deadline passed a significant number of bills continued to be introduced, with ministers using the urgency procedure to allow them to proceed.

This sessional order was adopted each session from 2002 until 2004. However, there were no instances where the resumption of the second reading debate on a bill was made an order of the day for the first sitting day of the next sitting.

Nevertheless, subsequent Premier's memoranda have continued to be issued warning that the Council may impose cut-off dates on the introduction of bills.

## Second reading

Debate on the second reading of a bill commences when the minister or member in charge of the bill moves: 'That this bill be now read a second time'.

The second reading debate is the stage at which the general principles of the bill are considered and when lengthy debate often occurs, particularly on controversial bills. The speech of the minister or other member when moving the motion for the second reading of a bill forms part of the body of material which may be considered in the interpretation of the Act or any statutory rule made under the Act.<sup>38</sup>

The motion for the second reading is the question to which amendments are most frequently proposed. Amendments include referring the bill to a select or standing committee for consideration and report, reasoned amendments, changing the day for giving the second reading, and 'this day six months' amendments. The 'this day six months' amendment, if carried, is fatal to the progress of the bill during that session (SO 140(3)). These forms of amendments are dealt with in greater detail below.

Historically up until 1997, after the second reading, all bills were considered in committee of the whole House. However, standing order 141(1)(a) now permits a bill to proceed directly to the third reading immediately after the second reading is agreed, without going through the committee stage, provided there is no objection.<sup>39</sup> Where amendments are proposed or a member wishes to discuss aspects of a clause, a bill is considered in committee of the whole House.

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37 *LC Minutes* (20/3/2002) 81-84.

38 *Interpretation Act 1987*, s 34(2)(f).

39 This practice was first introduced by sessional order in 1997.

*Referral of a bill to a select or standing committee*

A bill may be referred to a standing or select committee for detailed consideration. This usually occurs by way of an amendment to the motion for the second reading of the bill.<sup>40</sup> The amendment takes the form of omitting all words after ‘That’ and inserting alternative words to refer the bill to a committee. The amendment may be in general terms or may indicate specific matters which the House wishes to have considered by the committee.

When a committee reports on a bill, the second reading must be restored to the Notice Paper, and moved again.

There are also precedents where the provisions of a bill have been referred to a committee while the bill itself still progressed through its respective stages.<sup>41</sup>

Bills have also been referred to select and standing committees both after the motion for the second reading has been agreed to,<sup>42</sup> and as an amendment to or after the motion for the third reading of the bill has been agreed to.<sup>43</sup>

The House may also give instructions to a select or standing committee to extend or restrict its terms of reference. Such an instruction must be moved before the committee reports.<sup>44</sup>

**Consideration of bills in committee of the whole House**

Whenever objection is taken to proceeding directly to the third reading of a bill, or whenever there are amendments to be proposed to a bill, the House, on motion, resolves itself into a committee of the whole to consider the bill in detail, immediately or on a future day (SO 141(1)). This motion is not capable of amendment or debate.<sup>45</sup>

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40 For a motion for a bill to be referred to a standing or select committee which was carried, see *LC Minutes* (7/3/1961) 148, (29/8/1963) 245-246, (18/3/1964) 412; for a motion for a bill to be referred to a standing or select committee which was negatived, see *LC Minutes* (5/11/1952) 117, (3/12/1953) 118, (15/11/2000) 709-710.

41 See, for example, the Home Building Amendment (Insurance) Bill which was referred to the Standing Committee on Law and Justice at the third reading, *LC Minutes* (9/5/2002) 165, *LC Debates* (9/5/2002) 1887; the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill which was referred to the Standing Committee on Law and Justice at the third reading, *LC Minutes* (7/12/2000) 825, *LC Debates* (7/12/2000) 11765-11766; and the Correctional Services Legislation Amendment Bill which was referred to GPSC 3 at the second reading, *LC Minutes* (7/6/2006) 100-101.

42 See, for example, the Privacy and Data Protection Bill, *LC Minutes* (5/5/1994) 174.

43 On 7 December 2000 the House referred the provisions of the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill to the Standing Committee on Law and Justice at the same time as agreeing to the third reading of the bill, *LC Minutes* (7/12/2000) 825. On 9 May 2002 the House referred the provisions of the Home Building Amendment (Insurance) Bill to the Standing Committee on Law and Justice at the same time as agreeing to the third reading of the bill, *LC Minutes* (9/5/2002) 165.

44 See, for example, *LC Minutes* (1/12/1936) 55, (7/3/1961) 148.

45 Ruling: Flowers, *LC Debates* (7/10/1919) 1568.



The committee of the whole House consists, as its name implies, of all members of the House. It is presided over by the Chair of Committees instead of the President (SO 17(2)). The Chair of Committees sits at the Clerks' table. It is only in committee of the whole that the text of a bill may be amended. The operation of the committee of the whole is discussed in Chapter 15.

### *Instructions to the committee of the whole*

Standing orders 179 to 182 provide for instructions to the committee of the whole House on a bill. An instruction may give a committee authority to consider matters not otherwise referred to it, or may extend or restrict the committee's authority. An instruction can also authorise a committee to divide a bill into two or more bills, or to consolidate several bills into one. Although an instruction may empower a committee to consider amendments which are not relevant to the subject matter of a bill, such amendments must be relevant to the subject matter of the Act which the bill proposes to amend. Nor can an instruction empower a committee to consider amendments which would reverse the principle of the bill as read a second time.

Instructions are usually moved according to notice,<sup>46</sup> either before the House resolves into a committee of the whole or when the order of the day is read for the resumption of a committee. However, it is also possible to move an instruction to the committee as an amendment to the question for the adoption of the report of the committee and on the motion for third reading of a bill (SO 180).

### *Consideration of a bill in committee of the whole*

Once the House has agreed to the question that the President leaves the Chair and that the House resolve itself into committee of the whole (SO 141), or an order of the day is read for consideration of a bill in committee of the whole (SO 172(2)), the President leaves the Chair and the Chair of Committees takes the Chair at the centre of the table. The Chair announces the short title of the bill and proposes the question on the first clause of the bill by stating: 'Clause 1, the question is: That the clause as read stand a clause of the bill'. The Committee then proceeds to consider the bill in detail. The preamble and long title of the bill are considered after all the clauses and schedules have been determined (SO 143).

Standing order 142 requires the consideration of the bill clause by clause, although in reading the clauses of a bill it is sufficient to read the numbers only. With large bills, the committee may agree to consider a bill by parts rather than clause by clause. The practice commenced in 1940, when the Minister in charge of the Industrial Arbitration Bill, which consisted of 155 clauses divided into 16 parts, suggested to the Committee 'that it may be found convenient to deal with the bill in parts'.<sup>47</sup>

<sup>46</sup> See, for example, *LC Minutes* (22/8/1900) 86.

<sup>47</sup> *LC Debates* (9/4/1940) 7809.

The procedure was used intermittently until the 1960s since which time it has become common practice. Nowadays, the standing orders provide that the committee may, by leave, consider clauses, parts, divisions or schedules together and, in the case of cognate bills, may consider a bill in whole or in part (SO 142(6)). It is for the Chair to initiate such consideration. As the leave of the committee is required, any member may object to consideration of a bill by parts or other groupings of clauses.

Standing order 143 requires that, in considering a bill, clauses and schedules, if any, are taken in the order in which they stand in the bill. Consideration of a clause or schedule may be postponed on motion, whether amended or not (SOs 142 and 143).<sup>48</sup> The postponement of a clause may be debated. The committee of the whole considers the text of a bill in the following order:

- clauses (and any amendments);
- new clauses (at the place intended to be inserted);
- postponed clauses;
- schedules (and any amendments);
- new schedules (at the place intended to be inserted);
- preamble (if any);
- title (and any amendments).

More recently, to facilitate the business of the committee, and with its consent, clauses and schedules have been put in groups of a given number. Since the advent of cognate bills, it is not uncommon for the committee to deal with the principal bill clause by clause, and provided the committee consents, to propose one question on each of the remaining cognate bills: 'That the clauses, schedules and title be agreed to'.

Members may speak more than once to the same question to amend, delete or insert text (SO 87(2)). Debate on a clause or an amendment must be confined to the matter of the clause or amendment under discussion (SO 142(4)) and must not discuss the merits of the whole bill.<sup>49</sup> In discussing a clause, other clauses should not be debated, except to illustrate to the committee the probable working of the clause.<sup>50</sup>

A bill cannot be discharged or withdrawn in committee since such action requires an order of the House (SOs 136(4) and 140(1)).

Once the bill has been considered in committee, the Chair reports the bill to the House with or without amendment (SO 146).

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48 See, for example, *LC Minutes* (8/9/1937) 719.

49 Ruling: Hay, *Sydney Morning Herald*, 25 October 1878, p 2.

50 Ruling: Hay, *LC Debates* (6/10/1881) 1442.

### *Amendments*

Amendments may be made to the text of a bill by omitting certain words; by omitting certain words in order to insert or add words; or by inserting or adding words (SO 109(1)). Standing orders 109 to 111, which regulate the order in which amendments to motions in the House may be proposed, apply equally to amendments to bills in committee of the whole. A member is precluded from moving an amendment to a former part of a clause if a later part has been amended, or proposed to be amended, except if a proposed amendment has been withdrawn by leave (SO 109(3)). An amendment cannot be proposed to words already agreed to, except for the addition of other words (SO 110). Amendments can only be considered back to the point at which the committee last came to a decision. Therefore, the committee cannot go back over an earlier part of a bill if a decision has already been reached on a later part. This may only be achieved by reconsideration of the bill while in committee (SO 146(2)) or recommittal of the bill (SOs 147 and 149).

Amendments to bills are ‘marshalled’ by the Clerk to the committee in the order in which the text of the bill is considered or, if they relate to the same point in the bill, in the order in which they were provided to the Clerk. However, amendments by the minister or member in charge of the bill take precedence over other amendments at the same place in a bill. When more than one member has handed in a great number of amendments, a marshalled list of amendments is prepared by the Clerk to the committee and circulated for the convenience of members.

Where there are conflicting amendments, the practice has developed whereby the Chair allows the amendments to be moved and debated concurrently. If the question on the first amendment is agreed to, the Chair does not propose the question on the second amendment since it is in conflict with the decision already made by the committee.<sup>51</sup>

An amendment may be proposed to a proposed amendment (SO 109(2)).<sup>52</sup> In such cases the amendment on the amendment is dealt with first. Then the question on the original amendment, as amended (if the amendment on the amendment is agreed to), is proposed.

With the leave of the committee, related amendments may be moved and considered together, known as *in globo*, although members frequently seek leave to move unrelated amendments *in globo*.

Where a series of related amendments, or amendments of a technical or consequential nature, are proposed to a bill it is possible for the amendments to be considered together. In such cases it is usual for the member in charge of the amendments to seek the leave of the committee for the amendments to be considered *in globo*. The amendments are moved on one motion and only one question is

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51 See, for example, the Threatened Species Conservation Amendment (Biodiversity Banking) Bill, *LC Debates* (1/11/2006) 4400.

52 See, for example, the Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill, *LC Debates* (16/3/2004) 7233.

put from the Chair: 'That the amendments be agreed to'. This procedure is often used on recommitment where there are many consequential amendments to clause references.<sup>53</sup>

The necessity for consequential amendments can arise in the text of a bill where a clause, sub-clause, paragraph, sub-paragraph or schedule has been omitted or a new one inserted. Amendments of a formal nature and corrections of clerical or typographical errors may be made by the Chair of Committees or the Clerk (SO 150).

Where a bill is to give effect to an agreement between the Commonwealth and State governments, so called inter-governmental legislation, amendments to the bill may result in New South Wales legislation being inconsistent with legislation passed in other Australian jurisdictions. However, there is nothing to prevent the House from moving amendments to such a bill, or even rejecting the bill outright, although there may be financial or other penalties to New South Wales in doing so. For example, amendments were moved to the Human Cloning and Other Prohibited Practices Amendment Bill 2007 which, if agreed to, would have placed New South Wales out of step with other jurisdictions. In the event, the amendments were defeated.<sup>54</sup>

Once an amendment has been proposed, it can only be withdrawn by the mover or by authority of the mover and by the unanimous leave of the House or committee (SO 109(5)). It is not necessary for a member to withdraw amendments which have not been moved, even if they have been submitted to the Chair and circulated to the committee.

### *Admissibility of amendments*

Standing order 144 governs the admissibility of amendments to bills. An amendment may be made to any part of a bill, provided it is relevant to the subject matter of the bill and otherwise in conformity with the rules and orders of the House.<sup>55</sup> However, the following rules apply to amendments to bills:<sup>56</sup>

- An amendment is out of order if it is irrelevant to the subject matter or beyond the scope of the bill, or if it is irrelevant to the subject matter or beyond the scope of the clause under consideration.
- An amendment cannot be admitted if it is governed by or dependent on an amendment which has already been negatived.<sup>57</sup>

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53 See, for example, the Gambling Legislation Amendment (Gaming Machine Restrictions) Bill, *LC Debates* (3/5/2000) 5079-5080.

54 *LC Debates* (26/6/2007) 1684-1685, 1686, 1687, 1689, 1690, 1692-1693.

55 See, for example, the discussion of the Business Names Bill, *LC Minutes* (14/11/1934) 188-189.

56 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, pp 607-609.

57 Ruling: Healey (Deputy), *LC Debates* (25/11/1985) 10429.

- An amendment must not be inconsistent with, or contrary to, the bill as so far agreed, nor must it be inconsistent with a decision on a former amendment.
- An amendment is inadmissible if it refers to, or is not intelligible without, subsequent amendments, or if it is otherwise incomplete.
- An amendment is not admissible which is equivalent to a negative of the bill, or which would reverse the principle of the bill as agreed to on the second reading. No amendment or new clause may be inserted which reverses the principle of the bill as read a second time.<sup>58</sup>
- An amendment to omit a clause is not in order, as the proper course is to vote against the question that the clause stand a part of the bill. Consequently, it is also out of order to propose to omit the effective words of a clause or offer any other amendment which is equivalent to a direct negative of the clause.<sup>59</sup> It is in order to negative a clause, even if amended, and propose a new clause in its place (SO 144(7)).
- An amendment is out of order if it would make a clause unintelligible or ungrammatical, or if it is incoherent and inconsistent with the context of the bill.
- An amendment is out of order if it is vague, trifling or tendered in a spirit of mockery.
- An amendment is out of order if it is offered at the wrong place in a bill.

In general, an amendment merely to omit words may not be held to be out of order as reversing the principle of the bill, as it is possible to create a blank in a bill.

In determining relevancy of proposed amendments, the Chair considers both the long title and the objectives of the bill. Where the purpose of the long title is broad, the Chair usually allows a considerable degree of latitude in admitting amendments. However, where the purpose of the long title is narrow, there is little latitude granted when determining the relevancy of proposed amendments.<sup>60</sup>

A committee of the whole can consider amendments which would not otherwise be in order, provided the committee receives an instruction from the House authorising it (SO 179, 180). However, not even an instruction can empower a

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58 See, for example, the Constitution Amendment (Legislative Council) Bill, *LC Minutes* (27/9/1932) 44-45; the Bungendore to Captain's Flat Railway Agreement Ratification Bill, *LC Minutes* (8/12/1937) 98; and the Factories and Shops (Further Amendment) Bill, *LC Minutes* (30/9/1941) 67.

59 *Erskine May*, 23rd edn, p 611.

60 See, for example, the Education Amendment (Non-Government Schools Registration) Bill, *LC Debates* (10/3/2004) 6956-6957; and the Snowy Mountains Cloud Seeding Trial Bill, *LC Debates* (30/3/2004) 7662-7663. See also rulings: Gay (Deputy), *LC Debates* (23/10/1991) 3037, 3097, 3099, (22/10/1991) 2906, (18/6/1996) 3018, (18/9/1996) 4264; Gardiner (Acting), *LC Debates* (7/6/1995) 741; Bull (Acting), *LC Debates* (18/10/1991) 2672.

committee to consider an amendment or new clause which reverses the principle of the bill as read a second time.

If an amendment is made in a bill which does not come within the original title, the long title is amended.<sup>61</sup> Amendments to the title of a bill are specifically reported to the House (SO 146(1)).

In the case of an Assembly bill, amendments agreed to by the committee are detailed in a schedule signed by the Clerk and Chair of Committees (SO 155). The bill and accompanying schedule of amendments are then forwarded to the Assembly, with a message requesting the concurrence of the Assembly to the amendments.

If the bill is a Council bill, there is no need for a schedule of amendments as the amendments are incorporated into a second print of the bill which is forwarded to the Assembly for concurrence.

### *Amendments to be in writing*

Since proceedings in the House guide proceedings in committee of the whole (SO 173), all amendments to bills in committee of the whole must be in writing if required by the Chair (SO 109(7)). Chairs of Committees have consistently ruled that amendments to bills in committee of the whole must be submitted in writing to the Clerk.<sup>62</sup> As the moving of an amendment without prior advice causes difficulty for members and for the Chair to consider their admissibility, successive Chairs have also consistently insisted that amendments be circulated before consideration of a bill in committee. This enables the minister and other members to examine the effect of the amendments and assists in ensuring the orderly and efficient consideration of bills by the committee, especially when there are many proposed amendments on a bill or when amendments occur at the same place in a bill.<sup>63</sup>

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61 For examples where the title was amended, see the Factories and Shops (Amendment) Bill, *LC Minutes* (20/2/1935) 277-278; the Saint Andrew's Cathedral Site Bill, *LC Minutes* (4/4/1935) 348-349; the Constitution (Legislative Assembly) Amendment Bill, *LC Minutes* (21/5/1990) 188-189; the Constitution Amendment Bill, *LC Minutes* (15/10/1997) 109; the Workers Compensation Legislation (Further Amendment) Bill, *LC Minutes* (20/4/1994) 135; the Anti-Discrimination (Heterosexual Discrimination) Amendment Bill, *LC Minutes* (14/11/2002) 484; and the Game Bill, *LC Minutes* (27/6/2002) 287. For examples where the short title was amended, see the Advances to Settlers (Government Guarantee) Bill, *LC Minutes* (1/11/1934) 173; the NSW University of Technology and Technical Education Bill, *LC Minutes* (12/4/1949) 107; and the Motor Traffic (Amendment) Bill, *LC Minutes* (1/3/1961) 138.

62 This was the subject of memorandums issued to members from the Chair of Committees and referred to in a ruling of the Deputy President (Fazio) during debate on Coal Acquisition Amendment (Fair Compensation) Bill, *LC Debates* (26/5/2005) 16251.

63 See, for example, the discussion of proposed amendments to the Companies (Amendment) Bill, *LC Debates* (9/11/1971) 2668-2671; see also rulings: Healy (Deputy), *LC Debates* (12/11/1985) 9260, (21/9/1988) 1606.

*Division of a bill*

A committee of the whole may, on instruction from the House, divide a bill into two or more bills, provided the bill is drafted in two or more distinct parts, or otherwise lends itself to such division.<sup>64</sup> Either House, when reviewing a bill originating in the other House, may agree that certain clauses or parts should form another bill.

Where a bill originates in one House but is divided into two or more bills in the other House, any new bills created by the division are taken to have originated in the House where the original bill commenced.

There is no standing order providing for the division of a bill. However, as indicated, the House may give instructions to the committee of the whole on the consideration of a bill. To date there have been three occasions in the Council where motions for an instruction to a committee of the whole to divide a bill into two or more bills have been moved, although only one was carried. These three cases are discussed below.

On 20 November 1990, a cross-bench member moved an instruction to the committee of the whole, that the committee divide the Appropriation Bill into two bills so as to incorporate in a separate bill the proposed appropriation for 'The Legislature' and that the committee report the bills separately. Following debate the motion was negatived on division.<sup>65</sup>

On 28 June 2000, the House agreed to a motion by a minister for an instruction to the committee of the whole to divide the Industrial Relations Amendment Bill into two bills so as to incorporate in a separate bill the provisions of the bill relating to independent contractors, and that the committee report the bills separately. The committee reported that it had considered the Industrial Relations Amendment Bill and, according to the instruction given by the House, had divided the bill into two bills, the Industrial Relations Amendment Bill and the Industrial Relations Amendment (Independent Contractors) Bill. The Committee reported the Industrial Relations Amendment Bill with amendments, reported progress on the Industrial Relations Amendment (Independent Contractors) Bill and sought leave to sit again on the first sitting day in August 2000. The Industrial Relations Amendment Bill was read a third time and a message forwarded to the Assembly advising that the Council had divided the bill into two bills: the Industrial Relations Amendment Bill, and the Industrial Relations Amendment (Independent Contractors) Bill. The Industrial Relations Amendment Bill was returned to the Assembly with amendments. The Industrial Relations Amendment (Independent Contractors) Bill remained under consideration in the Council. The Council requested the concurrence of the Assembly in the action taken by the Council.<sup>66</sup>

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64 *Erskine May*, 23rd edn, p 597.

65 *LC Minutes* (20/11/1990) 632-633.

66 *LC Minutes* (28/6/2000) 567-568.

On 29 June 2000, a message was reported from the Assembly agreeing to one amendment made by the Council to the Industrial Relations Amendment Bill and disagreeing with another amendment with reasons. In relation to the division of the bill into two bills, the Assembly considered that the established rules and practices of the Houses provided ample opportunity for the consideration and amendment of bills by each House and that the division of a bill in the House in which the bill did not originate was highly undesirable. This response from the Assembly on the division of the bill into two bills was somewhat surprising, given that the instruction to divide the bill was initiated by a government minister. The message from the Assembly was considered in committee of the whole at a later hour of the sitting and the Council agreed not to insist on its second amendment to the Industrial Relations Amendment Bill disagreed to by the Assembly.<sup>67</sup>

The second bill, the Industrial Relations Amendment (Independent Contractors) Bill, remained on the Council Notice Paper until the House was prorogued on 20 February 2002.

On 27 May 2003 another cross-bench member moved an instruction to the committee of the whole to divide the Crimes Amendment (Sexual Offences) Bill into two bills so as to incorporate in a separate bill the provisions of the bill relating to offences against children, and that the committee report the bills separately. Following debate the motion was negatived on division.<sup>68</sup>

### *Reconsideration and recommitment of a bill*

While in committee of the whole House, a bill may be reconsidered by an amendment to the motion that the Chair report the bill to the House (SO 146(2)). This allows the committee to reconsider any clauses of a bill without reporting back to the House.

A bill may also be recommitted for further consideration in whole or in part, or for the insertion of new clauses or schedules on the motion for the adoption of the report of the committee of the whole (SO 147)<sup>69</sup> or on the motion for third reading of the bill (SO 149).<sup>70</sup> Any member may move to recommit or partially recommit a bill but priority is given to the member in charge of the bill.<sup>71</sup>

An amendment may be moved to the motion for reconsideration or recommitment to add or omit clauses.<sup>72</sup>

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67 *LC Minutes* (29/6/2000) 580-581.

68 *LC Minutes* (27/5/2003) 125.

69 See, for example, the Crimes Legislation Amendment (Parole) Bill, *LC Minutes* (24/6/2003) 159; and the Deer Bill, *LC Minutes* (25/10/2006) 308.

70 See, for example, the Legal Practitioners (Amendment) Bill, *LC Minutes* (14/2/1935) 270; and the Fair Rents (Amendment) Bill, *LC Minutes* (1/11/1928) 76.

71 *Erskine May*, 23rd edn, p 625.

72 See, for example, the Crimes Legislation Amendment (Parole) Bill, *LC Debates* (24/6/2003) 1885-1886.



A bill may be recommitted as often as the House thinks fit. Bills have often been recommitted twice and even up to three,<sup>73</sup> four<sup>74</sup> and on rare occasions five times.<sup>75</sup> On the motion for recommittal debate is restricted to the amendment<sup>76</sup> or the whole clause proposed to be recommitted.<sup>77</sup>

A bill is generally recommitted for the following purposes:

- to re-insert a clause previously omitted;<sup>78</sup>
- to enable the committee to reconsider amendments it has previously made;<sup>79</sup>
- to enable the committee to take advantage of an instruction from the House to make certain amendments (SO 180(2));
- to enable the committee to make amendments consequential on amendments previously made;<sup>80</sup>
- to enable the committee to consider an amendment to a place in the bill which had already passed in committee.

If a bill is recommitted for consideration as a whole, the entire bill is again considered in committee and reported a second time with or without further amendments. In other cases, only those portions of the bill as specified in the order for recommittal are considered in committee. The procedures in committee of the whole on recommittal are the same as when considering the bill a first time.

When a bill has been reconsidered in committee of the whole the bill is reported a second or subsequent time to the House (SO 146). The report of the committee and adoption of the report on a recommitted bill are dealt with in the same way as on an ordinary committal of the bill.

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73 See, for example, the Workers Compensation (Benefit) Amendment Bill, *LC Minutes* (2/8/1989) 809; and the Homefund Restructuring Bill, *LC Minutes* (15/12/1993) 463-464.

74 See, for example, the Hunter District Water and Sewerage (Amendment) Bill, *LC Minutes* (3/9/1924) 56; and the Greater Newcastle Bill, *LC Minutes* (13/12/1937) 109-110.

75 See, for example, the Crown Lands Alienation Bill, *LC Minutes* (6/5/1861) 168; and the Lands Acts Amendment Bill, *LC Minutes* (22/7/1875) 128-129.

76 Ruling: Hay, *LC Debates* (4/8/1886) 3757.

77 Ruling: O'Connor (Deputy), *LC Debates* (1/11/1928) 1439.

78 See, for example, the Residential Tenancies (Amendment) Bill, *LC Debates* (30/11/1988) 3994.

79 See, for example, the Crimes Legislation Amendment (Parole) Bill, *LC Debates* (24/6/2003) 1885-1886.

80 See, for example, the Statute Law (Miscellaneous Provisions) Bill, *LC Debates* (4/6/1990) 4993; the Constitution (Legislative Council) Amendment Bill, *LC Debates* (20/3/1991) 1402; the Land Acquisition (Just Terms Compensation) Bill, *LC Debates* (27/8/1991) 537; the Constitution (Legislative Council) Further Amendment Bill (No 2), *LC Debates* (25/9/1991) 1729; the Local Government Amendment (Amalgamation and Boundary Changes) Bill, *LC Debates* (1/7/1999) 1897; the City of Sydney (Electoral Rolls) Bill, *LC Debates* (7/5/2003) 363; and the Workers Compensation (Benefits) Amendment Bill, *LC Minutes* (2/8/1989) 9115.

***Postponing and terminating consideration of a bill***

When a committee of the whole wishes to postpone its consideration of a bill until a later time a motion may be made by any member during committee proceedings: ‘That the Chair leave the Chair, report progress and ask leave to sit again (on a stated day)’ (SOs 173(6), 177(1) and 177(2)). In the case of government bills, it is usual for the minister in charge of the bill to move such a motion, although there have been instances where other members have moved the motion.<sup>81</sup>

When a motion to report progress is moved, the Chair puts the question and, if it is agreed to, leaves the Chair, reports progress to the President (who resumes the Chair of the House) and seeks leave to sit again (at a later hour of the next sitting day). The President restates the report of the Chair to the House. The member in charge of the bill then moves a motion for the adoption of the report. On the day for resumption of committee proceedings, when the order of the day for further consideration in committee is read by the Clerk, the President leaves the Chair without any question or debate. Before the order of the day is read it may be postponed to a future day.

The proceedings of a committee of the whole may be terminated by agreeing to a motion: ‘That the Chair do now leave the Chair’ (SO 177(4)). In such cases the Chair has no instructions from the committee and makes no report to the House, which results in the proceedings of the committee being terminated (superseded). The Chair simply leaves the Chair, makes no report to the House and the President resumes the Chair of the House. The order of the day for the bill is then removed from the Notice Paper by the Clerk and can only be revived by motion on notice. If revived, the committee’s proceedings are resumed at the point where they were discontinued.

This procedure was used by a government minister as a tactical measure during consideration of the Ombudsman (Amendment) Bill 1989 and the Police Regulation (Allegations of Misconduct) (Ombudsman) Amendment Bill 1989, when amendments had been made to the Ombudsman (Amendment) Bill 1989 which were contrary to the government’s wishes.<sup>82</sup>

***Reports from committee of the whole on bills***

When a bill has been considered in committee of the whole, the Chair signs a certificate that the bill is in accordance with the bill as reported from the committee.<sup>83</sup> The Chair, on motion by the member in charge of the bill, then leaves the Chair and reports the bill to the House, with or without amendment, including any amendment in the title (SO 146). The House then adopts the report on motion,

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81 *LC Debates* (8/8/1989) 9519-9525 (motion moved by member of the opposition but negatived on voices).

82 *LC Minutes* (2/5/1989) 620; *LC Debates* (2/5/1989) 7044-7045.

83 There are different certificates for bills initiated in the Council and bills initiated in the Assembly.

or sets consideration of the adoption of the report as an order of the day for a future day (SO 146(3)).<sup>84</sup>

When the report from the committee of the whole has been adopted, a future day may be fixed, without notice or debate, for the third reading of the bill (SO 148(1)). If standing orders have been suspended (see SO 198), the motion for the third reading of the bill can be moved immediately (SO 148(2)).

The House does not take notice of proceedings in committee until the bill is reported (SO 145). Consequently, it is irregular to refer in the House to the committee proceedings on a bill before it has been reported back to the House.<sup>85</sup>

### Third reading

Following the adoption of the report of the committee of the whole, the third reading of a bill may be set down for a future day (SO 148). In practice the third reading usually takes place immediately, either with the concurrence of the House in the case of a Council bill, or if the standing orders have been suspended to allow a bill originating in the Assembly to pass through all stages on any one sitting day.

Debate on the third reading of a bill commences when the minister or member in charge of the bill moves: 'That this bill be now read a third time'.

Debate on the motion for the third reading is limited to stating reasons for supporting or opposing the bill. Attempts by members to engage in extended discussion of the provisions of a bill or to introduce new matters have been ruled out of order by successive Presidents.<sup>86</sup> It is also possible to amend the motion for the third reading to recommit a bill (SO 149),<sup>87</sup> to move a 'this day six months amendment', to move the previous question (SO 148), to move a reasoned amendment or to refer it to a committee.

On the motion for the third reading of a bill, before the question on the third reading is put, the President announces receipt of a certificate signed by the Chair of Committees that the bill is in accordance with the bill as reported from the committee of the whole (SO 148(4)).

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84 For examples where adoption of the report was made an order of the day for the next sitting day, see the Royal Alexandra Hospital for Children Incorporation Amendment Bill, *LC Minutes* (20/11/1906) 129; and the Community Protection Bill, *LC Minutes* (16/11/1994) 375-376. For an example where adoption of the report was fixed for a later hour of the sitting, see the Local Government (Amendment) Bill, *LC Minutes* (27/2/1935) 292.

85 *Erskine May*, 23rd edn, p 617. See also ruling: Hay, *LC Debates* (29/5/1890) 827.

86 Rulings: Johnson, *LC Debates* (4/5/1989) 7452; Willis (Deputy), *LC Debates* (4/5/1989) 7451, 7452; Burgmann, *LC Debates* (29/6/2001) 15934, (21/11/2002) 7240; Nile (Deputy), *LC Debates* (4/7/2001) 16258; Griffin (Deputy), *LC Debates* (29/10/2003) 4304; Forsythe (Deputy), *LC Debates* (18/11/2003) 5108.

87 See, for example, the Education Reform Bill, *LC Minutes* (22/5/1990) 200; the Motor Accidents Amendment Bill, *LC Minutes* (4/12/1995) 372; and the Liquor Amendment Bill, Registered Clubs Amendment Bill, *LC Minutes* (6/6/1995) 108.

Under standing order 44 an order of the day for the third reading of a bill may be dealt with as a formal motion. No amendment or debate is permitted on motions dealt with as formal business.

When a bill is introduced in one calendar year but does not pass the third reading until the next calendar year, the year reference in the short title or clause 1 to the bill is altered and initialled by the Clerk before the bill is sent to the Assembly.<sup>88</sup> It is not usual for the bill to be reprinted in such cases, although the year reference is altered before reprinting of the bill for assent.

### REASONED AMENDMENT TO A SECOND OR THIRD READING

A member who wishes to place on record any reasons for not agreeing to a bill may move a 'reasoned amendment' to the second or third reading of the bill. The form of a 'reasoned amendment' is to leave out all words after 'That' and to insert other words explaining why the House opposes the second or third reading.<sup>89</sup>

The following rules govern the contents of 'reasoned amendments':

- the amendment must be relevant, and must not include in its scope other bills then before the House;
- the amendment must not be concerned with the provisions of the bill on which it is moved, nor anticipate amendments to be moved in committee;
- the amendment should not be a direct negation of the principle of the bill.

The effect of carrying a 'reasoned amendment' to the second or third reading of the bill is that no order is then made for a second or third reading on a future day, and the bill drops from the Notice Paper.<sup>90</sup>

### 'THIS DAY SIX MONTHS' AMENDMENTS

When it is desired to defeat a bill and prevent its reintroduction in the same session, an amendment may be moved to the motion for the second or third reading to omit the word 'now' and insert instead 'this day six months'. The 'this day six months' amendment, if carried, finally disposes of a bill (SOs 140(2) and 148(3)) and it may not be considered again in the same form in that session (SO 148(2)).<sup>91</sup>

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88 *LC Minutes* (28/2/1973) 219.

89 See, for example, the Public Trustee Corporation Bill, *LC Minutes* (26/6/1997) 11233; and the Workers Compensation Legislation Amendment Bill (No 2), *LC Minutes* (28/6/2001) 15680-15681.

90 *Erskine May*, 23rd edn, p 585.

91 The amendment was successfully moved by Sir Henry Manning in 1943 to effectively defeat the McKell Bill to reform the Council, *LC Debates* (16/12/1943) 1390; and on the Sydney Heliport Bill, *LC Minutes* (8/3/1994) 51. The amendment was unsuccessfully moved to the motion for the third reading of the Crimes Amendment Bill, *LC Minutes* (18/5/1984) 146-147; and to the motion for the second reading of the Judicial Officers Bill, *LC Minutes* (12/11/1986) 452; and the Terrorism (Police Powers) Amendment (Preventative Detention) Bill, *LC Minutes* (30/11/2005) 1797.

To circumvent this, a bill can be modified to omit or amend unacceptable provisions and reintroduced as another new bill with a different long title.

In 1990, an amendment to the motion that the bill be read ‘this day four months’, which would only have the effect of delaying debate, was negatived on division.<sup>92</sup>

### TIME LIMITS ON DEBATE ON BILLS

As noted in Chapter 11 (Rules of Debate), while there are no time limits on debate on government bills, there are time limits imposed on debate on private members’ bills. On the question of leave to bring in the bill there is a time limit of one hour for the debate and 10 minutes for each speaker. Although there is no overall limit on the time for debate at either the second or third reading stages, the mover is limited to a 30 minute speech while everyone else, including the mover in reply, is limited to 20 minutes (SO 187). These time limits are listed in Appendix 11.

### INTERRUPTION AND RESTORATION OF BILLS

There are several ways that proceedings on bills can be interrupted. A bill can lapse, the order of the day can be discharged from the Notice Paper, or the question can be superseded, that is, no order is made setting a future date for continuation. A bill can also be defeated if the motion for a stage of the bill is negatived. In addition, when the House is prorogued all orders of the day lapse.

In some cases it is possible, where a bill has been interrupted, to restore the bill to the Notice Paper at the stage it had previously reached. However, in the case of an order of the day on a bill being discharged, or a ‘this day six months’ amendment to the second or third reading motion being carried, it is not possible to revive the bill in the same form during the same session.

### Lapsed bills

Debate on the second or third reading or proceedings in committee of the whole on a bill can lapse where the House is adjourned or the House or committee is interrupted by the lack of a quorum.<sup>93</sup> When a bill lapses due to a lack of a quorum, revival of the bill is achieved by motion, on notice, to restore the bill to the Notice Paper. There were several cases early last century of a bill lapsing for the want of a quorum in the House or committee,<sup>94</sup> although strict party discipline has meant that there have been no cases since then.

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92 Police Service Bill and Police and Superannuation Legislation (Amendment) Bill, *LC Minutes* (9/5/1990) 133-134.

93 When notice is taken that there is no quorum in committee of the whole, the Chair must report the lack of quorum to the House. The committee proceedings only lapse when the House itself is counted out.

94 Motion for the second reading lapsed, *LC Minutes* (11/12/1902) 196; motion for the third reading lapsed, *LC Minutes* (12/9/1900) 125-126; consideration in committee of the whole interrupted, *LC Minutes* (20/9/1905) 89, (29/8/1906) 50.

### Discharge and withdrawal of a bill

When a member in charge of a bill no longer wishes to proceed with the bill, the order of the day for the second reading or subsequent stage can be discharged from the Notice Paper by motion without notice (SO 81(4)). A second bill may only be introduced under the original order of leave once the order for the second reading or any subsequent stage of the original bill has been discharged (SO 136(6)).<sup>95</sup> The original bill is to be withdrawn before the order for the introduction of the second bill may be read (SO 136(7)). Once an order relating to a bill has been discharged and the bill withdrawn it is not possible to restore the original bill to the Notice Paper.<sup>96</sup> Any new bill introduced under the original order of leave must have the same long title as the original bill.<sup>97</sup>

Although it is possible to discharge the order of the day in relation to any bill, only bills which have been initiated in the Council can be withdrawn.<sup>98</sup> When an Assembly bill is discharged in the Council a message to that effect is sent to the Assembly, but the bill is not withdrawn.<sup>99</sup>

Unlike notices of motions which can be withdrawn at any time by the member in whose name the notice stands, an order of the day is in the possession of the House and can only be discharged by motion which must be moved when the particular order is called on.

### Motion negated for second or third reading

Unlike the British House of Commons, where defeat on the second or third reading is fatal to a bill,<sup>100</sup> it is possible in the Council to revive a bill where the motion for the second or third reading has been negated. There are established precedents in the Council where a member in charge of a bill which has been negated

95 See, for example, the following private members' bills: the Public Hospitals (Conscientious Objection) Bill, *LC Minutes* (14/10/1993) 305; and the Public Health Amendment (Juvenile Smoking) Bill, *LC Minutes* (24/10/2002) 430. See also the following government cognate bill: the Maintenance and Champerty Abolition Bill, *LC Minutes* (27/10/1993) 331.

96 A precedent to the contrary occurred in 1931, when the Finance (Greyhound-Racing Taxation) Management Bill having been defeated on the third reading, was discharged, but subsequently restored by suspending standing orders. The bill was then read a third time and returned to the Assembly, *LC Minutes* (2/10/1931) 364-365, (25/11/1931) 378-380.

97 A ruling by President Flowers in 1924, by implication, confirmed this when he ruled that a bill could be restored after defeat at the second reading as the order had not been discharged from the Notice Paper, *LC Debates* (11/12/1924) 4459.

98 See, for example, *LC Minutes* (17/10/1996) 374, (17/9/1998) 706-707.

99 See, for example, *LC Minutes* (13/9/2005) 1550-1551, (11/11/1993) 382-383, (23/4/1996) 61-62, (5/12/1996) 558-559. In an unusual occurrence, the Public Finance and Audit Amendment Bill, one of a number of cognate bills, was discharged and a message forwarded to the Assembly, *LC Minutes* (1/6/1999) 114. In precedents to the contrary, in 1931 an Assembly bill was discharged and withdrawn in the Council, *LC Minutes* (1930-31-32) 188; and in 1996 a Council bill, introduced by a private member, was discharged and withdrawn in the Assembly, *LC Minutes* (30/10/1996) 412.

100 *Erskine May*, 23rd edn, p 583.

on the motion for its second reading has moved for its restoration to the Notice Paper.<sup>101</sup>

The revival of a bill in the Council which has been negated on the second or third reading revolves around the use of the word 'now' in the motion: 'That this bill be now read a second (third) time'. The defeat of this motion 'now' does not preclude the House from giving the bill a second or third reading at a later time.

A bill which has been successfully revived following its defeat on the motion for its second or third reading is restored to the commencement of the stage it had reached before it was defeated. The motion must be moved again and debate proceeds in the normal manner from that point.

### Restoration after prorogation

Prorogation has the effect of immediately terminating all business of the House, and all orders of the day and notices on the Notice Paper lapse. Under standing order 159 any bill which lapses by reason of prorogation before it has reached its final stage may be proceeded with in the next session at the stage it has reached in the preceding session, providing no periodic election for the Council has occurred between the two sessions. A Council bill which has not yet been sent to the Assembly may be restored to the Notice Paper at the stage reached in the previous session by motion on notice. If the bill has already been forwarded to the Assembly for concurrence, a message must be sent to the Assembly by motion on notice requesting that consideration of the bill be resumed in that House.<sup>102</sup> As a corollary, if an Assembly bill is in the Council when the House is prorogued, the bill can only be restored upon receipt of a message from the Assembly requesting that consideration of the bill be resumed.<sup>103</sup>

The majority of bills are interrupted by prorogation at the second reading stage and restored at that stage. On restoration of the bill, it is open to the member in charge of the bill to give a new second reading speech, or to refer members to their previous second reading speech. This can be particularly important when a considerable period of time has elapsed since the bill was first introduced. Furthermore, since there has been ample time for members to familiarise themselves with a bill which is restored at the second reading stage, the five-day rule relating to

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101 For example, the Local Government (Amendment) Bill, defeated on the second reading on 27 November 1924, was restored to the Notice Paper on 11 December 1924, and finally agreed to on December 1924. More recently on 20 May 1993 there was an unsuccessful attempt to restore the Khappinghat Nature Reserve Bill, following its defeat at second reading on 29 April 1993, *LC Minutes* (20/5/1993) 163-164. The Anti-Discrimination (Homosexual Vilification) Amendment Bill was restored on 16 November 1993, following its defeat at second reading on 20 May 1993, *LC Minutes* (16/11/1993) 393-394.

102 For a message asking the Assembly to proceed, see *LC Minutes* (3/3/1993) 32-33, (13/3/2002) 51.

103 For a message asking the Council to proceed, see *LC Minutes* (10/2/1926) 8-9, (11/2/1926) 12-13, (25/2/1926) 34, (11/2/1927) 21, (22/10/1929) 51-52, (18/9/1997) 50-51.

bills initiated in the Council, whereby debate is adjourned for five calendar days at the conclusion of the mover's second reading speech, does not apply.

Restoration of bills following prorogation was relatively common up until the 1930s, after which time it fell into disuse for several decades. However, since 1990 several private members' bills have been restored to the Notice Paper, with some bills even being restored over several sessions.<sup>104</sup>

In 1999, 2002 and 2006, the Leader of the Government in the Council or another minister restored, on motion, all private members' business from the previous session to the stage it had reached during the previous session before prorogation. In 1999 and 2002, private members' business was restored in the order in which it last appeared on the Notice Paper and in 2006 in random order.<sup>105</sup>

## COMMUNICATIONS BETWEEN THE TWO HOUSES ON BILLS

As indicated previously, a bill must be passed in identical terms by both Houses of the Parliament before it may be sent to the Governor for assent, with the exception of bills that are approved under the provisions of sections 5A and 5B of the *Constitution Act 1902*.

The Houses communicate in relation to the provisions of bills by message, conference or by committees conferring with each other (SO 123).

### Messages

Where there is disagreement on the provisions of a bill, messages on the bill may pass between the two Houses several times, with various amendments being proposed, before agreement is reached. When considering a message on amendments to a bill, only those amendments, and matters relating to those amendments, are open for debate. This rule is intended to focus attention on reaching agreement.

Messages are generally sent after a bill has passed all stages and is returned to the originating House with or without amendment. However, it is in order to move at any time, without notice, that a message be sent to the Assembly relating to any stage of a bill agreed to (SO 125).

### *Council amendments on bills originating in the Assembly*

When the Council makes amendments on a bill originated in the Assembly, a schedule of the amendments is prepared containing a reference to the page, clause and line of the bill and describing the amendment proposed. This schedule,

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104 The Interpretation (Amendment) Bill, first introduced in 1988, was restored in the 1990 and 1992 sessions, while the Coroners (Amendment) Bill, first introduced in 1989, was restored in the 1990, 1992 and 1993 sessions.

105 *LC Minutes* (8/9/1999) 32-33, (12/3/2002) 44, (23/5/2006) 20.



signed by the Chair of Committees and certified by the Clerk,<sup>106</sup> accompanies the message returning the bill to the Assembly, requesting the concurrence of the Assembly in the amendments (SO 155(2)).

*Assembly disagreement with Council amendments on bills originated in the Assembly*

The Council may receive a message from the Assembly disagreeing with any amendment by the Council to a bill originating in the Assembly or proposing an amendment to Council amendments, together with written reasons for disagreeing with any of the Council's proposed amendments. The message from the Assembly is taken into consideration, on motion without notice, in committee of the whole, either immediately or on a day to be fixed. The House may also order that the message be considered 'this day six months', which is fatal to the progress of the bill during that session (SO 156(1)).

The committee of the whole deals with each of the Council's amendments disagreed to by the Assembly, any amendments made by the Assembly to the Council amendments and any further amendments made by the Assembly to the bill. Amendments made by the Assembly may be agreed to, with or without further amendment, or disagreed with, and the Council's amendments either insisted on or not insisted on (SO 156(2)).<sup>107</sup> On one occasion when the Council did not insist on its original amendment it proposed a further amendment in the bill in substitution.<sup>108</sup>

In considering the Assembly's message the Chair announces the short title of the bill and calls each amendment in turn. The member in charge of the bill then moves that the committee either insist,<sup>109</sup> or do not insist,<sup>110</sup> on its amendment disagreed to by the Assembly. Other words may be added to these motions as appropriate, for example:

- and agrees,<sup>111</sup> or disagrees, with the Assembly's amendment to the Council amendment;<sup>112</sup>

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106 Although standing order 155 only requires the Clerk to certify the schedule of amendments it has been the practice for the Chair to also signify that the amendments have been examined.

107 See, for example, the Education Reform Bill, *LC Minutes* (23/5/1990) 236-242.

108 See, for example, the Grain Handling Authority (Corporatisation) Bill, *LC Minutes* (21/9/1989) 919-922.

109 See, for example, the Dairy Industry Bill, *LC Minutes* (23/6/2000) 558.

110 See, for example, the Dairy Industry Bill following disagreement by the Assembly a second time, *LC Minutes* (29/6/2000) 580.

111 See, for example, the Local Government (Boundaries Commission) Amendment Bill, *LC Minutes* (4/4/1963) 220.

112 See, for example, the State Planning Authority Bill, *LC Minutes* (5/12/1963) 352-354.

- and agrees,<sup>113</sup> or disagrees, with the Assembly's further amendment;<sup>114</sup>
- and agrees with the Assembly's amendment with the following amendment;<sup>115</sup>
- but proposes amendments to the amendment;<sup>116</sup>
- but proposes a further amendment in the bill as follows.<sup>117</sup>

Amendments may also be moved to such motions. For example, a motion that the committee insist on its amendment may be amended to insert the words 'do not' before the word 'insist'.

The standing orders allow consideration of only those portions of the bill on which there is disagreement over amendments. However, there have been instances where consequential amendments have been proposed in a part of a bill already agreed to.<sup>118</sup>

In special circumstances, further amendments have been proposed to a part of a bill already agreed to in order to resolve a disagreement, in which case the Houses have acknowledged that the action should not be considered a precedent.<sup>119</sup>

In March 1992 a message from the Assembly requesting the concurrence of the Council in its disagreement from the Council's amendments and the further amendments proposed by the Assembly in the Timber Industry (Interim Protection) Bill emphasised that the proposed amendments were not in derogation of the principles incorporated in the Bill and that it did not desire that its action be drawn into a precedent by either House.<sup>120</sup> Before the House proceeded into committee of the whole to consider the Assembly's message, the Acting President (Mr Gay) made a statement indicating that it was competent for the committee to consider the Assembly's proposed further amendments given the reasons for the Assembly's request and that such action was not to be drawn into a precedent by either House. Ultimately, in a message to the Assembly the Council did not insist on three amendments and agreed to the Assembly's further 12 amendments in the Bill on the understanding that such agreement was not to

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113 See, for example, the National Parks and Wildlife (Adjustment of Areas) Bill, *LC Minutes* (4/7/2001) 1116.

114 See, for example, the Sydney Turf Club Bill, *LC Minutes* (29/6/1943) 202.

115 See, for example, the Constitution (Further Amendment) Bill, *LC Minutes* (3/12/1929) 113-115.

116 See, for example, the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill, *LC Minutes* (27/3/2001) 897-898.

117 See, for example, the Public Finance and Audit Amendment (Auditor-General) Bill, *LC Minutes* (13/11/2001) 1258-1259.

118 See, for example, the Workers Compensation (Silicosis) Bill, *LC Minutes* (10/6/1942) 211, (11/6/1942) 216.

119 See, for example, the Jury (Amendment) Bill, *LC Minutes* (11/12/1947) 78-79; and the Timber Industry (Interim Protection) Bill, *LC Minutes* (11/3/1992) 60-62.

120 *LC Minutes* (11/3/1992) 54-58.

be drawn into a precedent.<sup>121</sup> A similar instance occurred on the Jury (Amendment) Bill 1948.<sup>122</sup>

Following consideration of the Assembly's message in committee, the proceedings are reported to the House in the same manner as consideration of the bill. Once the report from the committee is adopted, a message is forwarded to the Assembly indicating the result of the Council's consideration. If any amendments are proposed the message must request the concurrence of the Assembly (SO 152(5)).

If the committee of the whole disagrees to any amendment made by the Assembly on an amendment of the Council, the message must contain written reasons for not agreeing to the Assembly's proposed amendment. The reason may be adopted by motion at that time, or a select committee may be appointed, on motion without notice, to draw up the reasons (SOs 157(1) and (2)).<sup>123</sup> The members of the committee are usually composed of members who supported the original amendment of the Council.

The motion to appoint a select committee to draw up reasons is usually moved by the member in charge of the bill. The number of members to serve on and the procedures of the select committee are governed by the standing orders (SO 207). The select committee usually comprises between five and 10 members who support the principal object of the bill. The clerk to the committee of the whole acts as clerk to the select committee and usually writes the report of the select committee. The reasons for disagreement can usually be gleaned from the debates on the bill.

For many years the Council had adopted a practice, quite contrary to the standing orders, of appointing a select committee to draw up reasons for insisting on its amendments made in a bill originated in the Assembly.<sup>124</sup> However, the standing orders only require written reasons to be drawn up by a select committee when:

- the Council disagrees to an amendment made by the Assembly in a bill originated in the Council (SO 152);
- the Council disagrees to an amendment made by the Assembly on an amendment by the Council to a bill originated in the Assembly (SO 157).

The last time a select committee was appointed to draw up reasons was in 1988.<sup>125</sup> Since then, agreement has been reached between the Houses by message or the bill has not proceeded further.

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121 *LC Minutes* (11/3/1992) 60-61.

122 *LC Minutes* (11/12/1947) 78-79.

123 See, for example, *LC Minutes* (5/12/1963) 352-354, (29/3/1966) 288-290, (4/4/1944) 115, (26/5/1943) 146, (29/6/1943) 200-201, (5/8/1931) 236, (13/8/1931) 253, (21/9/1931) 308, (24/9/1931) 325, (29/9/1931) 340, (1/10/1931) 352, (26/11/1929) 101, (15/5/1930) 260.

124 See, for example, the Police Regulation (Reinstatement) Bill, *LC Minutes* (11/10/1988) 130.

125 See, for example, the Police Regulation (Reinstatement) Bill which was not proceeded with by the Assembly, *LC Minutes* (20/10/1988) 191.

*Assembly amendments on bills originated in the Council*

When a Council bill is returned from the Assembly with amendments, the amendments must be considered in committee of the whole. The message may be ordered, on motion without notice, to be considered in committee of the whole, either immediately or on a day to be fixed. The House may also order that the bill be considered ‘this day six months’, which is fatal to the progress of the bill during that session (SO 152(1)).

Amendments made by the Assembly to a bill originating in the Council may be agreed to, with or without further amendment, or disagreed with. Consideration of the amendments may also be postponed or the bill laid aside (SO 152(2)).<sup>126</sup> In considering the Assembly’s message the Chair of the committee of the whole reads the short title of the bill and calls each amendment in turn. The member in charge of the bill then moves one of the following motions, as appropriate:

- ‘That the committee agree to amendment no [1] made by the Assembly’;  
or
- ‘That the committee disagree from amendment no [2] made by the Assembly’.

Other words may be added to these motions as appropriate, for example ‘and proposes a further amendment as follows’. Such motions are also capable of amendment.

When it is known that there is agreement on all sides of the House on any amendments made by the Assembly it is possible for the amendments to be considered on one motion ‘That the committee agree to the amendments made by the Legislative Assembly’.

The standing orders allow for consideration of only those portions of the bill on which there is disagreement over amendments (SO 152(3)). The remaining portions of the bill, having been already agreed to by both Houses, are not open to further amendment, except in rare cases. This is discussed above in the case of bills originated in the Assembly.

Once the committee of the whole has completed consideration of the Assembly’s message, the proceedings are reported to the House. After the report from the committee is adopted, a message is sent to the Assembly indicating the result of the Council’s consideration. If any further amendments are proposed the message is to be accompanied by a schedule of the amendments and must also request the Assembly’s concurrence (SO 152(5)).

Where the committee of the whole disagrees with any amendment made by the Assembly, the message must give written reasons for not agreeing to the Assembly’s proposed amendment (SO 152(7)). As noted previously, the reason may be

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<sup>126</sup> See, for example, the Constitution (Further Amendment) Bill, *LC Minutes* (3/12/1929) 113-116; and the Workers Compensation Legislation (Further Amendment) Bill, *LC Minutes* (20/4/1994) 135-136.

adopted by motion at that time, or a select committee may be appointed, on motion without notice, to draw up the reasons (SO 152(8)).<sup>127</sup>

The motion to appoint a select committee to draw up reasons is the same as that used to appoint a committee to draw up reasons for disagreeing with amendments made by the Assembly on Council bills, as discussed earlier.

When the Assembly disagrees with any Council amendments on Assembly amendments, insists on its original amendments or agrees to any Council amendments with further amendments, the Assembly again indicates this by message, which is again taken into consideration in committee (SO 153).

## Conferences

Where messages have failed to resolve a disagreement between the Houses on the provisions of a bill, a conference provides another mechanism for communication between the Houses in an attempt to reach agreement. The conduct of conferences – both ordinary conferences and free conferences – is discussed in more detail in Chapter 21 (Relations between the Houses).

Between 1856 and 1927, free conferences were proposed in respect of the following 23 bills, with 22 free conferences actually convened:<sup>128</sup>

- St Andrew's College Bill 1867;<sup>129</sup>
- Lands Act Amendment Bill 1875;<sup>130</sup>
- Parliamentary Powers and Privileges Bill 1878-79;<sup>131</sup>
- Influx of Chinese Restriction Bill 1881;<sup>132</sup>
- Crown Lands Act Amendment Bill 1891-92;<sup>133</sup>
- Crown Lands Bill 1894-95;<sup>134</sup>
- Land and Income Tax Assessment Bill 1895;<sup>135</sup>
- Mining Laws Amendment Bill 1896;<sup>136</sup>
- Hunter District Water and Sewerage Act (Amendment) Bill 1897;<sup>137</sup>

<sup>127</sup> See, for example, the Long Service (Amendment) Bill, *LC Minutes* (29/3/1966) 288; and the Law Reform (Miscellaneous Provisions) Bill (4/4/1944) 115-116.

<sup>128</sup> A free conference was not convened in relation to the Crown Lands Bill. See the discussion below.

<sup>129</sup> *LC Minutes* (16/10/1867) 83, (23/10/1867) 87, (30/10/1867) 91.

<sup>130</sup> *LC Minutes* (4/8/1875) 156, (5/8/1875) 157.

<sup>131</sup> *LC Minutes* (9/4/1879) 166, (10/4/1879) 169.

<sup>132</sup> *LC Minutes* (10/11/1881) 122, (17/11/1881) 130, (23/11/1881) 134.

<sup>133</sup> *LC Minutes* (24/9/1891) 88, (30/9/1891) 94, (7/10/1891) 103.

<sup>134</sup> *LC Minutes* (25/4/1895) 184-185.

<sup>135</sup> *LC Minutes* (20/11/1895) 123-124, (21/11/1895) 127, (22/11/1895) 129, (26/11/1895) 131, (27/11/1895) 134.

<sup>136</sup> *LC Minutes* (27/10/1896) 183-184, (12/11/1896) 227-229.

<sup>137</sup> *LC Minutes* (6/10/1897) 140, (13/10/1897) 153, (20/10/1897) 161.

- Public Roads Bill 1897;<sup>138</sup>
- Crown Lands Bill 1898;<sup>139</sup>
- Australasian Federation Enabling Bill 1899;<sup>140</sup>
- Sydney Corporation (Amending) Bill 1900;<sup>141</sup>
- Industrial Arbitration Bill 1911-12;<sup>142</sup>
- Gas Bill 1912;<sup>143</sup>
- Fair Rents Bill 1915-16;<sup>144</sup>
- Eight Hours Bill 1915-16;<sup>145</sup>
- Superannuation Bill 1915-16;<sup>146</sup>
- Valuation of Land Bill (No 2) 1916;<sup>147</sup>
- Government Railways (Appeals) Bill 1916;<sup>148</sup>
- Forestry Bill 1916;<sup>149</sup>
- Workman's Compensation Bill 1916;<sup>150</sup>
- Industrial Arbitration (Living Wage Declaration) Bill 1926-27.<sup>151</sup>

Not all free conferences on bills have resulted in an agreed compromise. In 1899 the Council managers appointed to the free conference on the Council's amendments to the Australasian Federation Enabling Bill reported:

That the Managers chosen by this House had met the Managers for the Legislative Assembly at the said Conference, and that the Conference had failed to arrive at a settlement of the matters of difference.<sup>152</sup>

The House subsequently adopted the managers' report and the bill was not proceeded with.

In 1900, the free conference on the Sydney Corporation (Amending) Bill also failed to reach agreement. This time the motion to adopt the report of the managers was amended to indicate that, while the Council insisted on its amendments, it would

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138 *LC Minutes* (2/6/1897) 38, (9/6/1897) 44.

139 *LC Minutes* (7/7/1898) 48.

140 *LC Minutes* (23/3/1899) 31-32, (28/3/1899) 34.

141 *LC Minutes* (19/9/1900) 134, (20/9/1900) 138-139.

142 *LC Minutes* (22/3/1912) 132, (25/3/1912) 135-136.

143 *LC Minutes* (2/12/1912) 154-155.

144 *LC Minutes* (16/12/1915) 229-231.

145 *LC Minutes* (28/3/1916) 287, (29/3/1916) 293, (30/3/1916) 300.

146 *LC Minutes* (13/4/1916) 345-347.

147 *LC Minutes* (8/3/1916) 252-253.

148 *LC Minutes* (7/9/1916) 76-77.

149 *LC Minutes* (27/9/1916) 129, (28/9/1916) 135-137.

150 *LC Minutes* (23/11/1916) 197-200.

151 *LC Minutes* (10/3/1927) 142-143, (11/3/1927) 147-148.

152 *LC Minutes* (28/3/1899) 34.

be willing to consider any further proposal which would have the effect of deciding the matters in dispute.<sup>153</sup>

There are only two instances where the Council has declined an Assembly request for a free conference. In 1898, the Council declined a request for a free conference on the Crown Lands Bill owing to the lateness of the session. As the Council's message to the Assembly said, the Council expressed its regret:

[T]hat it does not consider it practicable at this late period of the Session to enter into a Free Conference, which would involve a prolonged discussion, requiring more time than is now available for the proper consideration of so important a subject.<sup>154</sup>

On 7 April 1960 the Council also refused an Assembly request for a free conference on the Constitutional Amendment (Legislative Council Abolition) Bill, made pursuant to the provisions of section 5B of the *Constitution Act 1902*.<sup>155</sup>

The procedure of calling for free conferences when there was disagreement between the Houses on bills fell into disuse between 1927 and 1978. Rather than signifying a period of calm, however, there were many disagreements between the Houses during this period. Many bills were amended, lengthy messages passed between the Houses and major pieces of legislation were lost through disagreement.

It was not until 1978 that a free conference was again held to consider the Constitution and Parliamentary Electorates and Elections (Amendment) Bill, a bill to reconstitute the Council. The outcome of this free conference is discussed in detail in Chapter 2 (The New South Wales Legislative Council) and Appendix 2.

The most recent attempt to establish a free conference on a bill was on 29 June 2000, when the President reported the receipt of a message from the Assembly insisting on its disagreement to amendments made by the Council to the Dairy Industry Bill. In response, the Deputy Leader of the Opposition, the Hon Duncan Gay, sought leave to suspend standing orders to allow a motion to be moved forthwith to request a free conference with the Assembly. However, objection was taken to the suspension of standing orders and the matter lapsed.<sup>156</sup> Later during the sitting, the Council adopted the report of the committee of the whole that the Council do not insist on its amendments in the bill. A message was forwarded to the Assembly accordingly.<sup>157</sup>

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153 *LC Minutes* (26/9/1900) 144.

154 *LC Minutes* (7/7/1898) 48.

155 *LC Minutes* (7/4/1960) 213-215.

156 *LC Minutes* (29/6/2000) 575-576.

157 *LC Minutes* (29/6/2000) 580.

## THE RESOLUTION OF DEADLOCKS

Sections 5A and 5B of the *Constitution Act 1902*, inserted in 1933,<sup>158</sup> provide a mechanism to resolve deadlocks between the Houses. Section 5A provides that a bill for the 'ordinary annual services of the Government' may be forwarded to the Governor for assent, notwithstanding the failure of the Council to pass the bill. Section 5B allows for bills other than those for the 'ordinary annual services of the Government' to be submitted to a referendum, notwithstanding the failure of the Council to pass the bill.

### **Bills under section 5A of the *Constitution Act 1902***

Under section 5 of the *Constitution Act 1902*, the legislature is empowered to make laws for the peace, welfare and good government of New South Wales. However, section 5 contains a proviso that bills which appropriate any part of the public revenue, or which impose taxation or raise revenue, commonly referred to as money bills, must originate in the Assembly.

In turn, section 5A provides that an 'appropriation bill for the ordinary annual services of the government' cannot be blocked by the Council's failure to pass it in a form acceptable to the Assembly. Section 5A(1) states:

If the Legislative Assembly passes any Bill appropriating revenue or moneys for the ordinary annual services of the Government and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor for the signification of His Majesty's pleasure thereon, and shall become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill.

Section 5A(2) further provides that a bill is taken to have failed to pass the Council if it is not returned to the Assembly within one month after its transmission to the Council.

The power of the Council in relation to money bills is examined in greater detail in Chapter 13 (Financial Legislation).

### **Bills under section 5B of the *Constitution Act 1902***

Section 5B of the *Constitution Act 1902* provides a mechanism for resolution of disagreements between the Houses on all bills initiated in the Assembly other than a bill to which section 5A applies, that is, a bill which appropriates revenue for the ordinary annual services of government.

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<sup>158</sup> Originally there was no prohibition on the Council amending money bills and this provision was inserted as part of a package of reform of the Legislative Council by the *Constitution Amendment (Legislative Council) Act 1932*, No 2 of 1933.



A bill, other than a bill to which section 5A applies, which the Council rejects, fails to pass or passes with amendments to which the Assembly does not agree may be submitted to a referendum under section 5B, after certain procedures have been followed.

The bill must be introduced into and passed by the Assembly, and forwarded to the Council for concurrence. The Council must then reject or fail to pass the bill, or pass the bill with amendments to which the Assembly disagrees. A bill is taken to have failed to pass the Council if the bill is sent to the Council and is not returned to the Assembly within two months and the session continues.<sup>159</sup>

After the expiration of three months following the Council's rejection, failure to pass or unacceptable amendment of the bill, the bill may be re-introduced and passed by the Assembly during the same or the next session.<sup>160</sup> The bill, as re-introduced, may include amendments previously made by the Council, or originally made by the Assembly and previously agreed to by the Council, but in other respects should be identical to the bill as originally introduced into the Assembly.

If the Council again rejects or fails to pass the re-introduced bill, or passes the bill with amendments to which the Assembly disagrees, the bill is deemed to be rejected. The re-introduced bill is also deemed to be rejected if the bill is sent to the Council and the Council delays dealing with the bill for two months during the same session.

A free conference of managers of the Council and the Assembly may then be held.<sup>161</sup> Standing orders 128 to 134 deal with the appointment and conduct of conferences. At the free conference the managers for the Council may confer both orally and in writing with the managers for the Assembly. No vote is taken at the conference, and once it has concluded the managers must report the proceedings in writing to the Council as soon as practicable.

If there is still not agreement on the bill after the conference of managers, the Governor may convene a joint sitting of the Council and Assembly. The joint sitting deliberates on the bill as last proposed by the Assembly and any amendments made by the Council. Again, no vote is taken.<sup>162</sup>

Further communication may, but need not, take place between the Houses to bring about agreement. If no agreement can be reached, the Assembly, by resolution, may direct that the bill be submitted to a referendum. The bill submitted to a referendum is as last proposed by the Assembly, with or without any amendments subsequently agreed to by the Assembly and Council. The bill must be submitted to a referendum during the life of that Parliament or at the next general election. The day of the referendum is appointed by the Governor and must be no

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159 *Constitution Act 1902*, s 5B(4).

160 *Constitution Act 1902*, s 5B(1).

161 This is discussed in more detail in Chapter 21 (Relations with the Executive).

162 *Constitution Act 1902*, s 5B(1).

sooner than two months after the Assembly passes a resolution that the bill be submitted to a referendum. If the bill is approved by a majority of electors at a referendum, the bill is presented to the Governor for assent, notwithstanding that it has not been agreed to by the Council.<sup>163</sup>

The absolute minimum time frame for submission of a bill to a referendum under these procedures is nine months.

Only one bill, the Constitution Amendment (Legislative Council Abolition) Bill 1959, has been submitted to the people at a referendum under section 5B.<sup>164</sup>

### *Bills affecting the powers of the Council*

When a bill relates to the powers or constitution of the Council – that is, a bill under section 7A of the *Constitution Act 1902* – the day appointed by the Governor for the referendum must be during the life of the Parliament and not at the next general election, and not sooner than two months after the Assembly passes a resolution that the bill be submitted to a referendum.<sup>165</sup>

## THE SAME QUESTION RULE ON BILLS

As noted in Chapter 10 (Resolutions, Motions and Amendments), the same question rule is designed to prevent a question on a substantive or subsidiary motion being proposed which is the same in substance as one already determined in the same session, unless the order, resolution or vote was determined more than six months previously or has been rescinded (SO 103). However, the application of the rule to bills varies from its application to motions.

Taking a narrow construction of the rule as it applies to readings of a bill, such as the second reading, the question ‘That this bill be now read a second time’ is limited to that particular time, in that it is asking the House to agree to the second reading ‘now’. If the question is negatived, the same question rule would in theory prevent the bill from being considered again for six months.

In reality, the same question rule as it applies to bills is interpreted to allow the order of the day on a bill to be restored to the Notice Paper by motion on notice and for the second reading to be moved again the next day or on a subsequent sitting day, provided no other mechanism has been used to prevent the bill proceeding at that time, such as a ‘this day six months’ amendment.

Indeed, as noted, section 5B of the *Constitution Act 1902* provides a mechanism for the resolution of deadlocks which requires the Assembly to resubmit a bill which the Council has failed to pass, rejected, or passed with amendments unacceptable

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163 *Constitution Act 1902*, s 5B(1), (2), (3), (5)(b) and (5)(c).

164 This is discussed in greater detail in Chapter 2 (The New South Wales Legislative Council).

165 *Constitution Act 1902*, s 5B(3).

to the Assembly. Strict application of the same question rule would prevent this process from occurring.

There are a number of President's rulings where a motion to restore a bill to the Notice Paper after it has been defeated on the second reading has been ruled to be in order.<sup>166</sup> It has also been ruled that the House has not given its decision in the affirmative or negative until a final stage of the bill has been reached,<sup>167</sup> and that a bill which has been negated on the third reading and discharged may be restored.<sup>168</sup>

Similarly, in the Senate, the rejection of the motion for the second reading is not an absolute rejection of a bill and does not prevent the Senate being asked subsequently to grant the bill a second reading.<sup>169</sup> Indeed, the procedures provided for in section 57 of the Australian Constitution to resolve deadlocks on bills, whereby the Senate can be dissolved by the Governor General, specifically require the Senate to consider the same bill a second time.

Another aspect of the same question rule as it relates to bills concerns the presentation of two or more bills relating to the same subject. *Erskine May* states:

There is no general rule or custom which restrains the presentation of two or more bills relating to the same subject, and containing similar provisions. But if a decision of the House has already been taken on one such bill, for example, if the bill has been given or refused a second reading, the other is not proceeded with if it contains substantially the same provisions ...<sup>170</sup>

There are President's rulings that the House may entertain a question for the first reading of a bill which has a similar object to that contained in a clause of a bill which has been read a second time during the same session.<sup>171</sup> In addition, where the two Houses have disagreed to certain portions of a bill and the bill has been laid aside in the other chamber, the House may consider a bill on substantially the same subject which differs only in respect of the areas which gave rise to the disagreement.<sup>172</sup>

This aspect of the same question rule as it relates to bills was raised in 2002 in relation to a government bill and a private member's bill, and in particular whether the second reading of one bill would preclude the consideration of the second reading of the other.

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166 Rulings: Trickett (Deputy), *LC Debates* (20/11/1901) 3484; Flowers, *LC Debates* (11/12/1924) 4459; Willis, *LC Debates* (16/9/1993) 3240-3241.

167 Rulings: O'Connor (Deputy), *LC Debates* (28/3/1916) 5814-5815; Flowers, *LC Debates* (26/9/1916) 2033.

168 Ruling: Peden, *LC Debates* (25/11/1931) 7109-7111.

169 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 236.

170 *Erskine May*, 23rd edn, p 578, emphasis as per original.

171 Ruling: Peden, *LC Debates* (26/6/1934) 1249.

172 Ruling: Suttor, *LC Debates* (7/12/1904) 2128-2129.

The Save Callan Park Bill was introduced into the Council by a cross-bench member on 26 September 2002.<sup>173</sup> Debate on the motion for the second reading of the bill was adjourned according to standing order for five calendar days after the mover's second reading speech. On 31 October 2002, the second reading debate was resumed but adjourned on division, on motion of a Government member. Later the same day, a Government bill, the Callan Park (Special Provisions) Bill, was forwarded from the Assembly, read a first time and the second reading of the bill set down as an order of the day for the next sitting day.<sup>174</sup> The remaining stages of the Callan Park (Special Provisions) Bill were dealt with on 13 November 2002 and the bill returned to the Assembly.

The two Callan Park Bills were not identical. One bill consisted of 11 clauses, the other eight clauses. Some of the clauses, which had similar headings, had different content and while the purpose of the two bills, as stated in the long titles, was substantially the same, there were significant differences in the provisions of the two bills. The question as to whether the private member's bill could properly proceed once a decision was reached on the Government's bill was not dealt with in the House. However, the second reading of the Save Callan Park Bill did not proceed, and the same question rule as it applied to the two bills was left undecided.

A similar case arose in the House of Commons in the session 1994-1995 in which the presentation of a private member's bill was followed by the presentation of a government bill which covered similar but not identical ground. In that case, the Speaker ruled that, although the two bills overlapped, 'in many respects they are incompatible and they cannot be said to contain substantially the same provisions'. The Speaker further noted that '[t]o the extent that their provisions differ and are incompatible, the House may at some stage have a choice to make between them', but was not prepared to prevent the House from proceeding with the second reading of either bill.<sup>175</sup>

## PROTESTS AGAINST THE PASSING OF A BILL

Standing order 161 allows any member who objects to the passing of a bill to enter a protest in the minutes, copies of which will be forwarded to the Governor by the President. The protest must be lodged in the Clerk's 'Protest Book' once the bill has finally passed both Houses, and before the next sitting day commences.<sup>176</sup> Reasons are enumerated and other members may subscribe to the protest, or add additional reasons to their dissent, or lodge separate protests.

The first protest with reasons against the passage of a bill dates from 1641 in the British House of Lords. The practice in the Lords is that a protest must be made no

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173 *LC Minutes* (26/9/2002) 397.

174 *LC Minutes* (31/10/2002) 458.

175 *Erskine May*, 23rd edn, p 579.

176 Ruling: Hay, *LC Debates* (16/6/1887) 2117.

later than the end of business on the next sitting day, although leave may be granted to extend this period. The right to enter a protest is limited to those who were present and, in the case of a division, voted on the question to which they wish to protest.<sup>177</sup> When a protest has been drawn up, other Lords may either subscribe to it without remark if they assent to all the reasons assigned in it, or they may signify the particular reasons which have induced them to attach their signatures. Any protest or reasons, or part thereof, if considered by the House to be unbecoming, or otherwise irregular, may be ordered to be expunged. Protests or reasons expunged by order of the House have also been followed by a second protest against the expunging of the first protest or reasons. Leave has been given to Lords to withdraw their names from a protest, and to withdraw and amend a protest as certain facts were incorrectly stated.

The Council did not adopt in the standing orders a right to protest against the passage of a bill until 1860. Before that, members had occasionally availed themselves of the right to enter a protest or dissent in accordance with the practice of resorting to the rules, forms and usages of the Imperial Parliament (allowed under standing order 1 as it then was). The first entry made in the Council 'Protest Book' is dated 12 February 1857. It is a protest entered by the Hon Alfred Lutwyche against the third reading of the Loan Bill.

In November 1858 when the Governor forwarded to the Secretary of State the newly assented to Pastoral Lands Assessment and Rent Act, it was accompanied by a Despatch in which His Excellency made, among others, the following remarks:

It appears that when this Act, having been passed by the Legislative Assembly, was submitted to the Legislative Council, it received the assent of the majority, but certain Members were permitted to enter a Protest against it. It was then brought up to me in the usual manner, no reference being made to the Protest.<sup>178</sup>

In order to avoid a recurrence of such an omission, and to enable the Governor to consider the grounds of objection contained in any protest against the passing of a bill which in future might be presented to him for the Royal Assent, on 16 February 1860 the Council resolved that the Standing Orders Committee:

consider and report upon the propriety of adopting a Standing Order requiring the transmission of all Protests entered on the Minutes of Proceedings against the passing of any Bill to His Excellency the Governor General, for consideration when it is presented to him for the Royal Assent.<sup>179</sup>

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177 *Erskine May*, 23rd edn, p 532.

178 'Report from the Standing Orders Committee of the Legislative Council in reference to the protests against the passing of any bill', *LC Minutes* (1859-1860) Vol 5, Part 1, p 172.

179 *LC Minutes* (15/2/1860) 60.

The Committee subsequently recommended the adoption of a standing order covering protests, and cited in support in its report the standing order of the House of Lords, adopted on 27 February 1721:

That such Lords as shall make protestation or enter their dissents to any votes of this House, as they have a right to do without asking leave of the House, either with or without their reasons, shall cause their protestation or dissents to be entered into the Clerk's book the next sitting day of this House, before the hour of two o'clock, otherwise the same shall not be entered; and shall sign the same before the rising of the House the same day.

In accordance with the recommendation of the Standing Orders Committee, the Council adopted a standing order covering protests on 18 April 1860.<sup>180</sup> It has been retained with minor modifications ever since.<sup>181</sup>

In 1890, President Hay ruled that every member, following the example of the House of Lords, has the right to protest against any vote; and it is not for the Chair to say whether it is exercised properly or not. However, if a protest contains a statement which is known to be inconsistent with fact, it is the duty of the Chair to point out to the member, through the Clerk, that it is necessary to correct that statement. The President also ruled that a protest should lie upon the Table of the House during the hours when it is open for signature by members.<sup>182</sup>

During the 19th century, members made frequent protests against the passage of bills. Between 1857 and 1899, a total of 35 protests were lodged. The Hon Leopold Fane De Salis, a member of the Council for 23 years, protested on no less than seven occasions. Even the Hon Sir Terence Aubrey Murray, when President of the Council, was moved to protest on two occasions. The last entry from this period made in the 'Protest Book' was dated 22 November 1899, after which the practice of protesting fell into disuse for almost 100 years.

Of the protests that were lodged during the 19th century several appear to have been anomalous. One protest was expunged from the minutes by motion made without notice and as a matter of privilege, the House having determined that the statements made in the protest entered by the Hon Louis Heydon reflected upon the motives of certain members. The protest was ordered by the House to be read by the Clerk before the vote on the motion that it be expunged. On another occasion the House, by consent and without previous notice, gave leave to a member to sign a protest after the time for signing had lapsed. On another occasion although a member drew attention to a matter of privilege that a bill had passed

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180 The standing order provided: Whenever any Bill shall have finally passed both Houses, against the passing of which any Member shall have entered a Protest upon the Minutes, the President shall forthwith forward copies of such Protest to His Excellency the Governor General. *LC Minutes* (18/4/1860) 71 and 175.

181 Standing order 161 currently provides: Any member objecting to the passing of a bill may have a protest entered in the Minutes, copies of which will be forwarded to the Governor by the President.

182 Ruling: Hay, *LC Debates* (10/7/1890) 1987-1988.

through all stages and been assented to before expiration of the time period during which protests could be lodged, no action was taken.

When a member has lodged a protest, other members have also subscribed to the terms of the protest, and have added further reasons.<sup>183</sup>

However, following the protest in 1899, it was not until 1986 that members of the Council again exercised their right to lodge a protest. On 12 November 1986 several protests were lodged against the passage of the Judicial Officers Bill.<sup>184</sup> The protests were signed by most of the opposition as well as cross-bench members, including a member who was absent throughout the duration of the proceedings on the bill in the House. The protests ranged from objection to the lack of wide ranging debate and extensive inquiry allowed on the bill, to concern that the bill represented a threat to the tenure, impartiality and independence of judges and would allow the tactical use of complaints against justices in the conduct of their duties. It was also asserted that the bill diminished the role of the Parliament in the removal of Supreme Court judges. The relevant entry appeared in the minutes the next day and the protests were forwarded to the Governor. Notwithstanding the protests the bill was assented to on 18 November 1986.

The most recent protest was lodged on 1 December 2005 against the passage of the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005.<sup>185</sup> Signed by several cross-bench members, the grounds of the protest were that there had been insufficient time to give thorough consideration to all the implications of the bill for Australian society, that the bill had been passed in an attempt to complement federal legislation before that legislation had been passed by the Commonwealth Parliament, and that the bill would have the effect of unduly and without sound justification trespassing on various rights and freedoms which are fundamental to a democratic society. Again the bill was assented to, despite the protest, on 7 December 2005.

## **BILLS SUBMITTED TO A REFERENDUM**

Part 2 of the *Constitution Act 1902* dealing with the powers of the Legislature provides for the conduct of a referendum on bills in certain circumstances:

- Section 5B provides a mechanism for resolution of disagreements between the Houses on all bills initiated in the Assembly other than a bill to which section 5A applies, that is, a bill which appropriates revenue for the 'ordinary annual services of the government'. Section 5B allows for a bill, other than a bill for the 'ordinary annual services of the government', to be

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183 See, for example, the Grants for Public Worship Prohibition Bill, *LC Minutes* (5/11/1862) 135-136.

184 *LC Minutes* (13/11/1986) 468-469.

185 *LC Minutes* (1/12/2005) 1809.

submitted to the electorate at a referendum, notwithstanding the failure of the Council to pass the bill.

- Section 7A requires that a bill for the abolition or dissolution of the Council, or to alter its powers, or the processes for the conduct of a periodic Council election, shall not be presented to the Governor for assent unless first passed by both Houses and approved at a referendum by a majority of the electors. Section 7A is itself entrenched, with the result that it cannot be altered or repealed except by a bill similarly approved at a referendum.
- Section 7B requires that a bill to amend the electoral arrangement for the Assembly, including to amend the duration of the Assembly or the date required for the taking of the poll, together with a bill that affects the independence of the judiciary, shall not be presented to the Governor for assent unless first passed by both Houses and approved at a referendum by a majority of the electors. Section 7B is also itself entrenched, and again cannot be altered or repealed except by a bill similarly approved at a referendum.

Sections 5B and 7B specifically provide that a referendum conducted under those sections is to be conducted in accordance with the provisions of the *Constitution Further Amendment (Referendum) Act 1930*. This act essentially applies the provisions of the *Parliamentary Electorates and Elections Act 1912* to the conduct of referenda so that they can be held jointly with general elections. The Act also sets out the processes for the conduct of a referendum, including the issuing of the writ by the Governor, voting, counting of votes after the close of polls, return of writs and disputed returns.

By contrast, section 7A does not provide that a referendum conducted under that section is to be conducted under the provisions of the *Constitution Further Amendment (Referendum) Act 1930*. As a result, a referendum conducted under section 7A is conducted in a manner appointed by the Legislature. As an example, in 1978, specific legislation was introduced by the Wran Government to facilitate a referendum on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill to reconstitute the Council. That legislation was itself passed by both Houses of Parliament in order to facilitate the conduct of the referendum.

A bill put to a referendum may only receive assent if the bill is approved by the people.

## ASSENT TO BILLS

### Background

A bill, after it has passed both Houses of Parliament, and if necessary has received approval at a referendum, can only become an Act once it has been assented to by the Governor. Section 8A of the *Constitution Act 1902* provides:



**8A. Assent to Bills**

- (1) Except as otherwise provided by this Act, every Bill:
- (a) shall be presented to the Governor for Her Majesty's assent after its passage through the Legislative Council and the Legislative Assembly, and
  - (b) shall become an Act of the Legislature when it is assented to by the Governor in the name and on behalf of Her Majesty.
- (2) Nothing in subsection (1)(b) precludes Her Majesty from assenting to a Bill while Her Majesty is personally present in the State.

Section 8A was inserted into the *Constitution Act 1902* in 1987. Before 1987, the requirement for assent to bills was found in section 31 of the *Australian Constitutions Act (No 1) 1842 (Imp)*.<sup>186</sup> Following the passage of the *Australia Acts 1986*,<sup>187</sup> the *Constitution (Amendment) Bill 1987 (NSW)* repealed section 31 of the *Australian Constitutions Act (No 1) 1842 (Imp)* and inserted section 8A into the Constitution.<sup>188</sup> In his second reading speech on the Constitution (Amendment) Bill 1987 the Leader of the Government in the Council stated:

With the severing of residual constitutional links with the United Kingdom, certain provisions in Imperial legislation still in force in New South Wales have become anomalous. The bill will repeal such provisions. However, it re-enacts the requirement in the Australian Constitution Act 1842 that bills be presented to the Governor for assent. The proposed legislation enhances the independence of New South Wales from the United Kingdom by ensuring that the constitution of the office of Governor and matters relating to the Executive Council are dealt with in the Constitution Act and are now entirely a matter for this sovereign Parliament.<sup>189</sup>

**Procedures for assent**

Under standing order 160(1), a bill originating in the Council and finally passed by both Houses is printed and presented by the President to the Governor for Her Majesty's assent. A similar provision is contained in standing order 239 of the Legislative Assembly for bills originating in the Assembly.

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186 Section 31, in part, provided:

XXXI. And be it enacted, That every Bill which has been passed by the said Council, and also every Law proposed by the Governor which shall have been passed by the said Council, whether with or without Amendments, shall be presented for Her Majesty's Assent to the Governor of the said Colony, and that the Governor shall declare according to his Discretion, but subject nevertheless to the Provisions contained in this Act, and to such Instructions as may from Time to Time be given in that Behalf by Her Majesty, Her Heirs and Successors, that he reserves such Bill for the Signification of Her Majesty's Pleasure thereon; ...

187 The *Australia Acts 1986* allowed New South Wales to repeal British laws applying to the State by paramount force.

188 For a detailed discussion of the background, development and legal issues surrounding assent, see Twomey A, *The Constitution of New South Wales*, The Federation Press, Sydney, 2004, pp 216-240.

189 *LC Debates* (27/5/1987) 12511.

The printed bill, including any amendments, is prepared by the Parliamentary Counsel's Office and printed on paper akin to a vellum, from which it derives the title of the 'vellum'. The vellum is then signed by the Clerk to certify that the bill has passed both Houses. It is then sent to the Governor for assent.

Traditionally, when the vellum was received, the Governor would send a copy of the bill to the Attorney General (as the first Law Officer of the State) requesting the Attorney's opinion as to whether the bill should be assented to, or whether there were grounds for the Governor reserving assent 'for the signification of Her Majesty's pleasure'.<sup>190</sup>

However, under current practice, the Clerk of the originating House forwards a copy of the bill to the Attorney General at the same time as the vellum is transmitted to the Governor. The Attorney General in turn sends an 'opinion' to the Governor, signed by the Attorney General, the Solicitor General and the Director General of the Attorney General's Department, that there is no objection to the Governor's assent to the bill. While there is no statutory provision requiring a legal opinion on the bill, the Governor does not assent to any legislation until the Attorney General's opinion has been received. The Governor then signs the vellum.

Once a bill has been assented to, a message is forwarded to both Houses signifying assent, and the original signed vellum is returned to the relevant Clerk. The Act, as it has now become, is numbered by the Clerk immediately before the title, in the order of assent, with the date of assent added after the title. A new series of numbers is commenced from the January of each year (SO 162(1)).

After numbering, the Clerk sends the Act to the Register General for enrolment in accordance with section 50 of the *Constitution Act 1902* (SO 162(2)). Section 50, inserted in 1984,<sup>191</sup> provides:

**50. Enrolment of Acts**

All Acts enacted by the Legislature shall, within 10 days from the day on which they respectively become law, be transmitted to and enrolled and recorded in the office of the Registrar-General.

The originals of all Acts assented to by the Governor, after numbering, are kept in the Registrar General's Department.

Details of assent are published in the Gazette under the authority of the Clerk (or the Clerk of the Legislative Assembly), showing the Act number, long title, short title and date of assent.

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190 Rose LJ, *The Framework of Government in New South Wales*, Government Printer, Sydney, 1972, p 61. Since the passage of the *Australia Acts 1986*, bills are no longer reserved for Royal Assent, although the Governor still has discretion to reserve assent on bills which do not conform to appropriate manner and form provisions.

191 Before 1984, the enrolment of Act was provided for in 6(1) of the *Registration of Deeds Act 1897*.

## Reservation of assent

Before the passage of the *Australia Acts* in 1986, bills relating to certain matters were reserved for assent by the Sovereign:

- Section 40 of the *Australian Constitutions Act (No 1) 1842*<sup>192</sup> provided that the Sovereign could convey instructions to the Governor regarding the power to assent to, dissent from, or reserve bills for Her Majesty's pleasure. The classes of bills which were to be reserved for Royal Assent included those dealing with divorce, grants of money or land, the currency of the colony, imposition of duties, the discipline or control of the military, and bills affecting the rights and property of imperial subjects. The Governor was also prohibited from assenting to any bill which contained provisions to which Royal Assent had been previously refused, or which had been disallowed.<sup>193</sup>
- Section 31 of the *Australian Constitutions Act (No 1) 1842* provided that all bills altering the electoral districts, the number of members returned by them or the number of members of the Council, as well as bills altering the salaries of the Governor or any judges, or affecting customs duties, had to be reserved for Royal Assent, unless they were of a temporary character or necessary in an emergency. Furthermore, none of these bills could come into effect unless Royal Assent was given within two years from presentation to the Governor.<sup>194</sup>

With only minor changes, the provisions regarding reservation of assent remained in force until the passage of the *Australia Acts* in 1986.<sup>195</sup> The *Australia Acts 1986* provides:

### 9. State laws not subject to withholding of assent or reservation

(1) No law or instrument shall be of any force or effect in so far as it purports to require the Governor of a State to withhold assent from any Bill for an Act of the State that has been passed in such manner and form as may from time to time be required by a law made by the Parliament of the State.

(2) No law or instrument shall be of any force or effect in so far as it purports to require the reservation of any Bill for an Act of a State for the signification of Her Majesty's pleasure thereon.

The Act also confers on the Governor exclusively the powers and functions of Her Majesty in respect of the State, save that when Her Majesty is personally present in the State she is not precluded from exercising any of Her powers and functions in respect of the State.

<sup>192</sup> *Australian Constitutions Act (No 1) 1842* 5 & 6 Vic, c 76 (1842) (Imp).

<sup>193</sup> Twomey, above n 188, p 231.

<sup>194</sup> *Ibid*, p 232.

<sup>195</sup> For a detailed examination of the issues surrounding reservation of assent, and the confusion and mistakes which were perpetrated in relation the requirements of reservation, see Twomey, above n 188, pp 230-240.

The effect of these provisions is that the Governor now has power to assent to all bills that have been passed in the manner and form required by law. The *Australia Acts* specifically preserve 'manner and form' laws passed by the State, although imperial 'manner and form' laws no longer have effect. The express preservation of 'manner and form' provisions means that the Governor is only entitled to withhold assent to bills which are passed other than in accordance with the prescribed manner and form.

### Errors in bills assented to

There have been instances in the Commonwealth and British Parliament where a bill has been assented to which has not been passed by both Houses. These are described in the various authorities cited.<sup>196</sup>

### COMMENCEMENT OF ACTS

An Act of Parliament or statute is a bill which has passed through its various stages in both Houses of Parliament and received the Royal Assent. Although a bill becomes a law when it is assented to by the Governor, it does not necessarily come into effect as a law at that time.

Under section 23(1) of the *Interpretation Act 1987*, a bill which has been assented to by the Governor is deemed to commence 28 days after the date of assent unless the bill provides for commencement on another day by proclamation or otherwise.<sup>197</sup> Some bills specify the day of assent as the day of commencement and some specify a particular date. Many bills provide that their provisions are to commence on a day or days to be appointed by proclamation.<sup>198</sup>

The failure of some bills to include a provision specifying a date of commencement, instead stipulating that the legislation should come into effect on a date to be proclaimed, has led in some instances to delay in the proclamation of certain pieces of legislation. Although this kind of provision is administratively convenient, allowing the government to delay the commencement of the operation of a law until administrative arrangements or regulations are in place for the law to operate effectively, it confers a great deal of power on the executive government to determine when, if ever, the provisions of a bill passed by the Parliament will have effect.<sup>199</sup>

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196 *Odgers*, 11th edn, p 266; Harris IC (ed), *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p 396; *Erskine May*, 23rd edn, p 663.

197 *Interpretation Act 1987*, s 23(1)(b) and (c).

198 That is, publication in the Government Gazette.

199 See the Legislation Review Committee, *Annual Review 2004/2005*, Report No 3, September 2006, pp 11-12. See also the Legislation Review Committee, *Legislation Review Digest No 10 of 2004*, 30 August 2004, pp 52-56.

Under standing order 160(2), a list of all legislation which has not been proclaimed 90 days after assent is tabled in the House on the second sitting day of each month. This procedure was first adopted as a sessional order in 1990, following a 1988 example in the Senate.

In 1999, the House debated a motion that the Special Minister of State and Assistant Treasurer, the Hon John Della Bosca, attend in his place and explain his failure to act should the proclamation of the commencement of a section of the *Motor Accidents Compensation Act 1999* not occur by a given date. The debate was adjourned and remained on the Notice Paper until interrupted by prorogation.<sup>200</sup>

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<sup>200</sup> LC Minutes (16/11/1999) 219-220.