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The Parliament of the Commonwealth of Australia

# **The anticipation rule**

**Aspects of the application of the rule**

House of Representatives  
Standing Committee on Procedure

March 2005  
Canberra

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## **Foreword**

The Procedure Committee was pleased to be asked to consider the application of the anticipation rule, by the Speaker and we thank him for consulting the committee on this matter. This year sees the 20<sup>th</sup> anniversary of the establishment of the Procedure Committee and during the past two decades the committee has made a considerable contribution to monitoring and, where necessary, improving the practices and procedures of the House. We hope the current report is another step in this direction.

The committee considers that improvement is needed in relation to the anticipation rule. While the objectives of the rule are sound, the application of the two standing orders which currently express the rule are used more for tactical advantage than to support the effective management of House business. In particular, the committee considers that the evolution of the rule as it applies during Question Time (standing order 100(f)) does little to enhance Question Time as an opportunity to hold the Government accountable to the Parliament.

The committee favours a trial of new arrangements for the rule for the rest of the 41<sup>st</sup> Parliament. The trial would abolish the application of the rule from Question Time and restrict its application at other times to substantive debates. At the end of the session the committee hopes to review the application of the recommended sessional order.

**Margaret May MP**  
**Chair**



## **Membership of the Committee**

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## **Terms of reference**

### **Terms of reference of the Committee**

To inquire into and report on the practices and procedures of the House and its committees.

### **Terms of reference of the inquiry**

The application of the anticipation rule.



## **List of recommendations**

### **Recommendation 1:**

The committee recommends that standing order 77 be replaced by the following sessional order:

“During a debate, a Member may not anticipate the discussion of a subject listed on the Notice Paper and expected to be debated on the same or next sitting day. In determining whether a discussion is out of order the Speaker should not prevent incidental reference to a subject.”

### **Recommendation 2**

The committee recommends that for a trial period the anticipation rule not apply to questions and answers and that consequently, standing order 100(f) be suspended for the remainder of the session.





## The anticipation rule

### What is the anticipation rule?

#### Description and standing orders

- 1.1 The rule against anticipation prevents matters already planned for discussion from being brought on before the time or stage arranged – thus supporting the orderly management of the House’s business. In the redrafted version of the standing orders which came into effect at the beginning of the 41<sup>st</sup> Parliament the rule is contained in two standing orders – one applying generally and one to questions. The standing orders are:

#### **77 Anticipating discussion**

A Member may not anticipate the discussion of a subject which appears on the Notice Paper. In determining whether a discussion is out of order the Speaker must consider the probability of the anticipated matter being brought before the House within a reasonable time.

#### **100 Rules for questions**

...

(f) Questions must not anticipate discussion on an order of the day or other matter.

## Interpretation

- 1.2 In standing order 77, the words “any subject which appears on the Notice Paper” are taken as applying only to the business section of the Notice Paper and not to matters listed elsewhere such as in the list of written questions or lists of committee inquiries.<sup>1</sup>
- 1.3 The Speaker’s discretion in relation to the likelihood of the matter being brought before the House within a reasonable time, has been interpreted in very different ways in the history of the rule. The tendency in recent years has been for a more liberal approach to be taken to this aspect of interpretation as well as the application of the rule generally.<sup>2</sup>

## Purpose of the rule

- 1.4 The intention behind the anticipation rule is
- to protect matters which are on the agenda for deliberative consideration and decision by the House from being pre-empted by unscheduled debate. The Speaker’s “reasonable time” discretion is to prevent the rule being used mischievously to block debate on a matter.<sup>3</sup>
- 1.5 The submission from the Clerk of the House summarises the core purposes of the rule as:
- Not pre-empting and influencing debate on substantive matters still to be considered by the House and not wasting the time of the House with the repetition of arguments that rightly should be made when the substantive debate occurs.<sup>4</sup>
- 1.6 The elements of the concept are:
- to support the right of the House to manage its business in an orderly way;
  - to prevent wasting the time of the House;
  - but at the same time to protect the right of Members to free speech by ensuring the anticipation rule is not used merely to stifle debate.

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1 *House of Representatives Practice*, 4<sup>th</sup> edn, 2001, p. 485.

2 *House of Representatives Practice*, 4<sup>th</sup> edn, 2001, pp. 485-6.

3 *House of Representatives Practice*, 4<sup>th</sup> edn, 2001, p. 485.

4 Submission from the Clerk of the House, p. 7. See also statement from Speaker Hawker H.R. Deb. (6.12.2004).

- 1.7 The application of the rule is made clearer by considering each of these points in turn.

### **The orderly management of business**

- 1.8 The anticipation rule is one of a number of practices and rules which contribute to the ability of the House to process matters in an orderly way. For example, there is a connection between the rule against anticipation and the same question rule – the object being that one decision should be made on a matter.<sup>5</sup>
- 1.9 Also complementary to the anticipation rule is the requirement that notice must be given for most substantive items of business. These subsequently appear on the Notice Paper. A daily program (the “Blue”) while unofficial and subject to change, gives a clearer idea of the day on which items of business are to be discussed and the stage in the day’s proceedings.
- 1.10 This basic arrangement of business ensures that all Members know which items of business are likely to be addressed and, within reason, at what time they are likely to be brought on. All Members then have an opportunity to contribute to the debate and vote on the outcome.
- 1.11 The anticipation rule prevents substantive discussion on a topic commencing before Members who wish to contribute to the business can be in the Chamber, and is thus one of the rules which support an orderly approach to dealing with the House’s business.
- 1.12 Other practices and rules which complement the anticipation rule include the practice of the Speaker stating what the current business is and a Member being able to ask that this be repeated if the matter has not been circulated [standing order 67]. Also, in general, Members have only one opportunity to speak on a matter [standing order 69]. When the debate is concluded there can be no further discussion [standing order 71]. Debates cannot be revisited [standing order 73]. In general, debate on an item must be relevant – that is the opportunity cannot be taken to discuss a subject while some other matter is before the House [standing order 76].
- 1.13 The original expression of the anticipation rule in the House of Representatives – standing order 274, contained both the rule of relevance and the rule against anticipation:

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5 Submission from the Clerk of the House, p. 3.

No Member shall digress from the subject-matter of any question under discussion; nor anticipate the discussion of any other subject which appears on the Notice Paper.

- 1.14 The submission from the Clerk of the House notes that this suggests that the rule was seen as necessary in terms of the efficiency of proceedings.<sup>6</sup> The committee notes that the anticipation rule is just one of a number of standing orders and House practices which support the efficient conduct of proceedings. This is relevant to the issue of whether retention of the anticipation rule is essential.<sup>7</sup>

### **Saving the time of the House**

- 1.15 Saving time is a subset of the orderly management of the House's business. The anticipation rule supports this value by ensuring that a decision to discuss a matter at a particular time is adhered to. If the House allocates time for a matter, either by procedures for giving notice, or through an order of the day, or by virtue of standing order 34, the thrust of the anticipation rule is that this is when the matter should be dealt with and not the allocated time plus any other time a Member wishes to discuss the particular matter.
- 1.16 The argument that the anticipation rule supports efficient use of the House's time is modified by the fact that time is allocated for private Members' business, Question Time, the grievance debate and adjournment debates, regardless of what subject matter is addressed during those periods. Thus the "saving time" purpose is not a strong stand-alone argument for the anticipation rule.

### **Members' right to free expression**

- 1.17 The second part of standing order 77 (*In determining whether a discussion is out of order the Speaker must consider the probability of the anticipated matter being brought before the House within a reasonable time*) is designed to ensure the anticipation rule is not used to stifle debate.
- 1.18 This part of the rule recognises that some matters on the Notice Paper may never be brought on for debate (or further debate). If the first part of standing order 77 (*A Member may not anticipate the discussion of a subject which appears on the Notice Paper*) were applied strictly the

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6 Submission from the Clerk of the House, p. 4.

7 The option of removing the anticipation rule altogether is raised in the submission from the Clerk of the House, p. 8.

number of subjects which could be discussed would be extremely limited.

## Applying the rule

- 1.19 The Chair may initiate the application of the rule by ruling a question [standing order 100(f)] or discussion [standing order 77] out of order on the grounds of anticipation.
- 1.20 Most attempts to invoke the anticipation rule arise as points of order, commonly during Question Time. The Chair will usually then rule on whether the matter complained of is the same as a topic on the Notice Paper or (in relation to questions) as an order of the day. The Chair further, will usually rule on whether the matter is likely to come before the House within a reasonable time.
- 1.21 Typically, Members objecting to a comment or question on the grounds of anticipation, cite the “orderly management of business” purpose. Members objecting to the application of the rule are likely to cite the “Members’ right to free expression” rider on the rule. With a degree of understatement the Clerk of the House noted in his submission:

[Rules against anticipation] ... are sometimes a source of procedural intervention or argument in the House.<sup>8</sup>

## History of the rule

### Origin

- 1.22 Parliaments following Westminster parliamentary traditions are likely to have some form of the anticipation rule though this may not be codified in the standing orders.<sup>9</sup> While the Canadian procedural text refers to “the ancient ‘rule of anticipation’”<sup>10</sup> it is not ancient compared with other parliamentary practices and procedures.

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8 p. 2.

9 The Canadian House of Commons, for example, has never included the “rule” in its standing orders. [R Marleau and C Montpetit, *House of Commons Procedure and Practice*, Ottawa, 2000, p. 476]. This Canadian procedural text notes that “... references to attempts made to apply this British rule to Canadian practice are not very conclusive.”

10 Ibid.

- 1.23 The “rule” was not originally part of the standing orders in the United Kingdom according to Josef Redlich’s authoritative three volume study of the history of procedure in the United Kingdom (1908). Redlich reports that a resolution relating to one application of the rule (in relation to motions for adjournment) was adopted in 1888 and became (U.K.) standing order 10. Significantly, Redlich’s index lists “Anticipation Rule” and then diverts searchers to “Abuses by Blocking Notices of Motions”.<sup>11</sup> Redlich notes that the earliest edition of Erskine May which refers to the “rule” appears to be that of 1871, though Speakers’ rulings indicated that the rule had been recognised many years before that date.<sup>12</sup>
- 1.24 The current edition of Erskine May notes that:
- The origin of the rule against anticipation is unclear. Indeed, according to Sir Courtenay Ilbert, Clerk of the House from 1902 to 1921, its first appearance is recorded by Charles Dickens in *Little Dorrit*.<sup>13</sup>
- 1.25 Assuming Sir Courtenay to be correct, the rule’s origins go back at least to 1857, when *Little Dorrit* was first published, though as an experienced Hansard reporter Dickens may have been reporting an existing practice. At any rate, by the time the new Australian Parliament was created, the rule was part of its procedural inheritance from the House of Commons (via the colonial Parliaments).

## House of Representatives

### Evolution of the anticipation rule standing orders in the House

- 1.26 The House has had a version of the anticipation rule in the standing orders since 1901. The original rules dealt with motions and amendments (standing order 117) and with debate (standing order 274). They were:

*Anticipating Motions*

117. No Motion or Amendment shall anticipate an Order of the Day or another Motion of which Notice has been given.

And

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11 J. Redlich, *The Procedure of the House of Commons*, vol. 3, London 1908, p. 286.

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

13 *Erskine May’s Parliamentary Practice*, 23<sup>rd</sup> edn, p. 4.

*Debate confined to present question*

274. No Member shall digress from the subject-matter of any question under discussion; nor anticipate the discussion of any other subject which appears on the Notice Paper.

1.27 In the early days of the Parliament, Clerks were provided with specially printed versions of the standing orders with lined blank pages inserted between the pages. This allowed the Clerk to annotate the standing orders by writing Speakers' rulings opposite the relevant standing orders. Clearly the anticipation rule was problematic from the beginning, with the standing orders in use in 1905 having several annotations against the two anticipation standing orders.<sup>14</sup>

1.28 The first substantive change to the anticipation rule in the House came in the revised standing orders adopted on 21<sup>st</sup> March 1950. The rider giving the Chair discretion regarding the application of the anticipation rule according to the likelihood of the matter being brought before the House in a reasonable time, was introduced at this time.<sup>15</sup>

1.29 The 1950 standing orders had, for the first time, a chapter on questions seeking information. Standing order 144 stated:

Questions cannot anticipate discussion upon an Order of the Day or other matter.

1.30 The next substantial change to the standing orders came in 1963. Standing orders 83 and 144 from the 1950 standing orders were unchanged (except that standing order 83 was renumbered to be standing order 82). At the same time a new standing order was inserted:

163. A matter on the Notice Paper must not be anticipated by another matter contained in a less effective form of proceeding.

1.31 This could be seen as an additional rider on the anticipation rule in support of the value of not allowing the rule to be used to unreasonably stifle debate. With this new standing order, a matter

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14 Annotated copy of the standing orders in the Chamber Research Library.

15 Standing Orders adopted 21<sup>st</sup> March 1950: standing order 83. "No Member shall anticipate the discussion of any subject which appears on the Notice Paper: Provided that in determining whether a discussion is out of order on the ground of anticipation, regard shall be had by the Speaker to the probability of the matter anticipated being brought before the House within a reasonable time".



could not be raised during an adjournment debate, for example, if a motion or bill on the subject appeared in the Notice Paper. A motion is a more effective form than the adjournment debate because it would result in a decision (and possibly some action) by the House. A bill in turn, is a more effective form than a motion because it might result in legislation with repercussions beyond the House.

- 1.32 These three expressions of the anticipation rule remained substantially unchanged until the major redrafting and reorganisation of the standing order which came into effect at the beginning of the 41<sup>st</sup> Parliament.

### **Current House standing orders on the anticipation rule**

- 1.33 Current expression of the anticipation rule is found in standing orders 77 and 100(f). The text is at the beginning of this chapter.
- 1.34 When the Procedure Committee in the 40<sup>th</sup> Parliament considered the standing orders with a view to restructuring and rewriting them to make them easier to understand, the committee saw its task as streamlining the standing orders but not changing them in relation to the practice of the House. Accordingly, the committee studied the three standing orders giving expression to the anticipation rule (standing orders 82, 163 and 144) to see if they were the clearest possible form of expression. Standing order 144 was changed only minimally (“cannot” changed to “must not”) and standing order 82 was slightly altered to use more modern language.
- 1.35 In relation to former standing order 163, the “less effective form” rule, the committee found that not only was it difficult to understand by the uninitiated, it had not been invoked in an effective way since its introduction in 1963. No applications of the anticipation rule between 1963 and 2004 were influenced by the “less effective form” concept, even when it was cited.<sup>16</sup> A search of the Procedural Records System (PRS) — an electronic data base of precedents and Speakers’ rulings maintained since 1982 — revealed no precedent which rested on the “less effective form” concept.

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16 For example, Speaker Andrew may have been alluding to the “less effective form” part of the rule in part of his response to a point of order on the anticipation rule and a government backbencher’s question about Centenary House. Later he ruled that the anticipation rule did apply but on the basis of standing order 82, not 163. H.R. Deb. (1.03.2004) 25403.

- 1.36 Accordingly, and consistently with its objective not to make any substantive changes, the committee decided not to incorporate this part of the anticipation rule in the new standing orders.

## Other Parliaments

- 1.37 The anticipation rule in one form or another is widespread amongst Parliaments having Westminster origins. Comparable Houses including New Zealand's House of Representatives, the Lok Sabha (India), the British and Canadian Houses of Commons and the Senate have versions of the rule.<sup>17</sup> The evolution of the rule in other Parliaments is addressed in chapter 3.

## About the inquiry

- 1.38 This inquiry is in response to an invitation from the Speaker for the Standing Committee on Procedure to express a view on the application of the anticipation rule.<sup>18</sup> The invitation was issued during a statement by the Speaker following discussions in the House particularly during Question Time on 30 November and 1 December 2004.

## Recent application of the rule

- 1.39 The application of the rule in the House will be considered in more detail in the next chapter but it is relevant to note in this overview that while there has not been a wholly consistent body of precedence for the guidance of recent Speakers, it is agreed that the rule is generally less stringently applied now than in the past.<sup>19</sup>
- 1.40 A review of the Procedural Record System reveals that current rulings on the application of the rule are consistent with the recent past and represent a steady liberalisation of the rule over the past ten or so years. However, there is a perception that a crisis point has been

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17 Submission from the Clerk of the House, p. 2.

18 H.R. Deb (6.12.2004) 24.

19 Submission from Ms Julia Gillard MP, Manager of Opposition Business, p. 1: "It has been noted that there has been a tendency in recent years for rulings concerning anticipation to be more relaxed". Submission from the Clerk of the House, p. 2: "An examination of this material has confirmed that this area has been one where the evolution of practice has been in the direction of a more liberal application of the rules." See also *House of Representatives Practice*, 4<sup>th</sup> edn, 2001, p. 486.

reached in the liberalisation of the rule. The current application of the anticipation rule has been regarded as so “relaxed” during Question Time that the purpose of the rule is being undermined. In support of her view that the rule was too relaxed, the Manager of Opposition Business cited a question from a government backbencher on 1 December 2004 about Government funding for schools on a day when debate on legislation relating to Government funding for schools was in progress.<sup>20</sup>

- 1.41 Arguments erupted during Question Time in the House on 30 November and 1 December 2004 about the application of the rule resulting in a statement by the Speaker on 6 December 2004 on the anticipation rule and other matters.<sup>21</sup>

### Speaker’s statement

- 1.42 In his statement the Speaker referred to recent discussion on the application of the rule, particularly as it applies to Question Time. He noted the discretion provided to the Chair in applying the rule and the tendency in recent years for the discretion to be exercised in a way that relaxed the strict application of the rule. He cited Speaker Child’s view to this effect and Speaker McLeay’s observation that a too literal application of the rule would mean that questions from opposition members would be very constrained.<sup>22</sup>
- 1.43 Amongst other things the Speaker said:
- My general attitude is that during Question Time, one of the key periods for the House to exercise its primary function of accountability, a decision to prevent certain subjects being raised should not be taken lightly.<sup>23</sup>
- 1.44 However, he also noted that there was a difficulty in applying the rule where Members want a stricter interpretation of the rule on some occasions but wanted to ignore it at other times. This was not only a difficulty for the Chair but could create a public image of a selective interpretation of the rule.
- 1.45 The committee welcomes the opportunity to promote a better understanding of the anticipation rule and to consider how it can best

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20 Submission from Ms Julia Gillard MP, p. 2.

21 H.R. Deb. (6.12.2004) 24.

22 H.R. Deb. (6.12.2004) 24.

23 H.R. Deb. (6.12.2004) 24.

be applied to support the principle of free expression while not undermining efficient programming of House business.



## Difficulties in applying the rule

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

### Inherent difficulties

#### Conflicting principles

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

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

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

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<sup>1</sup> H.R. Deb (6.12.2004) 24.

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

### Use and abuse of the rule as a tactic

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

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

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

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

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

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

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

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

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3 See appendix 2.

4 *Erskine May’s Parliamentary Practice*, 23<sup>rd</sup> edn, p. 4.

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



## Inconsistent application of the rule

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

## Difficulties in applying the rule strictly

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

## House of Representatives example of a strict approach.

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

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

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

### Historic example of difficulties in a strict application of the rule

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

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<sup>6</sup> H.R. Deb. (29.4.1976) 1754.

<sup>7</sup> H.R. Deb. (29.4.1976) 1753.

<sup>8</sup> H.R. Deb. (29.4.1976) 1753.

<sup>9</sup> H.R. Deb. (29.4.1976) 1756.

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

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

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

## **Problems in a flexible application of the rule**

### **A more flexible approach**

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

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

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

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

2.25 More flexibility places greater value on the rights of Members to speak freely and the greater right of the House to scrutinise the executive, than on the principles underlying the rule. Insofar as one of those principles is saving the time of the House, business which already has an identified period allocated to it – such as Question Time, grievance debates, Members’ statements and the adjournment debate – is likely to be subject to greater flexibility in the application of the rule.

2.26 The more flexible approach to the application of the anticipation rule in recent years might have avoided the problems outlined above, but other problems have arisen. The essence of a more flexible application of the rule rests on requiring the Chair to know what matters will be discussed during the substantive, scheduled, debate in order to recognise that these matters have been anticipated. The greater exercise of discretion tends to lead to greater criticism, particularly by those who feel the application detracts from the outcome they are seeking. This is understandable since the more liberal the application of the anticipation rule, the less advantageous the rule becomes as a tool for stifling discussion.

### **So flexible the rule disappears**

2.27 It is possible that an extremely liberal application of the anticipation rule – one that promotes greater scrutiny and opportunity for explanation – could result in such a weakening of the rule that its original purposes are undermined. This may not be undesirable in all circumstances. It is arguable that this is happening in some jurisdictions, perhaps also within the House of Representatives.

2.28 Recent movements towards a more liberal approach in other jurisdictions may be seen in two rulings made in the New South Wales Legislative Assembly. In a considered ruling on the anticipation rule in 1997 Speaker Murray ruled that the anticipation rule should not be applied to the Appropriation Bill to avoid stifling

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

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

## Flexibility and potential for confusion

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

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

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

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

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

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

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

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

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

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

## Difficulties in applying the rule to Question Time

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

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15 See appendix 2.

16 See appendix 2.

17 See paras 1.15 and 1.16 above.

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

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

## Looking to the future

### Evolution of the anticipation rule

- 3.1 The history of the anticipation rule in the House of Representatives was addressed in chapter 1 and its increasing liberalisation in chapter 2.<sup>1</sup> In general, the evolution of the anticipation rule in other Parliaments has also been marked by a less stringent application of the rule.

### Practice in other Parliaments

- 3.2 The anticipation rule is no longer strictly observed in the Canadian House of Commons and is not observed at all in relation to questions:

At one time, Members were also prohibited from asking a question during Question Period if it was in anticipation of an Order of the Day; this was to prevent the time of the House being taken up with business to be discussed later in the sitting. In 1975, the rule was relaxed in regard to questions asked during Question Period when the Order of (the) Day was either the Budget debate or the debate on the Address in Reply to the Speech from the Throne, as long as questions on these matters did not monopolize the limited time available during Questions Period. In 1983, the Speaker ruled that questions relating to an opposition motion on a Supply day motion could also be put during Question Period. In 1997, the Standing Committee on Procedure and House Affairs recommended, in a report to the House, that questions not be

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1 See paras 1.26 ff and 2.24 ff.



ruled out of order on this basis alone. The Speaker subsequently advised the House that the Chair would follow the advice of the Committee.<sup>2</sup>

- 3.3 The application of the rule has also been less strictly observed in the United Kingdom House of Commons. Having noted that the rule came to be observed from the middle of the 19<sup>th</sup> century, Erskine May notes:

A century and a half later, and without any explicit decision of the House, it has begun to lose significance and is now much less of a trap for the unwary than it was only a few years ago.<sup>3</sup>

- 3.4 The more liberal application of the rule in the New South Wales Legislative Assembly is noted in Chapter 2, particularly in relation to questions.
- 3.5 Oral advice from the clerk of the New Zealand House of Representatives is that the anticipation rule is rarely used in that House.<sup>4</sup>

## Proposals for a new approach to the anticipation rule

### Why is a new approach needed?

- 3.6 A commenter on procedures used in the United Kingdom House of Commons noted:

No system of procedure can be perfect. For one thing, it must always be adapting itself to new problems and is inevitably more or less out of date. Besides at best it cannot be more than a balance between advantages and disadvantages.<sup>5</sup>

- 3.7 This is particularly true of the anticipation rule. While the application of the rule has certainly never been perfect, the increasing use of it to prevent discussion on particular issues indicates that the time has come to consider a better approach.
- 3.8 The submission from the Clerk of the House proposed three options for the committee's consideration: the retention and vigorous enforcement of

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2 Marleau and Montpetit, *House of Commons Procedure and Practice*, p. 477.

3 *Erskine May's Parliamentary Practice*, 23<sup>rd</sup> edn, p. 4.

4 Discussion with Mr David McGee, Clerk of the House of Representatives, January 2005.

5 Campion, G. F. M., *An introduction to the procedure of the House of Commons*, 3rd edn, London: Macmillan, 1958, p. 47.

the current rules; abolishing the rule altogether; and amending the current rules.<sup>6</sup>

3.9 In relation to the first option the Clerk noted that

... the evolution noted in House practice to date, which is paralleled in other jurisdictions, seems to make this unfeasible as a long-term proposition ...

3.10 The committee agrees with this view.

### **Proposal to abolish the rule altogether**

3.11 This option is described by the Clerk of the House in his submission as an approach which is recommended in terms of ease of application. He considers that this may well be achieved in the longer term but does not favour it at the present time.<sup>7</sup>

3.12 The committee agrees that this may be an option for the future but like the Clerk, favours a more gradual approach to improving House practices. In considering the possible future abolition of the rule, the committee notes that the intention of the rule to support the efficient conduct of the House's business is protected by a number of complementary standing orders and practices of the House. The decision to support the retention of the rule at this stage does not reflect a concern that the good governance of the House would be at risk.

### **Proposal to more clearly define the current rules**

3.13 The Manager of Opposition Business made several suggestions for clarifying the future application of the anticipation rule and these were carefully considered by the committee.

3.14 The first suggestion is that a statement or explanation which clearly articulates the purpose of the rule should be compiled, taking account of the timetable of the House and its Committees. It should refer to both the Notice Paper and the daily program (known as the blue schedule or the "Blue"). The object of this statement should be to ensure that there is no constraint on debate, accountability, or the ability to ask questions, arising from a narrow application of the rule.

3.15 In relation to this suggestion the committee notes that several Speakers' rulings over the past twenty years have purported to articulate the

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6 Submission from the Clerk of the House, p. 7.

7 Submission from the Clerk of the House, p. 7.

purpose of the rule but this has not prevented the use of the rule primarily as a tactic for stifling discussion. It is not considered likely that a new articulation of the intention and purpose of the anticipation rule will address this difficulty.

- 3.16 Ms Gillard further suggested that the rule should be strictly applied to matters currently under debate or scheduled for debate within the next 24 hours. This could be achieved by placing greater emphasis on the “Blue” program than the Notice Paper, because it is a more reliable indicator of the day’s program.
- 3.17 The committee agrees that the use of the “Blue” as an indication of the House’s intention would provide better guidance to the House on what matters should be encompassed by the anticipation rule. The committee supports a narrowing of the scope of the anticipation rule to matters likely to be debated in the immediate future. The “Blue” is one (but not the only) means of ascertaining what these matters might be.
- 3.18 However, it should not be assumed that all difficulties would be removed. First, the “Blue” is an unofficial document, subject to last minute changes and not an infallible guide to the business of the House on a particular day. Also, “matters currently under debate” is an imprecise concept. Further, this suggestion is unlikely to address the real problem – that Members seeking to prevent discussion of a particular matter would use the rule when it suited (particularly at Question Time) and ignore it at other times.
- 3.19 The Manager of Opposition Business also proposed that the distinction between incidental and substantive reference to a matter be used by the Chair in applying the rule. The committee considers this a good suggestion and notes that this is what recent Chairs have tended to do.
- 3.20 Finally, Ms Gillard called for an application of the rule in a way that would not limit the ability of the Opposition to hold the Government accountable at Question Time. At the same time, having regard to the public aspect of Question Time, the application of the rule should not allow any political party to use “a lax application of the rule for political gain”. The committee considers that this is probably what successive Speakers have attempted to do. The practicalities of the political contest that is Question Time make it extremely difficult to achieve this objective. A great deal of the content of Question Time is aimed at providing political gain to one side or the other.
- 3.21 In this context the committee notes that other standing orders which inhibit the use of Question Time for unfair political advantage are not as

strictly observed as they might be. In particular, the committee considers more attention should be paid to standing order 98(d)(ii) which prevents Ministers using Question Time (instead of the period for ministerial statements) to announce government policy.

- 3.22 It is noted that Ms Gillard's suggestions all relate to improving the application of the rule rather than changing the rule or the standing orders supporting it.

## Proposals to change the current rules

- 3.23 The Clerk of the House proposed the modification of the general rules so that they are more easily interpreted and enforced by the Chair.<sup>8</sup> One approach would be to remove altogether standing order 100(f) – the rule relating to questions – and amend current standing order 77 to clarify the fact that it did not apply to questions and answers. The Clerk favours this option on the grounds that it would

accommodate the realities of evolving needs and demands on the House, in particular by building on the distinction between the value of the rule in respect of ordinary business, and in respect of Question Time.<sup>9</sup>

- 3.24 Arguments in favour of this proposition include the fact that ceasing to apply the anticipation rule to Question Time removes a cause of dissatisfaction with the rule while not undermining core values such as protecting the time of the House. Preventing anticipation during debates on bills, amendments and motions is more important in terms of supporting the core purposes of the rule than preventing questions and answers which anticipate other business.

## What problems need solving?

### The Speaker's statement of 6 December 2004

- 3.25 The committee notes that the Speaker's statement focuses almost entirely on problems in applying the current anticipation rule in the context of Question Time. The option to remove the application of the rule from Question Time [see para 3.23 above] would address these difficulties.

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8 Submission from the Clerk of the House, p. 7.

9 Submission from the Clerk of the House, p. 8.

## Other problems

- 3.26 The submissions to the inquiry drew attention to other problems which cause concern, particularly the wide ranging nature of the current expression of the rule. The committee considers that a narrowing of the rule is necessary in order to allow the rule to be applied with integrity.

## Conclusions and recommendations

### Getting the balance right

- 3.27 The committee is concerned to find a workable balance between the principles underlying the anticipation rule and the need to ensure that the rule is not used to avoid scrutiny by restricting debate.
- 3.28 The committee is also concerned to ensure that any change to the standing orders does not give unfair political advantage to either government or opposition. In relation to Question Time, the removal of the anticipation rule would give governments increased opportunity to interest the media and public in legislation currently before the House, but equally, it would give oppositions increased opportunity to challenge forthcoming legislation.
- 3.29 The committee notes that Question Time has become a focus for both governments and oppositions and considers that removing barriers to particular questions serves the public by providing information on important matters. This does not mean that ministers should use Question Time to announce government policy. Indeed, the committee supports a stricter application of standing order 98(d)(ii) and considers that this would be even more desirable should the anticipation rule no longer apply during Question Time.<sup>10</sup>
- 3.30 The committee proposes two amendments to the standing orders to achieve the balance referred to in paragraph 3.28 and notes that the amendments are interdependent.

### Retaining a general rule against anticipating debate

- 3.31 The committee favours retaining the general rule as expressed in standing order 77 but amending the standing order so that the rule applies to

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<sup>10</sup> See also para 3.22.

debates only. This change would keep the valuable elements of the rule but discard the aspects which cause disruption without supporting the efficient conduct of business.

- 3.32 For the purposes of this recommendation, the committee is using the definition of debate in *House of Representatives Practice* to indicate argument for and against a question:

The proceedings between a Member moving a motion and the ascertainment by the Chair of the decision of the House constitute a debate. A decision may be reached without debate. In addition, many speeches by Members which are part of the normal routine of the House are excluded from the definition of debate, because there is no motion before the House.<sup>11</sup>

- 3.33 The committee notes that by applying standing order 77 only to debates, the anticipation rule would not apply to proceedings with no question before the House including questions and answers, Members' statements in the House or Main Committee and a number of other items.
- 3.34 The proposed change to standing order 77 would also exempt matters of public importance (MPIs) from the rule as they are discussions and not debates. House practice already exempts the MPI from the anticipation rule in that Members are not prevented from anticipating the subject matter of the MPI during other business.
- 3.35 Most proceedings which would be exempt from the anticipation rule if it applied only to debates, occur during specified times or periods of the day (under standing order 34). The change therefore would not undermine the principle of saving the time of the House which is one of the objectives of the anticipation rule.
- 3.36 The committee also considers that standing order 77 should be amended to provide more guidance to the House in relation to the anticipated matter being brought on within a reasonable time. The concept of "reasonable time" should be more focussed in order to prevent misuse of the rule. In this regard the committee notes the important role of the daily "Blue" as a guide to what is likely to come before the House on a particular day.<sup>12</sup>
- 3.37 In addition, the rule should be applied to prevent substantial discussion of a subject (item) listed on the Notice Paper but not to inhibit incidental reference to the subject matter. This concept is already becoming part of

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11 *House of Representatives Practice*, 4<sup>th</sup> edn, p. 469

12 Also, see para 3.18.

House practice but is not enshrined in the standing orders. Including it in the relevant standing order might prevent Members seeking to prevent discussion for a technical and not a substantive reason.

- 3.38 The committee considers that the proposed changes should be introduced on a trial basis for the remainder of the 41<sup>st</sup> Parliament. As the anticipation rule is an occasional rather than constant issue in House proceedings, a shorter trial might not allow a proper evaluation.

### Recommendation 1

**The committee recommends that standing order 77 be replaced by the following sessional order:**

**“During a debate, a Member may not anticipate the discussion of a subject listed on the Notice Paper and expected to be debated on the same or next sitting day. In determining whether a discussion is out of order the Speaker should not prevent incidental reference to a subject.”**

### Discarding the rule as it applies to Question Time

- 3.39 If recommendation 1 is accepted then the anticipation rule would cease to apply to Question Time because questions and answers are not debates. The removal of standing order 100(f) would complement the changes proposed in recommendation 1. Again, the anticipation rule should cease to apply during Question Time for the remainder of the session to allow an evaluation of the change. In relation to Question Time, discarding the anticipation rule would not undermine the important principles enshrined in the anticipation rule.<sup>13</sup>
- 3.40 This does not mean that the change would encourage pre-empting substantive debates during Question Time. The Chair already has the power to ensure that questions are not debated (standing order 100(a)).<sup>14</sup> In relation to answers, Chairs are unlikely to permit substantive discussion on a matter listed for debate even though the rules for answers are less focussed than those for questions.
- 3.41 In terms of one of the objectives of the anticipation rule, – to avoid wasting the time of the House by allowing topics to be debated more than once – the time allocated to Question Time is not dependent on the subject of the questions and answers.

<sup>13</sup> See paras 1.4 ff in chapter 1 of this report.

<sup>14</sup> The reference to debate in standing order 100 does not relate to the technical definition of the word.

**Recommendation 2**

**The committee recommends that for a trial period the anticipation rule not apply to questions and answers and that consequently, standing order 100(f) be suspended for the remainder of the session.**

- 3.42 The committee considers that the recommended changes will remove the unhelpful aspects which have arisen in applying the anticipation rule while retaining the general rule as it applies to substantive pre-emption of scheduled debate.

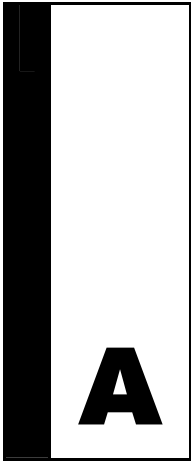
Margaret May MP

Chair

14 March 2005







## **Appendix A**

### **Submissions**

Two submissions to the inquiry were received: One from the Manager of Opposition Business (Ms Julia Gillard MP) and one from the Clerk of the House (Mr Ian Harris). Ms Gillard and Mr Harris also met with the committee to discuss their submissions and the inquiry.

The submissions are attached.





**The Acting Chair**  
**House of Representatives Procedure Committee**  
**Parliament House**  
**Canberra ACT 2600**

**Federal Member for Lalor**  
**Shadow Minister for Health**

**RE: INQUIRY INTO THE APPLICATION OF THE ANTICIPATION RULE**

On behalf of the Federal Parliamentary Labor Party I wish to make the following submission to the Procedure Committee's Inquiry into the Application of the Anticipation Rule.

**1. The purpose of the rule**

The anticipation rule involves two standing orders – one which applies generally (SO 77) and one applying specifically to questions (SO 100(f)).

Standing Order 77 states:

*A Member may not anticipate the discussion of a subject which appears on the Notice Paper. In determining whether a discussion is out of order the speaker must consider the probability of the anticipated matter being brought before the House in a reasonable period of time.*

Standing Order 100(f) states:

*Questions must not anticipate discussion on an order of the day or other matter.*

Also relevant is Standing Order 100(e) which states:

*Questions must not refer to debates in the current session, or to proceedings of a committee not reported to the House.*

The intention behind the rule, as stated in House of Representatives Practice, is "to protect matters which are on the agenda for deliberative consideration and decision by the House from being pre-empted by unscheduled debate".

**2. How the rule has been applied**

It has been noted that there has been a tendency in recent years for rulings concerning anticipation to be more relaxed. This has particularly been the case with matters of public importance and adjournment debate.

*Always putting our community first.*

Notice Paper

The role of the blue sheet should be considered in addressing what is scheduled for the day's program. As noted elsewhere and by previous Speakers, the Notice Paper is often only a guide to the day's program, and at the resumption of a sitting period, may constitute an ambitious list of planned activities, some of which will not take place within the scheduled timeframe. In contrast, the blue sheet is dated, and details a specific agenda. This agenda can only be changed at the instigation of the Manager of Government Business.

Incidental reference vs substantive reference

Clearly the use of words and phrases that are likely to be part of legislation cannot and should not be subject to the rule. However it is expected that the Speaker, in the knowledge of the day's schedule, will be alert to the appropriateness of any such reference and apply his rulings equitably.

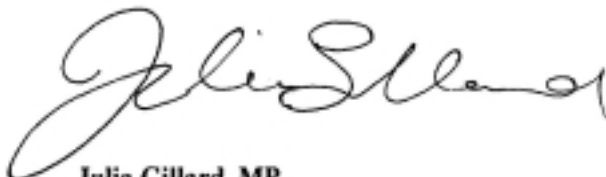
Accountability vs political gain

The ability of the Opposition to ask questions without notice of the Government is an important mechanism of accountability in the parliamentary system. The application of the rule should not be applied in such a way that this accountability is limited.

In the application of the rule to Question Time, the Speaker must have due regard to the fact that this part of Parliamentary proceedings is broadcast publicly, and that it is therefore inappropriate for any political party to seek to use a lax application of the rule for political gain.

I am grateful for the Committee's consideration of these issues, and I remain available for further input and discussions as required.

Yours sincerely



**Julia Gillard, MP**  
**Shadow Minister for Health and Manager of Opposition Business**

22/12/2004

## **The application of the rule against anticipation**

### **Submission to the Procedure Committee by the Clerk of the House**

1. Summary of submission
2. Introduction
3. What is the purpose of the rule?
4. The current provisions
5. Previous rules
6. The body of practice in the House
7. Practice in other Parliaments
8. Options

### 1. Summary of the submission

This submission discusses the purposes of the rules against anticipation, notes the current provisions and mentions aspects of earlier formulations of the rules.

The submission summarises key aspects of the body of practice which has grown around the rules. An examination of this material has confirmed that this area has been one where the evolution of practice has been in the direction of a more liberal application of the rules.

Comparable Houses, such as New Zealand's House of Representatives, the Lok Sabha, the British and Canadian Houses of Commons, and the Senate, all have rules against anticipation. The rules appear to be of more significance in relation to ordinary business, rather than questions, and are not mentioned in respect of questions in some Houses. In the case of the British and Canadian Houses of Commons in particular, it appears that practice has also evolved substantially, and in the direction of a more liberal application of the restriction.

The committee will make its own judgment on this matter. One of the options would be to retain the rule but to have its application limited to circumstances in which the efficient use of the time of the House was threatened, and to drop the rule where there was no such threat, such as during Question Time.

### 2. Introduction

I welcome the committee's invitation to make a submission in relation to the anticipation rule. Rules against anticipation have been contained in the standing orders since 1901. They have been something of a trap for the unwary<sup>1</sup>, and are sometimes a source of procedural intervention or argument in the House.

The present inquiry is welcome because it will allow the committee to examine the rules and House practice in relation to them, to note developments in comparable Houses and to put its conclusions to the House.

### 3. What is the purpose of the rule?

According to *House of Representatives Practice* the intention behind the rule is to protect matters which are on the agenda for deliberative consideration and decision '... from being pre-empted by unscheduled debate', with the 'reasonable time' discretion intended to prevent mischievous use of the rule to block debate.<sup>2</sup>

<sup>1</sup> And see, *May* 23rd edn, p.4.

<sup>2</sup> *House of Representatives Practice*, 4th edn, p.485.

Concern about matters being pre-empted is understandable. It is, at least in theory, possible that arguments to be put during, and impressions created and views formed as a result of, a scheduled debate could be influenced by earlier comments, and interest in the debate itself could be reduced by such comments. It is also possible to see a connection between the rule against anticipation and the same question rule: only one decision should be made on a matter.<sup>3</sup>

Finally, an assumption probably underlying all such rules is that the time of a legislature is precious and should be used with care and efficiency. Support for this assumption in relation to the rule against anticipation is indicated in that in the first and provisional standing orders the rule was set out in the same standing order, and in the same sentence, as the rule against digressing from the question before the House.<sup>4</sup> Unchecked anticipation could see the time of the House wasted with the repetition of arguments that should be made on the principal debate on a matter, and the formulation and location of the rule in original standing order 274 is a telling sign of the way it was regarded at that time.

#### **4. The current provisions**

Standing order 77 provides:

A Member may not anticipate the discussion of a subject which appears on the Notice Paper. In determining whether a discussion is out of order the Speaker must consider the probability of the anticipated matter being brought before the House within a reasonable time.

Standing Order 100(f) deals with questions, providing:

Questions must not anticipate discussion on an order of the day or other matter.

It is also to be noted that the general principles adopted by the House to guide the Selection Committee in allocating private Members' business time contain a provision that has an echo of the anticipation rule: the guidelines require that the Selection Committee shall have regard to 'the probability of the subject being brought before the House by other areas within a reasonable time'.<sup>5</sup>

<sup>3</sup> And see Marleau and Montpetit, *House of Commons Procedure and Practice (Canada)*, p.476.

<sup>4</sup> original standing order 274.

<sup>5</sup> Guidelines, paragraph 1(e)



## 5. Previous rules

Provisions dealing with anticipation have been included in the standing orders since 1901. The initial provisions (standing orders 117 and 274) dealt, respectively, with motions and amendments, and with debate. Standing order 274 in fact contained the rule of relevance and the rule against anticipation in one sentence: 'No Member shall digress from the subject-matter of any Question under discussion; nor anticipate the discussion of any other subject which appears on the Notice Paper'. As noted at 3 above, this circumstance suggests that the rule was seen as necessary in terms of the efficiency of proceedings.

Notable changes were included in the standing orders adopted in 1950. First, although the provisions concerning debate were repeated, (but as a separate standing order) a proviso was added requiring that, in applying the rule, regard be had to the probability of the matter being brought before the House within a reasonable time. Secondly, standing order 144 was included in the new chapter on questions, and provided 'Questions cannot anticipate discussion upon an Order of the Day or other matter'.

Consistent with the Procedure Committee's objective that the rewritten and re-ordered standing orders should not contain any changes to the substantive provisions, the changes adopted with effect from the commencement of the 41st Parliament, while replacing three separate rules with two, were presumably intended to ensure that the practical position would not change, and the deletion of the reference to matters contained in a 'less effective from of proceedings' was presumably meant to have no practical effect. However, in suggesting this change, subsequently endorsed by the House, the Procedure Committee in the previous Parliament has moved in the direction of diluting the application of the rule.

## 6. The body of practice in the House

House of Representatives Practice<sup>6</sup> spells out the key aspects of the body of practice which has been built up in connection with the rule. In relation to debate, precedents include decisions that:

- o the rule applies to the business section of the Notice Paper, not to other sections, such as questions on notice;
- o the subject of a notice of motion should not be discussed by means of an amendment or by means of a matter of public importance;
- o the rule has applied to personal explanations, motions of censure or want of confidence, the adjournment debate and the grievance debate.

<sup>6</sup> *House of Representatives Practice*, 4th edn. pp.485-6.

It is notable that some of the precedents are very old, and in more recent years rulings have been 'more relaxed'.<sup>7</sup> It is recognised that, after a long period of sittings the Notice Paper may contain many notices and orders of the day and that an overly strict application could rule out a large proportion of subjects.

In relation to questions, practice first shows the reconciliation of the apparent conflict between the rule that questions may not anticipate discussion on an order of the day or other matter and the fact that Ministers can be questioned about proceedings pending in the House - essentially that questions about proceedings pending are permissible provided they do not anticipate the discussion itself, or invite a Minister to do so<sup>8</sup>. Secondly, practice is that the listing of orders of the day for the consideration of legislation has not been held to prevent Ministers referring to government policy in the area, although questions should not go into detail<sup>9</sup>. Speakers at least since Speaker Child (1986-89) have been aware that a too literal interpretation of the rule would constrain the ability of Members to ask questions. This reality is also recognised in the Senate.<sup>10</sup> The restriction has thus been interpreted liberally. It is also notable that, although the specific rule applying to question time is limited to questions, Speakers have often cautioned Ministers to avoid in their answers going into the detail of matters listed for debate.

## 7. Practice in other Parliaments

Rules and practice against anticipation exist in the British House of Commons, the New Zealand House of Representatives, the Lok Sabha, the Canadian House of Commons and the Senate. Australian State and Territory Houses also have such rules.

The various published authorities contain useful and interesting information and help one to see the most recent discussion in the wider context.

First, the origins of the rule seem not to be entirely clear. It may not even be a rule of great antiquity: the latest edition of May quotes a former Clerk of the House of Commons as saying its first appearance is recorded by Dickens in *Little Dorrit*<sup>11</sup>

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<sup>7</sup> *House of Representatives Practice*, p. 486.

<sup>8</sup> *House of Representatives Practice*, p. 528.

<sup>9</sup> *House of Representatives Practice*, p. 529.

<sup>10</sup> *Odgers*, 10th edn, p. 507.

<sup>11</sup> *May*, 23rd edn. pp. 4, 389; although Marleau and Montpetit refer to it as an 'ancient rule' (p. 476).

Second, in some Houses the rule is set out in standing orders (eg. the Lok Sabha, the New Zealand House of Representatives and the Senate), but in others (eg. the Canadian House of Commons) it is a matter of practice. The similarity in wording between various standing orders, and descriptions of practice, is notable, although not surprising.

Thirdly, although in all the Houses mentioned there are rules or practice against anticipation, the greater emphasis is in respect of ordinary proceedings (such as debates), rather than in respect of questions. It appears that related restrictions apply to questions in the British House of Commons<sup>12</sup> and the Senate<sup>13</sup>. They do not apply to questions in Canada's House of Commons<sup>14</sup> and are not mentioned in respect of questions in New Zealand and the Lok Sabha. The widely differing practices in relation to questions mean, however, that particular care is needed in any assumptions or extrapolations that may suggest themselves about the rules in other Houses.

Fourthly, it is very clear that the evolution in practice in the House has been paralleled elsewhere. The current edition of *May* emphasises this, for example:

"... [the rule] ... has begun to lose significance and is now much less of a trap for the unwary than it was only a few years ago ..."<sup>15</sup>,

"In recent years there have been several occasions when the rule has not been applied in particular instances".<sup>16</sup>

In respect of Canada's House of Commons:

"The moving of a motion was formerly subject to the ancient 'rule of anticipation' which is no longer strictly observed."<sup>17</sup>

There, the rule, which has always been a matter of practice rather than a standing order, was abandoned completely in respect of questions in 1997, having been relaxed by significant decisions in 1975 and 1983.<sup>18</sup>

<sup>12</sup> *May*, 23rd edn, p. 355.

<sup>13</sup> *Odgers*, 10th edn, p. 507 standing order 73.

<sup>14</sup> *Marleau and Montpetit*, p. 477.

<sup>15</sup> *May* 23, p. 4.

<sup>16</sup> *May* 23, p. 389.

<sup>17</sup> *Marleau and Montpetit*, p. 476.

<sup>18</sup> *Marleau and Montpetit*, p. 477.

## 8. Options

It is inevitable that Members will have differing views as to the issues involved in the present rules. One of the realities is that during Question Time points of order and interventions in connection with the rule are not infrequent, however it is not common for it to be invoked (publicly at least) about other proceedings. Speaker Hawker has noted that when raised during Question Time such points tend to be taken selectively: the rule will be cited when it suits, but ignored at other times.<sup>19</sup> This point is substantiated by the records, in particular, by a review of the *Hansard* for question times when particularly significant legislation has been before the House, or for the days after a budget has been presented. The lack of consistency in approach by Members, whereby anticipation has been raised on occasion and ignored on other occasions on what appears to be a political basis makes the application of the current practice extremely difficult. The occasional explanations in the media by those who do not really appear to understand the considerations result in the House being depicted in a less than favourable light, which ultimately reflects on all Members.

The Committee may find it useful to consider, first, what the rules should be, and, secondly, and having regard to its conclusions about the rules themselves, what form the rules should take - for example whether they should be contained in the standing orders or instead dealt with as matters of practice, as is the case in Canada. The sub judice convention is dealt with in this way.

A range of options is available in respect of the rules themselves including:

1. retention and vigorous enforcement of the current rules;
2. modification of the general rules so that they are more easily interpreted and enforced by the Chair - Perhaps one suggestion could be the adoption of an order to operate for a specified time when the anticipation considerations would not apply during Question Time;
3. abolition of the current rules.

In relation to option 1, "vigorous enforcement" could mean that a current tactic pursued by Oppositions of both major political persuasions of asking questions on the same subject as a proposed discussion of a matter of public importance would be at risk. Practice has evolved that the anticipation rule should not apply in these circumstances, and this is appropriate from an accountability point of view. However, application of the letter of the rules would prevent this. In addition, the evolution noted in

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<sup>19</sup> House of Representatives Debates 6 December 2004, p.37.

House practice to date, which is paralleled in other jurisdictions, seems to make this unfeasible as a long-term proposition and it is not favoured.

Option 3, which is at the other extreme, has something to recommend it in terms of ease of application and may well be achieved in the longer term. However, a complete abandonment of the rules would remove the core purposes of not pre-empting and influencing debate on substantive matters still to be considered by the House and not wasting the time of the House with the repetition of arguments that rightly should be made when the substantive debate occurs.

I favour option 2 as it would see the retention of some provision, but would accommodate the realities of evolving needs and demands on the House, in particular by building on the distinction between the value of the rule in respect of ordinary business, and in respect of the House, and issues such as the same question rule - the arguments for an ability to prevent anticipation are stronger in relation to motions and amendments, and to debate, than in relation to questions. Further, by having an order to operate for a limited time, the Committee could judge whether its suspension was having a deleterious effect on Question Time or on the business of the House; the impact of such a change could be monitored by the Committee with a view to considering whether the rules could be modified further or abandoned entirely in the longer term.

The characteristics of Question Time are unlike those of other proceedings: it is the time when Ministers are under pressure to defend or explain their actions; it is the time of greatest community and media attention. It is also a time when all Members may feel entitled to raise questions about the broadest range of matters for which Ministers are responsible. In terms of the assumed ultimate purposes of the anticipation rule references in questions, and answers, could be permitted without compromising the efficiency of the use of House time or without risking any notion of the same question concept being jeopardised - technically Question Time is not a time in which decisions are made. If the reality of the difference between Question Time and other proceedings is accepted, then provisions akin to current standing order 77 (but with an indication that they did not apply to questions or answers) could be retained, and standing order 100(f) dropped.

I believe that the operation of the House should take current realities into account. By and large, Question Time is a time of heightened public and media interest in the House. The nation's attention is focussed on Question Time at least as much as on second reading debates of legislation, as a general rule. It seems unrealistic, particularly from an accountability point of view, to expect that the House will refrain from consideration of major issues that are freely discussed in the media, on the basis of a parliamentary technicality of the anticipation rule.

Depending on its conclusions on the rules themselves, the committee may also made recommendations as to the form any rules should take.

Generally speaking, standing orders have the advantage of being clear, concise and readily accessible. Their disadvantage is of course that, relative to practice, they can reduce the ability to adapt easily to changing needs. Matters dealt with only by practice, such as the sub judice convention, have that facility, but at the price of less precision. In practical terms, matters dealt with purely by practice can also place more responsibility on the Chair, although statements of practice to be applied can be made in advance - indeed, the committee itself, it is wished to follow the Canadian model, could set down recommended criteria. On balance, if the rule is retained I would favour its retention in the standing orders. However, this would be a matter for the Committee to decide in reviewing the impact of any suspension of the rule.

I will of course be happy to assist the Committee further in any way it may wish.

Ian Harris  
Clerk of the House  
20 January 2005



# B

## Appendix B

### A sample of recent applications of the anticipation rule

Date	Issue	Outcome	Chair	Stage
19/02/2002	<i>Point of order from Opp. Member: answer anticipated debate on bill listed for that day.</i>	<i>Chair accepted Minister's assurance that answer did not anticipate any of the material covered in the bill.</i>	Andrews	Question Time
24/06/2003	<i>Govt Member mentioned forthcoming Private Members' bills during adj. deb.</i>	<i>Chair noted that Member would have anticipated debate if the bills had been on the notice paper.</i>	Andrews	Adj. Deb.
21/08/2003	<i>Point of order from Opp. Member – Minister's answer referred to Senate passing a bill today (and subject matter of bill) when Senate message due to be considered by House later in day.</i>	<i>Chair reminded Minister of anticipation rule but did not stop answer.</i>	Andrews	Question Time
9/09/2003	<i>Points of order from Opp. Member – Minister's answer referred to subject of a bill to be debated later in day.</i>	<i>Chair said occupiers of the Chair endeavour to ensure that provided the bill is not being reflected on the answer is in order.</i>	Andrews	Question Time
11/09/2003	<i>Point of order from Opp. Member – Minister's answer referred to subject of bill before the House.</i>	<i>Chair allowed Minister to refer to subject but not refer specifically to matters in bills before the House.</i>	Andrews	Question Time



1/12/2003	<i>During Grievance Deb. Member referred to Private Member's Bill he had presented earlier that day.</i>	<i>Chair reminded Member that he should not anticipate debate on the bill</i>	<i>Dep Speaker Causley</i>	<i>Grievance debate</i>
1/03/2004	<i>Points of order from Opp. Member – a question from a Govt Member anticipated debate on a Private Member's motion listed for later that day.</i>	<i>Chair eventually accepted the points of order – the answer should not anticipate debate on the Private Member's motion – test was whether the answer intrudes on what the debate may be and this not always easy to predict.</i>	<i>Andrews</i>	<i>Question Time</i>
2/03/2004				
9/03/2004	<i>Point of order from Govt. Member – question about a matter on the Notice Paper (but in fact – it was listed as the MPI subject.</i>	<i>Chair noted that anticipation rule did not apply to the MPI</i>	<i>Andrews</i>	<i>Question Time</i>
2/06/2004	<i>During debate on a bill a Member referred to another bill on the Notice Paper.</i>	<i>Chair thanked him for not pre-empting debate on the other bill.</i>	<i>A/g Dep. Speaker Jenkins</i>	<i>2<sup>nd</sup> reading debate</i>
1/12/2004	<i>Multiple points of order from Opp. Member about question from Govt subject of a bill listed for debate later that day.</i>	<i>Chair said the Minister can refer to the subject of the question but not the bill. Further point of order that standing order 100(f) referred to question not answer rejected. Further point of order that questions allowed on the process of a bill but wide ranging debate on subject matter not permitted was rejected.</i>	<i>Hawker</i>	<i>Question Time</i>
6/12/2004	<i>Speaker made a statement on the application of the anticipation rule.</i>	<i>Question Time a key period for House to exercise its function of ensuring accountability and subject matter should not be restricted lightly..</i>	<i>Hawker</i>	<i>Question Time</i>

