PARLIAMENT *of* AUSTRALIA
HOUSE *of* REPRESENTATIVES

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Submission 2

20 January 2005

Mrs Margaret May MP
Chair
Standing Committee on Procedure
PO Box 291
PALM BEACH QLD 4221

Dear Mrs May

Thank you for the invitation of 9 December 2004, from the Acting Chair, to make a submission to the Procedure Committee's *Inquiry into the application of the standing orders on the anticipation rule.*

Please find attached my submission to the Committee for its consideration .

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

Yours sincerely

Ian Harris
Clerk of the House

cc. Judy Middlebrook
Secretary, Procedure Committee

The application of the rule against anticipation

Submission to the Procedure Committee by the Clerk of the House

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 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[1], 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.[2]

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1 *And see, May* 23rd edn, p.4.

2 *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.[3]

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.[4] 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'.[5]

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

4 original standing order 274.

5 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[6] 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:

- the rule applies to the business section of the Notice Paper, not to other sections, such as questions on notice;
- 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;
- the rule has applied to personal explanations, motions of censure or want of confidence, the adjournment debate and the grievance debate.

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6 *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'.[7] 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[8]. 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[9]. 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.[10] 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*[11]

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7 *House of Representatives Practice*, p. 486.
8 *House of Representatives Practice*, p. 528.
9 *House of Representatives Practice*, p. 529.
10 *Odgers*, 10th edn, p. 507.
11 *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[12] and the Senate[13]. They do not apply to questions in Canada's House of Commons[14] 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 ..."[15],

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

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.[17]

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.[18]

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12 *May*, 23rd edn, p. 355.
13 Odgers, 10th edn, p. 507 standing order 73.
14 Marleau and Montpetit, p. 477.
15 *May* 23, p. 4.
16 *May* 23,p. 389.
17 Marleau and Montpetit, p. 476.
18 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.[19] 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 condiserations 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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19 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