

## CHAPTER 7

### MEETINGS OF THE LEGISLATIVE COUNCIL

For an effective system of representative and responsible government, it is essential that Parliament meet regularly. The provisions of the *Constitution Act 1902* guarantee the continuity of Parliament and provide for regular meetings of the Parliament.

#### INITIAL MEETING OF EACH PARLIAMENT FOLLOWING AN ELECTION

As discussed in Chapter 4 (Elections), the *Constitution Act 1902* provides for the periodic election of one-half of the Council and the general election of the Assembly every four years. The date of the election is fixed as the fourth Saturday in March of the relevant year, unless the Assembly is dissolved sooner in the circumstances set out in section 24B of the Act.<sup>1</sup> Periodic elections for the Council and general elections for the Assembly are held pursuant to writs issued by the Governor.<sup>2</sup> Amongst the matters specified in the writ is the date by which the writ must be returned to the Governor with the names of the candidates elected endorsed on the writ (approximately seven weeks after the election day).<sup>3</sup> The *Parliamentary Electorates and Elections Act 1912* requires that the Council and the Assembly meet not later than the seventh clear day after the date of the return of the writs.<sup>4</sup>

#### SESSIONS AND SITTINGS

The Governor convenes the Council and the Assembly to meet for each new session and prorogues a session of the Council and the Assembly by proclamation published in the Government Gazette.<sup>5</sup>

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1 *Constitution Act 1902*, ss 22A and 24.

2 *Ibid*, s 11A.

3 *Parliamentary Electorates and Elections Act 1912*, ss 68, 74 and 129G. The return date for the writ is generally not later than the 60th day after the date of issue of the writ unless a later date is directed by proclamation of the Governor.

4 *Ibid*, ss 69 and 74B.

5 *Constitution Act 1902*, s 10.

A 'Parliament' commences on the date of the first meeting of the Parliament following a periodic election for the Council and a general election for the Assembly, and ends on the dissolution or expiry of the Assembly (on the Friday before the first Saturday in March in the fourth calendar year after the return of the writs for election of that Assembly). The Parliament that ended on 15 January 2007 was known as the 53rd Parliament (since the establishment of responsible government in 1856). The Parliament that commenced on 8 May 2007 after the return of the writs for the election held on 24 March 2007 was the 54th Parliament. A new Parliament commences by an 'opening' either by the Governor or Commissioners on behalf of the Governor, or on rare occasions by the Queen.

Within each Parliament there are a number of 'sessions'. Section 11 of the *Constitution Act 1902* provides that there must be a session of the Council and Assembly once at least in every year, and that a period of 12 months must not intervene between the last sitting of the Council and Assembly in one session and the first sitting of the Council and Assembly in the next session.

A 'session' of Parliament commences after every election and following a prorogation of Parliament. In this context a 'session' is the period between the meeting of Parliament and its subsequent prorogation, which brings a session to an end. There is no requirement in section 11 as to when a session is to commence following a prorogation. Like other Crown prerogatives, the timing of sessions of Parliament is, in practice, decided upon on the advice of the executive government.<sup>6</sup>

The period between the prorogation of a session of Parliament and its next meeting is termed a 'recess'.

The duration of a session of Parliament is not fixed and a session may overlap calendar years. However, it has become common practice for the initial session of a Parliament to be relatively short, followed by a number of additional sessions, some of which may continue for more than 12 months. This is despite the wording of section 11 of the *Constitution Act 1902*, which seems to envisage annual sessions of Parliament. For example, the 52nd Parliament consisted of three sessions:

- First session: 11 May - 11 August 1999 (16 sitting days);
- Second session: 7 September 1999 - 20 February 2002 (141 sitting days);
- Third session: 26 February 2002 - 28 February 2003 (52 sitting days).

By contrast the 53rd Parliament consisted of just two sessions: the first began on 29 April 2003 and ended on 19 May 2006 and the second commenced on 22 May 2006 and ended on 15 January 2007.

Section 6 of the Commonwealth Constitution is almost identical to section 11 of the *Constitution Act 1902*. Between 1957 and 1961 the Commonwealth Parliament was prorogued to enable annual sessions. However, it has now become common-

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<sup>6</sup> Note, however, that s 24B(5) of the *Constitution Act 1902* specifically retains the prerogative of the Governor to dissolve the Assembly despite the advice of the Premier or the Executive Council.

place for there to be a single session in each Parliament at the Commonwealth level, and session has in practice been interpreted as ‘sitting period’.<sup>7</sup> Prorogations of the Commonwealth Parliament have become rare, apart from those immediately before the end of a Parliament, and have been the result of unusual circumstances such as enabling the Monarch to open the next session of Parliament, or following the death of the Prime Minister.

Notwithstanding the tendency at both State and Commonwealth levels to have long sessions of Parliament, there has been some support expressed for the possibility of returning to regular annual prorogations. Regular prorogations and annual sessions of Parliament would provide:

- a regular statement of government policy and intentions in the form of the opening speech of the head of state, which is then the subject of wide ranging debate by members;
- a regular, comprehensive clearing of the Notice Paper;
- an opportunity for defeated legislation to be considered again in the next session.<sup>8</sup>

Within a session of the Council, there are a number of ‘sitting periods’. Established practice is for there to be two major sitting periods each calendar year: an autumn sitting period and a spring sitting period. In recent years, the annual appropriations have been dealt with during the autumn sitting period, which has become known as the budget sitting period.<sup>9</sup>

During the course of sittings within a session, the House may adjourn itself. The periods between one sitting day and the next, between sitting weeks, and between the breaks in the major sitting periods are termed ‘adjournments’. The motion for the adjournment of the House is moved by a member of the government, either a minister under standing order 31(2) or a parliamentary secretary under standing order 25. Where the House is to be adjourned to a date other than the next day of sitting, as determined in a sessional order adopted at the commencement of a session, a ‘special adjournment’ is required to fix the date and hour of the next sitting. Otherwise the House is required to meet on the next sitting day as set out in the sessional order.<sup>10</sup> The timing of ‘sitting periods’ is usually a matter for determination by the executive government. However, under the standing orders the House can be recalled at the request of an absolute majority of members (SO 36(1) and (2)).

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7 Harris IC (ed), *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p 227.

8 *Ibid*, p 228.

9 Sometimes inaccurately referred to as the budget ‘session’.

10 This typically occurs when it is desired that the House is to adjourn on a Thursday until Tuesday next, rather than the Friday or Monday specified in the sessional order.

## OPENING OF PARLIAMENT

Traditionally, the opening of a new session of Parliament takes place in the Council chamber. There are two types of openings: official openings, involving the presence of the Governor or infrequently the Monarch, and commission openings, where the Governor appoints commissioners to open the Parliament on his or her behalf.

### Commission openings

It has become common practice for the opening of the first session of a new Parliament following an election to be conducted by commissioners appointed by the Governor. There are two reasons for this. First, the incoming or re-elected government may not be in a position to have the Governor present its legislative program in a comprehensive fashion (as outlined below) within the timeframe for the initial meeting of the new Parliament. Secondly, the swearing in of new members and the election of the President and the Speaker, which take place following the opening of the first session, may be lengthy and may lead to unpredictable outcomes.

#### *Joint sitting to hear commissioners' message*

For a commission opening of Parliament, the House meets at the time appointed by proclamation of the Governor and the Clerk reads the proclamation convening Parliament to meet. The Clerk then announces the names of commissioners appointed by the Governor to open Parliament.<sup>11</sup> The commissioners – usually three ministers in the Council are appointed commissioners to open Parliament – take their place on the dais. A commissioner then directs the Usher of the Black Rod to request the attendance of the Assembly in the Council chamber to hear the commissioners' message on the opening of Parliament. When Assembly members are present in the House, the Clerk reads the commission appointing the commissioners to open Parliament and to deliver messages to both Houses. A commissioner, usually the Leader of the Government in the Council, then reads a message from the Governor informing members that after the swearing in of new members, the Council must elect a President and the Assembly must elect a Speaker.<sup>12</sup> Assembly members then return to their chamber.

#### *Swearing in of newly elected members*

Following the departure of Assembly members, the Clerk announces receipt of the writ for the periodic Council election and reads the names of newly elected members (SO 6(h)). The Clerk announces the names of the commissioners appointed by the Governor to administer the pledge of loyalty to members, usually

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11 See, for example, *LC Minutes* (8/5/2007) 3.

12 See, for example, *LC Minutes* (8/5/2007) 4.

the same commissioners appointed to open Parliament, and then reads the commission (SO 6(i)). New members then make a pledge of loyalty, as required by law, before the commissioners and sign the roll of the House (SO 6(j)). The swearing in of members is discussed further in Chapter 5 (Members).

### *Election and presentation of the President*

After the commissioners have left the dais, the Clerk then proceeds with the election of the President. The procedure for the election of the President is outlined in Chapter 6 (Office Holders and Administration of the Council). Once the President is elected, the Leader of the Government informs the House of the date and time at which the Council will proceed to Government House to present their President to the Governor. Depending on the time set by the Governor to receive the Council, the House may proceed directly to Government House, adjourn or transact business.

The President is presented to the Governor at the appointed time.<sup>13</sup> When the House returns from Government House the President reports that he or she has been presented to the Governor.

### *Other matters*

It is common for a variety of other matters to be dealt with at the first sitting. The House, under standing order 15, elects a member to be Deputy President and Chair of Committees. A ministerial statement is usually made by the Leader of the Government about the new administration, and party leaders and whips are announced. Standing orders have sometimes been suspended to allow the adoption of sessional orders and the appointment of committees.

### *'Pro forma' bill*

It is customary that, following the opening of each new session of Parliament, a 'pro forma' bill is read for the first time. This custom arises from the practice of the House of Commons and House of Lords, since the 17th century, of asserting the right of each House to deliberate on any matter it wishes to discuss, rather than being bound to give first consideration to the causes for the summons of the Parliament by the Crown. The practice of reading a 'pro forma' bill in the Council at the beginning of the session commenced in 1856.<sup>14</sup> Since 1901, the 'pro forma' Law of Evidence Bill has been used. Debate on the bill is out of order, but the bill is recorded as having been read a first time. No date is fixed for the second

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13 Following the election of President Burgmann in 2003, she was presented to the Governor after the adjournment of the House, *LC Minutes* (7/5/2003) 69. In 2007, the President, having been elected on 8 May 2007, was not presented to the Governor until 25 September 2007 following a three-month adjournment, *LC Minutes* (25/9/2007) 253.

14 See the Infants Real and Personal Estate Bill, *LC Minutes* (23/5/1856) 5.

reading, and nothing more is heard of the bill until it is read a first time at the start of the next session.

### Official openings

Following the prorogation of the first session of a Parliament, subsequent openings in an existing Parliament may take the form of either an official opening or a commission opening.

An official opening takes place in the presence of the Governor of New South Wales<sup>15</sup> or, on rare occasions, the Monarch. The first occasion on which the Monarch was present in the chamber for the opening of the session was on 4 February 1954 during the visit to Australia by Queen Elizabeth II – the first by a reigning sovereign. The Queen was present again for the opening of Parliament on 20 February 1992.<sup>16</sup>

Official openings of Parliament are traditionally accompanied by considerable pomp and ceremony. The Governor arrives at the Parliament under mounted police escort and the Vice Regal Standard is broken out as the President formally receives the Governor. The Governor receives the Vice Regal Salute and inspects the Guard of Honour, which in the past has consisted of the military, the Mounted Police Troop or representatives of the Emergency Services. Recently, however, the opening ceremony has been considerably scaled down and much of the pomp has been done away with.<sup>17</sup>

The official opening takes place in the Council chamber since, by convention, the Monarch or the Monarch's representative does not enter the lower House. This convention reflects the historical development of the House's right to freedom of speech and uninterrupted debate.

The official opening ceremony arises from the struggle for power over several centuries in Britain between the sovereign and Parliament. The English monarchy, always dependent, at least to some extent, on the nobility, adopted or was forced to adopt the practice of calling together parliaments of nobles and commoners, particularly when additional funds were needed. In return for approving taxes, these parliaments increasingly demanded more say in relation to the expenditures, as well as demanding settlement of various grievances before taxes were approved. The parliaments also adopted the practice of passing laws themselves.

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15 On 22 May 2006, in the absence of the Governor from the State, the Lieutenant-Governor (Chief Justice Spigelman) was present at the official opening to celebrate the sesqui-centenary of responsible government, *LC Minutes* (22/5/2006) 2.

16 *LC Minutes* (20/2/1992) 1-4.

17 The ceremony for the opening of the third session of the 52nd Parliament on 26 February 2002 included representatives of the emergency services in recognition of their role in fighting recent bushfires and other emergencies. This opening ceremony demonstrated the scope for the ceremony to be used in a creative manner to recognise community service. The arrangements for the ceremony are at the discretion of the President (although, in practice, arrangements are made in consultation with the Speaker).

This increasing struggle for authority culminated in the mid-17th century with the English Civil War. A parliamentary victory established its supremacy and, even when the monarchy was restored, the *Bill of Rights 1689* and other measures guaranteed the supremacy of Parliament.

The barring of the lower House doors to the Monarch or his or her representative arose from the well-known incident in 1642 in the months before the English Civil War broke out, as described in Chapter 3 (Privilege), when Charles I entered the House of Commons, accompanied by armed soldiers in an attempt to arrest five members of the House. King Charles' entry into the House of Commons remains the first and last time a Monarch has ever done so and, indignant at this breach of privilege and in defence of their rights, lower Houses have barred their doors to the Monarchy ever since.

Of course, the Council is significantly different to the House of Lords. As the House is now democratically elected under a system of proportional representation it reflects the range of views and interests of the community rather than those of the 'nobility'. However, through the traditional ceremony for the opening of Parliament, the Council and the Assembly express the independence of the people's representatives from the Crown and thereby celebrate the freedoms inherited from the centuries of struggle between the Westminster Parliament and the Crown.

### *Joint sitting to hear the speech by the Governor or Monarch*

Official openings in the Council chamber commence with the President taking the Chair at the appointed time and the Clerk reading the proclamation of the Governor convening Parliament. Official guests are also seated in the Council chamber. Following the arrival of the Governor and announcement to the House, the Governor directs the Usher of the Black Rod to summon the members of the Assembly to the Council chamber. When Black Rod arrives at the Assembly chamber, the doors are shut and barred. The Usher of the Black Rod raps three times on the door with the Black Rod and awaits the Speaker's invitation to enter the chamber. The Usher of the Black Rod then delivers the message summoning the members to the Council chamber. Led by the Usher of the Black Rod, the Sergeant-at-Arms and the Speaker, members of the Assembly walk in procession to and assemble in the Council chamber. The Governor then delivers the official opening speech which declares the causes of calling Parliament together. The speech, which is composed by the executive, is the centrepiece of an official opening. It reviews current policy issues and outlines the government's broad legislative program for the upcoming session.<sup>18</sup> On conclusion of the speech by the Governor, the President and the Speaker each receive a copy of the speech from the Governor to report to their respective Houses. The Governor then retires from the chamber.

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<sup>18</sup> The text of the speech has been recorded in the Minutes of Proceedings since 1856; see, for example, *LC Minutes* (23/5/1856) 3, (22/5/2006) 3.

From 1856 until 1910 it was not uncommon for the Governor to attend and give a speech to both Houses on the second sitting day following a commission opening,<sup>19</sup> once the Assembly had elected a new Speaker, but this is now a rare occurrence.<sup>20</sup>

### *Address-in-Reply debate and presentation of address*

At the next sitting of the House following an official opening, the first item of business is the presentation of the 'pro forma' bill (discussed above). The President then reports receipt of a copy of the Governor's speech, whereupon by tradition a backbench member of the government moves a motion 'That the following Address be adopted and presented by the whole House to the Governor in reply to the speech which Her/His Excellency had been pleased to make to both Houses of Parliament: [followed by the content of the Address]'. The Address expresses the thanks of members for Her/His Excellency's speech, together with loyalty to the Sovereign.<sup>21</sup> The motion is seconded by another backbench member of the government (SO 8(2)), and is the only motion that requires a seconder.

Members are given wide latitude in their contributions to the debate on the Address-in-Reply, although members' remarks should be relevant to something in the Governor's speech. The debate often becomes a wide-ranging discussion on any matter which may properly be considered by Parliament, including the conduct of the government, the administration of government departments, any proposed legislation and the need for other legislative measures to be taken.

Originally, after the President either read or reported the Governor's opening speech to the House, a select committee was appointed to prepare an answer in response. The business of the House was suspended while the committee met and reported the proposed wording of the address to the House, which was then read by the Clerk. A motion was then moved and seconded to adopt the Address-in-Reply, as read. Debate on the motion often commenced and concluded in the one day.

The practice of a select committee being appointed to draft the wording of the address ceased in 1875. This followed an incident when a point of order was raised on a proposed amendment after the President had proposed the question for adoption of the address. Relying on the practice of the British Parliament in *Erskine May*, the President ruled the amendment out of order,<sup>22</sup> although noting that there had been a departure from this practice in 1861, when an amended address was adopted.<sup>23</sup> Subsequently, the standing orders committee

19 See, for example, *LC Minutes* (23/5/1856) 3, (16/11/1910) 6.

20 *LC Minutes* (19/8/1952) 12-15, (10/8/1966) 14-20.

21 See, for example, *LC Minutes* (12/3/2002) 45-46. However, in its Address-in-Reply to the Governor's opening speech on 22 May 2006, the Council expressed its loyalty 'to Australia and to the people of New South Wales', *LC Minutes* (24/5/2006) 42-43.

22 *LC Minutes* (28/1/1875).

23 See *LC Minutes* (11/1/1861) 8-9, (14/1/1861) 12-13.



was instructed to ascertain the procedure followed in the House of Lords. Following adoption of the report of the committee,<sup>24</sup> the present practice, whereby the terms of the address are included in the motion for adoption of an Address-in-Reply, commenced.<sup>25</sup>

As this present practice has developed, the length of debate on the motion for adoption of an Address-in-Reply has grown. It 1956, on the centenary of responsible government, the debate on the Address-in-Reply continued over several days.<sup>26</sup> It is now commonplace for the House to deal with other business, including both government business and private members' business during the currency of the debate on the Address-in-Reply.<sup>27</sup> The executive now provides the draft wording of the Address-in-Reply.

Occasionally, amendments have been moved to the motion for the Address-in-Reply. In most cases these amendments have either been negatived<sup>28</sup> or withdrawn by leave.<sup>29</sup> However, in 1961 the Address-in-Reply was amended, on division, to add a paragraph recording the rejection of the bill to abolish the Council at a referendum held earlier that year.<sup>30</sup> In 2006 the wording of the address was changed to express loyalty to Australia and to the people of New South Wales, rather than the previous loyalty to the Sovereign.<sup>31</sup>

On one occasion the order of the day for adoption of the Address-in-Reply was discharged, following an amendment being moved expressing regret at the appointment of nine additional members to the Council.<sup>32</sup>

Once the Address-in-Reply has been agreed to, the President, accompanied by members and officers, formally presents it to the Governor at Government House. On returning, the President reports to the Council on the presentation and the reply of the Governor.

## PROROGATION

Prorogation is an act of the Governor by proclamation in the Government Gazette which specifies the date from which the Council and Assembly are prorogued,

24 *LC Minutes* (26/5/1875) 60; see also 'Report of the Standing Orders Committee on Address-in-Reply to the Governor's opening speech', *LC Journals* (1875) Vol 25, p 209.

25 *LC Minutes* (16/11/1875) 3.

26 *LC Minutes* (22/5/1956) 7, adopted (6/6/1956) 36; debate took place over 7 sitting days with 30 speakers.

27 In 2006 the Address-in-Reply was not adopted until six months later, shortly before the House adjourned for an election; see *LC Minutes* (22/11/2006) 402.

28 *LC Minutes* (16/11/1875) 4, (17/3/1885) 8, (19/5/1891) 6, (9/7/1903) 34, (17/3/1994) 401-402.

29 *LC Minutes* (10/9/1878) 4, (28/8/1894) 8, (27/4/1897) 6, (24/8/1904) 8, (17/7/1924) 22.

30 *LC Minutes* (30/8/1961) 56.

31 *LC Minutes* (24/5/2006) 42-43.

32 *LC Minutes* (7/3/1889) 16.

thus bringing to an end a session of Parliament. The proclamation also provides for the Council and the Assembly to meet again at a specified time and place and requires members to attend at that time and place.

From 1857 until 1893 it was common practice for the Governor to attend the Council chamber and give a prorogation speech to both Houses of Parliament at the end of a session. Sometimes the Governor would first personally give assent to bills and then make a prorogation speech, at the end of which the Governor would personally prorogue Parliament to a stated day.<sup>33</sup>

The background to the practice of prorogation and some of the issues that arise from it, particularly in the context of upper houses, are set out in *Odgers*:

This power of prorogation is inherited from the unwritten British constitution, and is closely associated with the monarchy. The monarch determines when the Parliament meets and may terminate its meeting by prorogation, which puts it out of session until summoned again, and quashes all legislative business pending before it. The historical rationale behind the power is that Parliament is only an advisory council to the monarch and meets only when the monarch requires advice. Much used by the Stuart kings to dispense with rebellious parliaments, the power is now normally exercised on the advice of the prime minister. As with other royal powers it is generally accepted that there are circumstances in which advice could be refused. For example, if a prime minister were to lose a party majority in the lower house and were to advise a prorogation simply as a means of avoiding a no-confidence motion and clinging to power, the sovereign would be entitled to decline to act on the advice. Leaving aside such circumstances, prorogation provides the executive government, the Ministry, with a handy weapon to use against troublesome upper houses. A government can normally use its compliant party majority in the lower house to adjourn that house, but where such a majority is lacking in the second chamber prorogation may be the only means of avoiding embarrassing parliamentary debate or inquiry. It is, however, something of a two-edged sword so far as governments are concerned, as it terminates all pending government legislation, which must then be revived when the Parliament is called to meet again. The potential for misuse of the power adds significance to the question whether prorogation prevents the Senate meeting.<sup>34</sup>

The question of the power of the Council to meet after prorogation of the Parliament has not previously arisen. Section 22F of the *Constitution Act 1902* only prohibits the Council from dispatching business following termination of the Assembly for a general election. However, the Act is silent in relation to the capacity of the Council to meet and dispatch business after prorogation other than for a periodic Council election.

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33 See, for example, *LC Minutes* (18/3/1857) 87, (13/6/1893) 361.

34 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 499.

The effect of prorogation of the Council is to terminate all business pending before the House, until Parliament is summoned again to meet for the next session. Consequently:

- the House may not meet again until the date nominated in the proclamation;
- all business on the Notice Paper lapses;
- all sessional orders cease to have effect;
- resolutions or orders of the House cease to have any force unless there are explicit provisions to give them continuing effect.

However, while generally assented to before prorogation, bills may be assented to after prorogation.

It has become common practice in the Council for various items on the Notice Paper to be restored to the Notice Paper after the commencement of a new session. These include contingent notices and items of private members' business within the order of precedence.<sup>35</sup> On some occasions the Notice Paper has been restored in its entirety.<sup>36</sup> However, it is not possible to restore items to the Notice Paper at the commencement of a new session following a Council periodic election. The rationale for this is that the membership of the House has changed.

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35 See, for example, *LC Minutes* (12/3/2002) 44.

36 See, for example, *LC Minutes* (8/9/1999) 33.