

## 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.

