11 Legislation

Introduction—the Territory's laws

11.1 The Self-Government Act empowers the Assembly to make laws for the peace, order and good government of the Territory.[1] This extends to the exercise of the powers of the executive to make laws as provided for by section 37 and Schedule 4 of the Act. Those powers are subject to the provisions of Part VA of the Act relating to the judiciary, (inserted into the Act in 1992) and section 23, which lists specific matters excluded from the Assembly's power to make laws.[2]

11.2 In addition, section 21 of the Self-Government Act empowers the Assembly (subject to the provisions of the Act) to make rules and orders with respect to the conduct of its business. The Assembly is thus authorised to make standing and other orders covering the introduction and consideration of proposed laws. The Assembly may also make laws relating to its own privileges and immunities, but it has yet to do so.[3]

11.3 A range of laws, other than those made by the Assembly, is in force in the Territory. The notes to Part 1.3 of the *Legislation Act 2001* summarise those sources of law:

Note 1 The laws in force in the ACT consist of the written law and various unwritten laws known as the principles and rules of common law and equity.

Note 2 The written law of the Territory consists primarily of laws, known as Acts, made by the Legislative Assembly. It also includes regulations, rules of court and other legislative instruments made under specific powers given by Acts. (Written laws made under an Act are commonly called 'subordinate' or 'delegated' legislation.)

Note 3 Before self-government, ordinances made by the Governor-General under the *Seat of Government (Administration) Act 1910* (Cwlth) were the main form of legislation made for the ACT. Most of the ordinances in force at self-government have been converted into Acts (see the Self-Government Act, s 34). However, the Governor-General (in practice, the Commonwealth Government) retains the power to make ordinances for the ACT on a limited number of topics (see *Seat of Government (Administration) Act 1910* (Cwlth), s 12).

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1 Self-Government Act, section 22. Note that this Act uses the term 'enactment' to describe a law made by the ACT Assembly or an Act of another jurisdiction that is in force in the ACT pursuant to section 34 of the Self-Government Act.

2 Section 3A of the Australian Capital Territory (Self-Government) Regulations (Statutory Rules 1989 No. 96 as amended) excludes certain matters from paragraph 23(1)(h) of the Self-Government Act. Other provisions of the Self-Government Act that relate to the Assembly's law making powers are: section 25 (Notification of enactments—now superseded by section 28 of the Legislation Act (see paragraph 11.66)); section 26 (Special procedures for making certain enactments (see paragraphs 11.61 to 11.74)); section 29 (Avoidance of the application of an enactment or part of an enactment to the Commonwealth Parliament (see paragraph 1.37)); section 31 (Publication of enactments (the responsibility actually rests with the executive, not the Assembly)); section 35 (Disallowance of enactments by the Governor-General and the power of the Governor-General to recommend amendments (see paragraph 11.60)); and sections 57 (Public money), section 58 (Withdrawals of public money) and section 65 (Proposal of money votes) (see paragraphs 11.221 to 11.271 on subordinate legislation).

3 Self-Government Act, section 24. See also Chapter 2: Immunities and powers of the Assembly (Privilege).

Note 4 The written laws in force in the ACT also include the Commonwealth Constitution, Commonwealth Acts, and regulations and other legislative instruments made under Commonwealth Acts. As a general rule, Commonwealth Acts and legislative instruments apply in the ACT in the same way as they apply in other parts of Australia. Commonwealth Acts and instruments prevail over the Acts made by the Legislative Assembly to the extent to which they are inconsistent (see Self-Government Act, s 28).

Note 5 Certain Acts of New South Wales and the United Kingdom also formed part of the written laws in force in the ACT.[4] Because of the *Interpretation Act 1967*, s 65, these are now taken to be laws made by the Legislative Assembly as if they had been enacted by the Assembly. (Section 65 has expired, but its previous operation was saved – see s 65 (3)).[5]

Bills

11.4 A bill is a proposed law presented to the Assembly for its consideration. Though the Self-Government Act does not use the term 'bill' to denote proposed laws, the term has a long history of parliamentary usage, is commonly used in Australia and has been adopted throughout the Assembly's standing orders.[6] The adoption of the term is not without historical significance; 'bills' replaced 'petitions' as the term for proposed laws in England in the fifteenth century and marked an important step in the development of an independent parliament. As Redlich describes it:

> … the essence of the change was that the basis for discussion and the matter for determination in the House were no longer requests, but drafts of the desired enactments free from any formula of asking.[7]

11.5 In Assembly usage, a bill is a proposed law which, if agreed to by the Assembly (and notified on the ACT Legislation Register by parliamentary counsel at the request of the Speaker), becomes law.

11.6 As is the practice in the House of Representatives, all bills in the Assembly are treated as 'public bills'—that is, bills relating to matters of public policy. The Assembly standing orders do not contain provision for 'private bills'—that is, bills for the particular interest or benefit of any person or persons, public company or corporation—as recognised in the United Kingdom House of Commons and certain other legislatures derived from Westminster. Again,

4 For example, the *Bill of Rights 1688* (UK), which includes the guarantee of freedom of speech in Parliament, has, via New South Wales and the Commonwealth, become a law of the ACT.

5 These Acts are listed in Schedule 1 (to the Legislation Act) and see section 34 of the Self-Government Act. For a summary of the sources of law in the Territory see the ACT Legislation Register at <http://www.legislation.act.gov.au/updates/sources_of_law.asp>.

6 In fact, with the exception of standing orders 193 and 194, the term 'proposed law' does not appear in the standing orders. Standing order 193 sets out the procedures for certification of a bill once it has passed and requires the Speaker to request parliamentary counsel to notify 'the making of the proposed law'.

7 (See *May*, p. 982). See Redlich, Vol. I, pp. 16-7, ix, and Lord Campion, *An introduction to the procedure of the House of Commons*, 3rd edn, Macmillan, London, 1958, pp. 10-4, 22-5. Bills had been first adopted for legislative proposals brought forward at the instance of the Crown (it being convenient to supply Parliament with drafts of the new statutes). Redlich sees the great advance being taken when petitioners who approached Parliament from without began to make use of the same form, and when the Commons began to replace their own petitions to the Crown by complete drafts of laws. A survivor from this earlier procedure is that private bills must be accompanied by a petition signed by the parties (or some of them) who are the promoters for the bill.

as in the House of Representatives, there is no recognition of what are termed 'hybrid bills'—that is, public bills to which some or all of the procedures relating to private bills apply.[8]

11.7 The subject matter of bills is restricted by the power of the Assembly to make laws as set out in the Self-Government Act[9] and standing order 200 requires that bills appropriating money be proposed by a Minister. Other than these requirements, there is no restriction on the subject matter of bills introduced by executive and non-executive, or private, Members.

11.8 Assembly bills may originate from the executive or from private Members, the distinction denoting the status of the Member introducing the bill. This determines the listing of the business on the *Notice Paper* and its precedence in the order of consideration. Of the bills introduced in the Assembly to December 2006, 1 418 were introduced by the executive, 379 were introduced by private Members (21% of bills introduced) and seven were introduced by 'Executive Members'. Of those bills enacted, 89% were introduced by the executive and 10.7% were introduced by private Members. During the course of the Fourth Assembly, a further category of business—Executive Members' business—was adopted by temporary order. A small number of bills were introduced and considered under this category of business.[10]

11.9 Generally, the Assembly offers non-executive Members very generous opportunities to introduce business when compared with other Australian parliaments. However, the proportion of private Members' bills introduced and passed has varied from Assembly to Assembly. In the Sixth Assembly, with a majority government, proportionately fewer private Members' bills were introduced than in previous Assemblies, and the proportion of such bills enacted was significantly lower. Details are given at Appendix 11.

Form of a bill

Long title

11.10 A bill begins with a long title that sets out its purposes in brief terms. A short description of the scope of the bill may also be provided.[11] A bill also has a short title that serves as a convenient name for the proposed law. This short title is usually placed in the first clause of a bill. Any reference in the standing orders to the 'title' of a bill is a reference to the long title, as is any procedural reference, without being qualified, to the 'title' of a bill.[12] The usual terms of the long title are 'A Bill for an Act to …' or 'A Bill for an Act relating to …'.

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8 See *House of Representatives Practice*, p. 336 and May, pp. 965-7. There is no obvious constitutional bar to the Assembly adopting such procedures (provided the subject of the proposed laws falls within the provisions of section 22 of the Self-Government Act). Standing rules and orders for the consideration of private bills have been proposed to the House of Representatives by standing orders committees, but not adopted. (See the reports of the Standing Orders Committees of the House of Representatives of 9 October 1902, 14 October 1903, and 19 September 1905).

9 Sections 22-24 of the Self-Government Act.

10 On 24 September 1998 the Assembly amended standing orders 77 and 78 by temporary order to create 'Executive Members' business', being business introduced by a member of the executive that was not government business. See MoP 1998-2001/190-1; Assembly Debates (24.9.1998) 2213-9. Over the course of the Fourth Assembly, seven bills were introduced under this category (pursuant to notice as an Executive Member), four of which were enacted: see MoP 1998-2001/419, 760, 772, 850. This provision reflected the unusual circumstances of the coalition which formed the executive in the Fourth Assembly in which a Minister was not bound by conventions of 'Cabinet solidarity' with regard to matters outside his portfolio responsibilities and retained the right to introduce bills in his private capacity.

11 For example, 'A bill for an Act to approve and provide for carrying out an agreement entered into between the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory with regard to the water, land and other environmental resources of the Murray-Darling Basin, and for other purposes'; short title, 'Murray-Darling Basin Agreement Bill 2007'. See also *House of Representatives Practice*, p. 336.

12 *House of Representatives Practice*, p. 336.

11.11 The long title is significant. It describes the proposed law and its relationship to previous legislation. Procedurally, it is very important in the context of the relevancy rule and the scope of amendments that may be moved. The rules of procedure have never treated the title as a casual or unimportant matter. It is part of a bill; it is capable of amendment; and it must be agreed to by the Assembly.[13] The provisions and powers contained in a bill must be covered by the description given in the title. If a bill contains clearly extraneous matters, then it should be withdrawn. Standing orders require that the title of a bill must be specified in (and agree with) the notice of presentation. A bill may not include a clause that does not come within its title.[14] Further, any amendments which are proposed to a bill must be relevant to its subject matter, as specified by the long title. Bills not complying with these requirements have been ordered to be withdrawn.[15]

11.12 A developing trend in legislative drafting has been to include a 'catch-all' phrase in the long title of bills—'and for other purposes'. This practice must be viewed with some concern since it appears to reduce the importance of the title as a guide to the substantive matters being dealt with in a bill. The use of the phrase is often justified by the need to make consequential amendments to a series of other pieces of legislation which it would be cumbersome to include in the long title or to take the opportunity to make minor amendments to other Acts. The practice of the Assembly is to read this phrase narrowly; the 'other purposes' should have a clearly demonstrable relationship to the main purpose of the bill.

Preamble

11.13 Following the long title, a bill may have a preamble which precedes (and, in the Territory, may include) the enacting formula. The preamble 'is to state the reasons why the enactment proposed is desirable and to state the objects of the proposed legislation'[16] though these matters are often encompassed in the explanatory statement. A preamble is often included in a bill regarded as being of particular significance. For example, the Native Title Bill 1994 included a preamble setting out the circumstances of pre-European settlement in Australia; the importance of land to Aboriginal people and Torres Strait Islanders and their circumstances since European occupation; the circumstances of the 1992 native title decision of the High Court; the objects of the *Native Title Act 1993* of the Commonwealth; and the intent of the Assembly to participate in the scheme enacted by the Commonwealth.

11.14 Examples of other bills that have included preambles have been the Human Rights Bill 2003, the Charter of Responsibilities Bill 2004, the Residential Property (Awareness of Asbestos) Bill 2004,[17] the Gungahlin Drive Extension Authorisation Bill 2004, the Hotel School (Repeal) Bill 2005 and the Civil Unions Bill 2006. The Electoral Bill 1992 did not contain a preamble; however, one was inserted during consideration of the bill at the detail stage. It briefly outlined the background to the choice of the proportional representation (Hare-Clark) system by referendum and the wish of the Assembly to enact legislation to implement the system chosen.[18] On occasion, where the legislation has been particularly controversial, the

13 Standing orders 186 and 180(e). And standing order 179 provides that the title and any preamble stand postponed in the order of consideration of the bill in the detail stage.

14 Standing orders 168(b) and 169.

15 See MoP 2004-08/1309. See also paragraphs 11.47 to 11.52. On occasion. bills have been withdrawn at this stage pursuant to standing order 169 which requires that the title of a bill agrees with that used in any relevant notices and orders and that the clauses of the bill be consistent with the title. Where a bill contravenes this standing order, another Member will move that it be withdrawn.

16 *House of Representatives Practice*, p. 337.

17 The preamble was inserted during Assembly consideration of the bill; see MoP 2001-04/1684-7.

18 Assembly Debates (24.11.1992) 3348-90; MoP 1992-94/213-220. Paragraph 5 of the original preamble (relating to the need to facilitate the implementation of that electoral system by the establishment of the offices and procedures necessary to enable the Territory to be divided into electorates) was omitted by section 5 of the *Electoral (Amendment) Act 1994*.

preamble may be a restatement of the proponent's justification for the legislation and have some of the character of an introductory speech to a sceptical chamber.

11.15 The preamble is part of a bill and can be amended by the Assembly.

Enacting clause

11.16 The enacting formula precedes the other clauses of a bill and, as mentioned above, it has on occasions been included as part of the preamble to a bill. The formula, reflecting the provisions of section 22 of the Self-Government Act, is:[19]

> The Legislative Assembly for the Australian Capital Territory enacts as follows.

The Assembly does not consider the enacting formula during its consideration at the detail stage (see paragraph 11.71).

Short title

11.17 The *Legislation Act 2001* provides that the name for an Act is the Act's short title.[20] Short titles are generally made up of a few words that describe in broad terms the area of law to be changed or affected.

11.18 Clause 1 of a bill contains the bill's short title and is usually worded as follows: 'This Act is the *Financial Management Act 1996*.' If the intention of a bill is to amend a principal Act, the word 'Amendment' is usually included in the short title. For example, the Financial Management Amendment Bill 2007 stated in its long title that it was 'A Bill for an Act to amend the *Financial Management Act 1996*.'

11.19 When more than one bill is introduced in the same year with effectively the same short title, the second and any subsequent bill introduced will include (No 2), (No 3), etc, in the short title. If a bill is dealing with matters contained in a principal Act or is seeking to add or delete provisions to the principal Act, it is usual practice to place words in parenthesis within the short title—for example, the Environment Protection (Fuel Sales Data) Amendment Bill 2007—which, if passed, would amend the *Environment Protection Act 1997*.

11.20 If a bill is introduced in one year and passed in a subsequent year, the bill is given a citation and the name of the bill changes to reflect the year in which it was agreed to by the Assembly. For example, the Construction Occupations Legislation Amendment Bill 2004 originated in the Assembly as the Construction Occupations Legislation Amendment Bill 2003 but, as it was not passed until 2004, the short title was amended prior to notification pursuant to the provisions of standing order 191 (see paragraphs 11.116 to 11.118). This fact, and any other amendment to the title, is recognised by the Clerk in certifying a bill has passed pursuant to the provisions of standing order 193.

11.21 For much of its consideration during the detail stage, the Human Rights and Equal Opportunity Bill 1991 was without a short title, the question 'That clause 1 be agreed to' having been negatived at an early stage in the Assembly's consideration of the bill. At the conclusion of the detail stage consideration of the bill, the Assembly ordered that clause 1 be reconsidered and the clause was agreed to following its amendment.[21]

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19 The enacting formula in the United Kingdom House of Commons was developed in the 15th century (see May, p. 536-7) and the formula in Commonwealth legislation has changed several times since 1901 (see *House of Representatives Practice*, p. 337).

20 *Legislation Act 2001, Dictionary, Meaning of commonly-used terms*, p. 231, (Republication No 53). There is a trend in some jurisdictions to adopt a title for legislation which appears to promote its claimed benefits; thus a 'Taxation Amendment Bill' becomes the 'Fairer Taxation System Bill'.

21 MoP 1989-91/571-2, 598-9, 599-602, 603-7, 611-4, 615-9.

Commencement clause

11.22 The commencement clause sets the day on which the law will come into effect. Such clauses are expressed in a range of ways. Commencement may occur on the day the Act is notified, on a particular date specified in the clause, on a date to be fixed by the Minister by written notice or on a date contingent on some other specified event—for example, the passage of another piece of legislation. The Appropriation Bill 2007-2008 did not pass the Assembly until late in August 2007 but was taken to commence on 1 July 2007, the first day of the financial year.[22]

11.23 The Legislation Act, at section 77, provides that different dates or times may be set for the commencement of different parts of an Act. Section 79 also provides that, if an Act or any provision has not commenced within six months of notification, that Act or provision automatically commences on the completion of the six-month period. Thus, unlike in other jurisdictions there would be very few (if any) Acts on the statute books with uncommenced sections.

Dictionary clause

11.24 The dictionary clause defines certain terms used in a bill and other pieces of legislation. A definition in the dictionary to an Act or statutory instrument applies to the entire Act or instrument unless the Act or instrument provides for the definition to have a more limited application.[23] If a dictionary clause is included in a bill it usually appears early in the bill while the actual dictionary is located towards the end of the bill. Prior to 1999 the 'dictionary' clause of a bill had also been referred to as the 'definitions' clause and the 'interpretation' clause.

Notes and headings

11.25 Notes are included in a bill to assist with its interpretation or to provide additional information that is not necessarily contained in its provisions. Along with footnotes and endnotes, notes do not form part of a bill.[24]

11.26 Headings to a chapter, part, division, subdivision and schedule do form part of a bill. Headings to sections or subsections are part of the bill if the bill was enacted or the heading was amended or inserted after 1 January 2000.[25]

Main body clauses

11.27 Thereafter comes the main body of a bill, in which the substantive matters that the bill deals with are set out. After the clauses, a bill may include a schedule or schedules which list relevant matters. For example, Schedule 4 of the Self-Government Act lists the 'Matters concerning which the executive has power to govern the Territory' and Schedules 2, and 5 and Part 3 list the Commonwealth, state and [British] imperial legislation that are to become enactments of the ACT at the commencement of self-government.

Consideration of bills by the Assembly

11.28 The more familiar stages of consideration of bills in other legislatures follows the pattern of a first reading, a second reading, consideration of the bill clause by clause in committee of the whole and a third reading. While the Assembly's procedure is structurally

22 Legislation having retrospective effect is undesirable. However in this case it is acceptable for reasons relating to the supply provisions that operate in the ACT. See paragraphs 11.147 to 11.220 on money bills.

23 Section 156 of the *Legislation Act 2001*.

24 Section 127 of the *Legislation Act 2001*.

25 See section 126 of the *Legislation Act 2001*.

similar, though with different terminology and emphasis, it does not utilise the committee of the whole procedure.[26]

11.29 The major stages that a bill must pass through during Assembly consideration up to enactment are as follows:

(a) initiation and presentation in the Assembly;[27]

(b) agreement in principle;[28]

(c) possible reference to a select or a standing committee;[29]

(d) detail stage;[30]

(e) agreement to bill;[31]

(f) certification of bill as having passed.[32]

26 As a unicameral legislature the procedures for reaching agreement with the 'other place' do not apply.

27 Standing orders 167-70.

28 Standing orders 171-3.

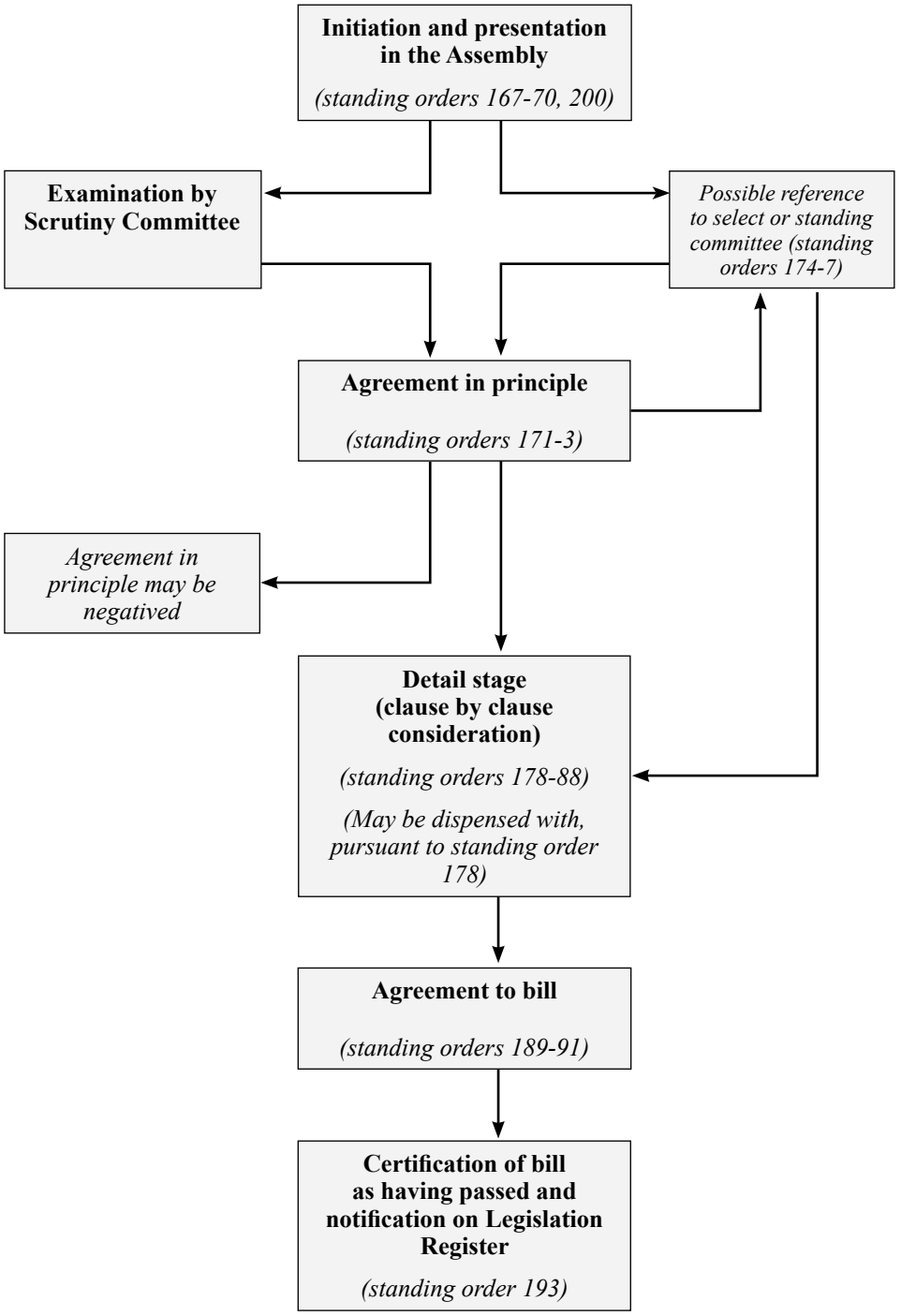
29 Standing orders 174-6. Following the May 2008 amendments to the standing orders, standing order 174 now provides that reference to a committee may occur at any time after the presentation of a bill to the Assembly, including immediately after a bill has been agreed to in principle but not after the completion of the detail stage.

30 Standing orders 178-88.

31 Standing orders 189-91.

32 Standing order 193.

Diagram 11.1– Consideration of bills by the Assembly



11.30 The procedure for consideration of bills may vary by leave of the Assembly (for example, detail stage may be by-passed) or by special order. In addition, standing orders contain specific provisions for:

- bills being declared urgent (see paragraphs 11.109 and 11.110);
- bills for entrenching laws (see paragraphs 11.121 to 11.128);
- money proposals (see paragraphs 11.221 to 11.271 on subordinate legislation); and
- consideration of amendments recommended by the Governor-General.

Initiation and presentation

11.31 Up until 2008, bills were able to be initiated in the Assembly, as provided by standing order 167:

- by motion for leave;[33]
- by notice; or
- without notice, pursuant to standing order 200 (money bills).

In addition, bills have been presented pursuant to order of the Assembly.[34]

11.32 The most common means of introducing a bill into the Assembly is for either a Minister or a non-executive Member to give notice of his or her intention to do so. Standing order 168 provides that:

- a notice of intention to present a bill shall be given by a Member by delivering a copy of its terms to the Clerk in the Chamber during a sitting;
- a notice of intention to present a bill shall specify the long title of the bill, and shall be signed by the Member; and
- on the calling on of the notice a Member shall present to the Assembly two printed copies of the bill signed by that Member and any associated explanatory statement.[35]

11.33 The usual form of a notice of presentation of a bill is 'I give notice that, on the next day of sitting, I shall present a bill for an Act to [*long title of the bill*]'.[36] The date the notice was lodged with the Clerk is indicated on the *Notice Paper*. A notice becomes effective only when it appears on the *Notice Paper*.[37]

33 This standing order has not been utilised and the procedure was removed from the standing orders when a major review was conducted in 2008. Although this procedure is still utilised in the Senate (see *Odgers*' p. 228-30), by the time of the publication of the first edition of *House of Representatives Practice* in 1981 the procedure had fallen into disuse in that chamber after the adoption of new procedures in 1963 in order to save the time of the House. The motion for leave, usually moved on notice, specified that the long title of the bill was capable of amendment and 'while this would not ordinarily be the appropriate time for long debate, the motion could be debated'. When the motion was moved, the objects of the bill could be explained, an amendment could be moved and the question could be put to a division. See *House of Representatives Practice*, First Edition, p. 314.

34 On 25 July 1989 the Assembly agreed to a recommendation of the Select Committee on the Police Offences (Amendment) Bill 1989, 'That [the bill] be withdrawn and that [the Member sponsoring the bill] be ordered to prepare and present a bill in accordance with the recommendations of this Committee'. Later, on 22 August 1989, the Member, pursuant to order, presented the Police Offences (Amendment) Bill 1989 [No. 2]. MoP 1989-91/55 (original bill withdrawn), MoP 1989-91/67; Assembly Debates (22.8.1989) 1188-92.

35 Standing order 168 also provides that the standing orders shall, to the necessary extent, be applied and read as if a notice of intention to present a bill were a notice of motion.

36 During the Fourth Assembly, notice of presentation of a bill presented by a member of the executive as Executive Members' business was in the form 'I give notice, as an Executive Member, that on the next day of sitting, I shall present a bill for an Act to < *long title of the Bill* >'. On the notice was an indication from the Manager of Government Business that the Manager of Executive Business had determined that the matter was an item of Executive Members' business.

37 Standing orders 112, 168 (d).

11.34 Notices are not given openly (orally) as in some legislatures, nor are they reported to the Assembly by the Clerk on the day of their submission. A record of all notices lodged on any day is kept at the Table by the Clerks and is available for inspection by any Member, thus ensuring that Members have access to information on the bills and motions to be introduced before the information appears on the *Notice Paper*.

11.35 A Member, in the absence of another Member and at that Member's request, may give a notice for that Member, sign the notice and put his or her name on the notice.[38] The Member who has given notice may alter its terms by notifying the Clerk in writing within such time as would enable the alteration to be made on the *Notice Paper*.[39] The Member who has given the notice may withdraw the notice by notifying the Clerk in writing at any time prior to that proposed for presenting the bill.[40]

11.36 Money bills, which are covered by the provisions of standing order 200, may be introduced without notice and may be proposed only by a Minister.[41] The Assembly has on many occasions granted leave to a Member to present a bill (not being a money bill).[42] On occasion, leave having been denied, a motion to suspend standing orders to enable a bill to be introduced has been successful.[43]

11.37 The majority of bills are presented after notice has been given of their presentation. The determination of the precedence of notices on the *Notice Paper* is governed by standing order 77 (see Chapter 9: Motions). It should be noted that the Assembly has, in the past, resolved that the executive should give advance notice of its legislation program.[44]

11.38 When the Clerk calls upon a notice (for example, 'executive business, Notice No 3'), the Member who has given notice rises and states 'I present the [short title of the bill]'. Standing order 168(c) requires that the Member present 'two printed copies of the bill signed by that Member'. The Member may then present a printed copy of any associated explanatory statement and (if the Member presenting the bill is a Minister) a copy of a Human Rights Act compatibility statement.[45]

11.39 On one occasion a Member was granted leave to present two bills together (as both bills dealt with the creation of a new criminal offence in the Territory)[46] and it is not unusual for a package of bills relating to the same subject matter to be presented seriatim on

38 Standing orders 168 and 104.

39 Standing orders 168 and 110. The fact that the notice has been amended and the date of amendment(s) is indicated on the *Notice Paper.*

40 Standing orders 168 and 111.

41 Standing order 200 refers to the introduction of money bills and is dealt with in paragraphs 11.147 to 11.220.

42 For example, MoP 2004-08/1015, 1042.

43 For example, MoP 2001-04/243.

44 On 22 October 1989 the Assembly resolved:
That the Assembly:
(a) believes that a forward legislative program is essential to the effective scrutiny of government legislation and the good government of the ACT;
(b) calls on the Government to provide Assembly Members with a forward legislative program at the beginning of each sitting session and that this program be regularly updated;
(c) notes that on 6 July 1989 the Chief Minister made an undertaking in the Assembly to provide a forward legislative program and to update this program on a regular basis; and
(d) demands that the Government corrects its failure to provide such a program.
See MoP 1989-91/105-6. See also MoP 1992-94/241 where the Assembly discussed a matter of public importance on 'The government's failure to implement its legislative program.'

45 Standing order 168(c). Section 37 of the *Human Rights Act 2004* provides that the Attorney-General must prepare a compatibility statement for each bill presented by a Minister for presentation to the Assembly.

46 (Crimes (Amendment) Bill 1996 and Domestic Violence (Amendment) Bill 1996.) MoP 1995-97/289. Assembly Debates (27.3.1996) 674-6.

the same sitting day.[47] In November 1991, standing orders were suspended to permit the presentation together of 10 bills (of which notice had been given and which proposed the implementation of certain policies in Territory statutory authorities) and for one motion to be moved and one question put in regard to, respectively, the agreement in principle, the detail stage and agreement to the bills.[48]

11.40 It is not unusual for a Minister to present a bill on behalf of an absent Minister pursuant to the provisions of standing order 80.[49]

11.41 After the Member presents his or her signed copies of the bill, the Clerk reads the long title of the bill and the Member must then move, 'That this bill be agreed to in principle.'[50] The Member may (and invariably does) speak to the motion for a period not exceeding 20 minutes (or, if the bill is the main appropriation bill for the year, for an unspecified period).[51] The speech is referred to as the presentation speech.

11.42 The relevancy rule (standing order 58) applies to the in principle or presentation speech. The presentation speech is of importance for Assembly Members and the community because it assists them to understand the purpose of the bill. It also aids the Chair in the application of the relevancy rule in subsequent debate and it provides a guide to the courts in the interpretation of the resulting Act.[52]

11.43 The Speaker then proposes the question, 'That this bill be agreed to in principle.' Standing order 171 requires that debate on the question must then be adjourned until a future day on the motion of another Member. (The question may not be determined by the Assembly during the sitting at which the bill was first introduced—unless the bill has been declared to be an urgent bill.[53] Accordingly, a Member moves, 'That the debate be adjourned.' The Speaker then puts the question and declares the result. If the question is resolved in the affirmative,[54] the Speaker next proposes the question, 'That the resumption of the debate be made an order of the day for the next sitting' (unless the Speaker had ascertained that it was proposed the debate be adjourned until a specific day or occurrence in the future). This question is open to amendment and debate.

47 Firearms Bill 1996 and Prohibited Weapons Bill 1996, see MoP 1995-97/427-9; Assembly Deb (29.8.1996) 2766-73. Children's Services (Amendment) Bill (No. 3) 1998, Crimes (Amendment) Bill (No. 6) 1998 and Magistrates Court (Amendment) Bill (No. 3) 1998, see MoP 1998-2001/169-70; Assembly Deb (23.9.1998) 2041-2. Human Rights Commission Bill 2005 and Human Rights Commission Legislation Amendment Bill 2005, see MoP 2004-08/141-2; Assembly Deb (7.4.2005) 1508-11.

48 MoP 1989-91/610. And see precedent of April 1992 when, standing orders having been suspended to enable the course to be followed, 10 bills which proposed the implementation in ACT statutory authorities policies of equal employment opportunity and the merit principle in respect of appointment and promotions were presented together, one motion moved and one question put in regard to, respectively, the agreement in principle, the detail stage and agreement to the bills—MoP 1992-94/20-1, 40-41 (in the detail stage the bills were, by leave, taken as a whole and amendments were made to all bills (on motion moved by leave).

49 See, for example, MoP 1989-91/577.

50 Standing order 171.

51 Standing order 69 (d)

52 *Legislation Act 2001*, section 142.

53 Standing order 172.

54 Following the presentation of the Publications Control (Amendment) Bill (No. 2) 1990 (and a point of order having been taken that the bill contravened the provisions of standing order 136) and no Member having moved the motion to adjourn the debate, the Speaker, having addressed the point of order, advised the Assembly that the debate stood adjourned under the provisions of standing order 171, see MoP 1989-91/375; Assembly Debates (12.12.1990) 5044-5. Strictly speaking, the Assembly declining to make an order setting a time for future consideration of the bill, its further consideration should not have been listed on the *Notice Paper.* However, the Speaker was constrained by and sought to comply with the provisions of standing order 171.

11.44 Although leave of the Assembly has been granted to enable consideration of the motion for the agreement in principle immediately after it was moved[55] and a Member has been permitted to move that the resumption of the debate be made an order of the day for a later hour that day,[56] these precedents must be regarded as highly unusual.

Irregular bills to be withdrawn

11.45 Standing orders provide that:

- the long title of a bill must agree with the notice of presentation;
- no clause may be included in a bill not coming within its title;[57] and
- any bill not prepared according to the standing orders shall be ordered to be withdrawn.[58]

The Speaker usually has no prior knowledge of the contents of bills introduced and could not be expected to be aware of irregularities contained in them. Accordingly, should a point of order be taken as to whether the contents of a bill contravene the provisions of the standing orders, the Speaker will often allow its introduction to proceed and rule on the matter after considering the contents of the bill.[59]

11.46 Bills have been ordered to be withdrawn because they contravened the provisions of standing order 136 (same question rule)[60] or standing order 169 (clauses to come within title).[61] On occasions when bills that contravened the provisions of [then] standing order 200 (money proposals), debate on the motion to withdraw the bills has been adjourned and the orders of the day for the resumption of debate were eventually discharged.[62] However, on other occasions when bills have been ruled out of order as they had not been prepared in accordance with the standing orders, different procedures have been followed, for example:

- the Assembly has agreed to suspend the standing orders to enable the order of the day for the consideration of the bill to remain on the *Notice Paper*;[63]the motion that the bill be withdrawn was negatived and debate proceeded on the bill;[64]

55 MoP 1998-2001/477-8.

56 MoP 2004-08/97, Assembly Debates (10.3.2005) 865.

57 Standing order 169. Bills have been presented pursuant to notice, as amended, by leave. See MoP 1998-2001/663; Assembly Debates (8.12.1999) 3949; MoP 1998-2001/ 989 (2), 990.

58 Standing order 170.

59 See, for example, comments by Speaker Prowse at Assembly Debates (22.10.1991) 4110.

60 Publications Control (Amendment) Bill (No.2) 1990, see MoP 1989-91/355, 357; Assembly Debates (28.11.1990) 4689-94, 4773-4 (the Speaker, having considered the contents of the Bill, made his ruling later in the day), and see ruling and order to withdraw on later attempt to introduce the Bill, see MoP 1989-91/375, 392; Assembly Debates (12.12.90) 5044 and (13.12.90) 5339; Road Transport (Safety and Traffic Management) Amendment Bill 2001, see MoP 1998-2001/1493; Assembly Debates (20.6.2001) 2138-41. A motion proposing to suspend so much of standing orders as would prevent the Member presenting the bill was negatived. And see later proceedings when standing orders were suspended to enable the Member to present his Road Transport (Safety and Traffic Management) Amendment Bill 2001 (No.2), see MoP 1998-2001/1655-6; Assembly Debates (22.8.2001) 3120-4.

61 On 30 May 1995 two bills were reintroduced in the Assembly, the Minister sponsoring the bills indicating during his presentation speech that due to a discrepancy between the description on the long title in the notice for presentation of one of the earlier bills and the one that had appeared on the bill itself, it was necessary for both bills to be presented again, see MoP 1995-97/51-2; Assembly Debates (30.5.1995) 532. The Assembly then ordered that the original bills be withdrawn from the *Notice Paper,* MoP 1995-97/53; Assembly Debates (30.5.1995) 533. And see paragraph 11.49.

62 Ainslie Transfer Station Bill 1990 and Royal Canberra Hospital Bill 1990, see MoP 1989-91/255, 271-2, 478; Assembly Debates (6.6.1990) 2131, 2136, (8.8.1990) 2563-83. Schools Authority (Amendment) Bill 1990, see MoP 1989-91/271, 284, 478; Assembly Debates (8.8.1990) 2546-57, (15.8.1990) 2854-77. Human Rights Bill 1990 and Landlord and Tenant (Rental Bonds) Bill 1990, see MoP 1989-91/293, 299, 394, 407, 478; Assembly Debates (12.9.1990) 3094-106 and (13.9.1990) 3206-27. Royal Canberra Hospital Bill 1991, see MoP 1989-91/514, 556; Assembly Debates (11.9.1991) 3162-9 and (22.10.1991) 4110-2.

63 Bail Amendment Bill 1992; see MoP 1992-94/234, Assembly Debates (8.12.1992) 3598-9. The bill contravened standing order 136 (same question rule).

64 Stamp Duties and Taxes (Amendment) Bill (No.4) 1993; see MoP 1992-94/514-5, Assembly Debates (15.12.1993) 4610-3. The bill contravened standing order 136 (same question rule).

- the Speaker has permitted debate to proceed as standing orders had been suspended in relation to the bill;[65] and
- standing orders were suspended to enable consideration of the bill to resume forthwith.[66]

11.47 Sometimes the Assembly has permitted bills to be presented pursuant to notice, as amended by leave,[67] and on 21 April 1999, on the resumption of the debate on the question that Building and Construction Industry Training Levy Bill be agreed to in principle and the attention of the Assembly having been drawn to the fact that the title did not agree with the notice of presentation of the bill, the Assembly gave leave for the debate to be resumed.[68]

11.48 The provisions of standing order 136 (same question rule) would not normally prevent the presentation of a bill the same in substance as a bill already listed for consideration on the *Notice Paper* where the Assembly had not made a substantive decision on the earlier bill.[69] Once a decision had been made to agree in principle to either of the bills, further consideration of the order of the day for the resumption of debate on the other bill would be prevented by standing order 136.

11.49 It is in order to present an amending bill whilst the principal bill is still before the Assembly. However, in making a statement to the Assembly on this matter, Speaker Berry added that it would be expected that the principal bill would be considered by the Assembly prior to consideration of the amending bill.[70] In 2002 a point of order was taken concerning the applicability of standing order 136 to the Medical Practitioners (Maternal Health) Amendment Bill. The Deputy Speaker ruled that the bill did not breach the provisions of standing order 136 as it did not obstruct the Assembly, nor was it unnecessarily repetitive, but provided an alternative course to the Assembly.[71]

11.50 The Speaker, having ruled the Royal Canberra Hospital Bill 1991 out of order as it contravened the provisions of [then] standing order 200 (its effect would have been to dispose of or charge the public money of the Territory), then called on the Deputy Chief Minister to move the appropriate motion under standing order 170. As neither the Deputy Chief Minister nor any other Member would move the motion, the Speaker advised the Assembly:

> After seeking the guidance of the assembled Members and no-one wishing to move under standing order 170, I must abide by the direction given to me by the Assembly on this matter, as indicated from the floor, and override standing orders. In that case, the matter will be placed back on the *Notice Paper*.[72]

In 2008 the standing orders were amended to provide that when a bill is ruled out of order by the Speaker, it is automatically withdrawn from the *Notice Paper*.[73]

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65 Long Service Leave (Building and Construction Industry) (Amendment) Bill (No.2) 1993, see MoP 1992-4/521; Assembly Debates (16.12.1993) 4714-5. The bill contravened standing order 136 (same question rule).

66 Egg (Labelling and Sale) Bill 2001, see MoP 1998-2001/1825; Assembly Debates (29.8.2001) 3659-60. The bill contravened standing order 136 (same question rule).

67 See, for example, MoP 1995-97/871, 1998-2001/663, 989 (2), 990.

68 MoP 1998-2001/383.

69 An exception could be where the bills had been introduced by motion for leave to bring them in (pursuant to standing order 167), a procedure that has not been utilised in the Assembly to date (see paragraph 11.31). This provision was omitted from the standing orders in March 2008.

70 MoP 2001-2004/340-1; Assembly Debates (26.9.2002) 3318. The bill for the principal Act was considered and agreed to that day, the amending bill was considered and agreed to on 13 November 2002.

71 MoP 2001-2004/262; Assembly Debates (21.8.2002) 2546-7, 2569-70. The key to the point of order was, should the two earlier Bills succeed, whether the bill in question would be out of order because it was seeking to reinstate something that the Assembly had just removed.

72 Assembly Debates (22.10.1991) 4110-2.

73 See standing order 170.

Early reference to a committee

11.51 Even though there was no provision for it in the standing orders, bills have sometimes been referred to standing or select committees at the presentation stage (or later during the course of the in principle debate) by order of the Assembly, notwithstanding the provisions of standing order 174 before the standing order was amended in 2008. Leave of the Assembly has been granted for the requisite motions to be moved or the relevant motions have been moved pursuant to notice or following the suspension of standing orders.[74] Standing order 174 now makes provision for a reference to be made at any time after the presentation of a bill to the Assembly but not after the completion of the detail stage. Committees may be given specific instructions in the order of referral.[75] It usually provides for the restoration of the order of the day to the *Notice Paper* after the presentation of the report to the Assembly. It must be noted that the reports of committees in these circumstances are advisory in nature, standing orders making no provisions otherwise.[76]

11.52 As will be addressed later in this chapter, although bills have not been referred to the committee performing the duties of a scrutiny of bills and subordinate legislation committee (currently the Standing Committee on Justice and Community Safety, but previously the Standing Committee on Legal Affairs),[77] the committee is charged with examining each bill introduced to consider whether its clauses unduly trespass on personal rights and liberties and other related matters, and whether any explanatory statement, explanatory memorandum or regulatory impact statement meets the technical or stylistic standards expected by the Committee. It also reports to the Assembly 'about human rights issues raised by bills presented to the Assembly'.[78] Members are protective of the committee and it is very unusual for a bill to be considered by the Assembly without either a report from the scrutiny committee or a statement from the chair summarising the committee's view.[79]

11.53 With the exception of the main appropriation bill dealing with the ordinary annual services for a year, which is referred to a select committee, it is common practice to refer appropriation bills to a committee before the agreement in principle stage. This course is followed as a simple convenience to expedite the Assembly's consideration of bills generally. It is also usual for consideration of the detail stage of such bills to be dispensed with after the Assembly has received the committee's reports. Once again, the exception is the main appropriation bill for a year, which is always considered in detail at the detail stage.[80]

Agreement in principle

11.54 Following presentation of a bill, the Member having carriage of it moves, 'That this bill be agreed to in principle' and may speak to the motion. This stage of consideration is analogous to the second reading stage in other legislatures. It allows Members to debate the

74 Select Committees have been established to consider bills at the commencement or prior to the commencement of the in principle debate (for example, MoP 1989-91/19) or during the course of the debate (MoP 1992-94/350) and Bills have been referred to existing standing or select committees (MoP 1992-4/129-30, 315, 1995-97/313). The Assembly has ordered the referral of a bill following the establishment of a select committee to inquire into and report on the bill (MoP 1992-94/369. See also MoP 1995-97/598 where the Assembly rescinded the order referring a bill to a committee following a statement by the committee chair pursuant to standing order 246A.

75 MoP 1989-91/19.

76 On the presentation of such reports the recent practice has been for a motion to be moved to take note of the report but this has not always been the case. Motions have been moved 'That the recommendations be agreed to'. See MoP 1989- 91/52, 54-5.

77 MoP 2004-08/12-16.

78 *Human Rights Act 2004*, section 38. The Act provides that the report must be made by 'The relevant committee'—a standing committee nominated by the Speaker for the purposes of the section or, if no nomination is in effect, the standing committee responsible for the consideration of legal issues.

79 Standing order 246A empowers a committee to authorise the Chair to make a statement to the Assembly with regard to '… matter within the committee's terms of reference'.

80 See, for example, Appropriation Bill 2001-2002 (No 3), MoP 2001-04/46-7; Appropriation Bill 2002-2003 (No 2), MoP 2001-04/559-60.

broad policy of the bill. Standing orders 171 and 172 require that debate on this motion be adjourned and not be completed until a later sitting day.[81]

11.55 Though the 'in principle' debate is primarily concerned with the principles of the legislation, the Chair has permitted brief reference to foreshadowed amendments. In the application of the relevancy rule, the Chair would have recourse to the long title and the content of the bill, the sponsoring Member's presentation speech and any explanatory statement presented with the bill. The Chair would also have available any report on the bill from the committee undertaking the duties of a scrutiny committee or any other report from a standing or select committee should the bill have been referred to committee prior to its agreement in principle.

11.56 The key factors in the application of the relevancy rule are the long title of a bill and its contents. Where a bill has a restricted title and its contents are of limited purpose, the interpretation and application of the relevancy rule are relatively simple. Where a bill has an unrestricted title and a large number of clauses, the interpretation and application of the relevancy rule are very difficult.[82]

Amendment to the question, 'That this bill be agreed to in principle'

11.57 Standing order 173 permits the moving of any amendment to the question, 'That this bill be agreed to in principle' as long as the amendment is relevant to the bill, does not anticipate an amendment which may be moved during the detail stage and makes clear whether or not the bill will proceed to further stages of passage. This standing order was amended in March 2008.

11.58 It is unusual in the Assembly for amendments to be moved at the agreement in principle stage. When it occurs, the amendments usually tend to be declaratory in nature. The following examples illustrate the point.

- On 28 June 1989, after the order for the consideration of a bill had been called on and the question before the Assembly was 'That this bill be agreed to in principle', an amendment was moved by a Member proposing the addition of words at the end of the motion. The amendment was negatived after a vote of the Assembly.[83]
- When debate resumed at the agreement in principle stage of the Film Classification (Amendment) Bill 1989 on 26 July 1989, an amendment was moved to the question 'That this bill be agreed to in principle'. The amendment proposed to omit all words after 'That' and to substitute other words which indicated that the Assembly would not oppose the bill but did hold certain opinions in relation to its subject matter. This amendment was also negatived by the Assembly.[84]

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81 Unless the bill has been declared an urgent bill; standing order 192. The issue of legislative processes and time frames relating to the passage of bills through the Assembly has been raised on a number of occasions since 1989 and there have been several efforts to impose a delay in the consideration of legislation before or at the agreement in principle stage. Motions have been moved attempting to amend standing orders to set minimum periods between different stages of a bill to allow for longer consultation processes for interested parties. (MoP 1992-94/765, 791; Assembly Debates (9.11.1994) 3926-33 and Assembly Debates (20.11.1994) 4343-46. MoP 1992-94/253; Assembly Debates (16.12.1992) 3950-73). A motion has also been moved noting the haste in which a government had brought forward legislation for premature debate after introduction. (MoP 1992-94/288-9; Assembly Debates (23.2.1993) 368-71). Also, during the First and Second Assemblies, several matters of public importance were submitted and discussed in relation to the issue of time frames for the passage of bills through the Assembly (MoP 1989-91/285; Assembly Debates (15.8.1990) 2901-15; MoP 1989-91/376-7; Assembly Debates (12.12.1990) 5092-5108; MoP 1992-94/72; Assembly Debates (23.6.1992) 1073-88).

82 See *House of Representatives Practice*, pp. 355-6.

83 Water Pollution (Amendment) Bill 1989, see MoP 1989-91/34; Assembly Deb (28.6.1989) 503-13. The amendment, in fact, contravened the provisions of standing order 173.

84 Film Classification (Amendment) Bill 1989, see MoP 1989-91/59-60; Assembly Deb (26.7.1989) 1002-15.

- On 21 November 2002, an amendment was moved to the question that the Planning and Land Bill 2002 be agreed to in principle. It proposed the omission of all words after 'That' and substituting words indicating that the Assembly, whilst not declining to agree to the bill in principle, condemned the responsible Minister for failing to provide all supporting statutory rules so as to allow the Assembly to make an informed decision about whether the total package deserved support. The amendment was negatived.[85]
- An amendment to the motion for agreement in principle to the Heritage Bill 2004 criticised the Minister for his failure to consult interested parties in preparing the bill, sought to require the Minister to carry out certain consultations and made further consideration of the bill conditional on the completion of those consultations.[86] The amendment was defeated.

11.59 The Assembly has never agreed to an amendment to the question that a bill be agreed to in principle. Just what the effect of agreement to such an amendment would be is problematical. Taking as examples the proposed amendments of 26 July 1989 and 21 November 2002 should they have been agreed to and the motions, as amended, been agreed to, neither of the bills would have been agreed to in principle. The final outcome would depend upon the wording of the amendment and, ultimately, it would be up to the Assembly to decide.

11.60 There are no precedents in the House of Representatives of that House agreeing to second reading amendments. The view there is that, should this occur in the future, any determination of the effect of carrying such an amendment may well depend upon its wording. If the rejection is definite and uncompromising, the bill may be regarded as having been defeated. However, wording giving qualified agreement could be construed to mean that the second reading may be moved on another occasion.[87]

Determination of question

11.61 When the debate on the question 'That this bill be agreed to in principle' has concluded and the question on any amendment has been resolved, the Chair then puts the original question to the Assembly.

11.62 Should that question be resolved in the negative, as occurs on occasion with both executive and non-executive bills, as the standing orders countenance further consideration of the bill if it has been agreed to in principle, the practice of the Assembly is for there to be no further consideration of the bill unless the Assembly, by special order, rescinds the order and resumes debate on the bill or the bill is re-introduced in the following calendar year. Defeat on this question is, therefore, fatal to the bill.

Reference to committee

11.63 Immediately after a bill has been agreed to in principle, a Member may move that it be referred to a select committee.[88] No such motion may be moved after completion of the detail stage of a bill.[89]

85 MoP 2001-04/428.

86 MoP 2001-04/1597-8.

87 *House of Representatives Practice*, pp. 361-2. See also Odgers', p, 237 and *McGee*, pp. 364-6.

88 Under the new provisions of standing order 174, adopted in March 2008, this motion may be moved at other stages of the consideration of a bill.

89 Standing order 174. A proposal to establish a select committee to consider the Animal Welfare Bill 1992, whilst the Bill was being considered at the detail stage, was negatived. MoP 1992-94/105.

11.64 Should a bill be so referred, it cannot be dealt with by the Assembly until the committee has reported,[90] the appropriate time to consider the committee's work being after its report to the Assembly. In practice, however, following reference of the main appropriation bill for the year to a select committee on estimates, references to public proceedings of the committee have been permitted in Assembly questions and answers. When a bill has been referred to a committee for inquiry and report, the entry for the bill is moved to a separate section of the *Notice Paper*, thus indicating that no further proceedings will take place on the bill until the committee has reported (unless the Assembly were to make a special order in relation to the matter).[91]

Proceedings following reference to committee

11.65 When a bill has been referred to a select or standing committee and the committee has reported to the Assembly, unless leave is granted to dispense with the detail stage the Assembly 'shall proceed to the next stage of the bill as reported' at the next sitting.[92] To date, however, though bills have been referred to committees pursuant to the provisions of standing order 174, the resultant reports have been advisory in nature. While many contain recommendations for amendments, no committee has reported a bill with an amendment or amendments.

Detail stage

11.66 Following the Assembly agreeing to the question 'That this bill be agreed to in principle', and providing there are no proceedings pursuant to standing order 174 (reference of a bill to a select or standing committee), the Assembly must then forthwith proceed to consideration of a bill at the detail stage unless leave of the Assembly is granted to dispense with this stage.[93] In fact, current practice is that leave of the Assembly is granted to dispense with the detail stage for the majority of the bills considered.

11.67 Should it be the wish of the Assembly to postpone further consideration of a bill prior to its consideration in detail (for example, to allow time for the drafting of amendments to clauses or further consultation on particular provisions), it is not uncommon for the detail stage consideration to commence and debate on the consideration of the first clause to be adjourned. The resumption of the debate is made an order of the day for a future time.[94]

11.68 To date, the Assembly has not seen fit to adopt the committee of the whole procedure (common in comparable legislatures) for the clause-by-clause consideration of bills.[95] In the Assembly the Speaker remains in the Chair whilst the plenum proceeds with its detailed consideration of the provisions of each bill. Approximately [as at 31 December 2007] 38% of bills agreed to by the Assembly since its creation have been amended at the detail stage.[96]

11.69 The provisions of a bill are usually considered seriatim, with the question being proposed by the Chair for agreement to each clause (or other provision) as it is reached (see also

90 Standing order 175.

91 For example, Adoption Bill 1992, MoP 1992-94/236, 307; NP (8.12.1992) 513, NP (24.3.1993) 688. Long Service Leave (Cleaning, Building and Property Services) Bill 1999, MoP 1998-2001/530-1, 641; NP (1.9.1999) 833, NP (8.12.1999) 1063. Appropriation Bill 2005-2006, MoP 2004-08/171-2, 185; NP (6.5.2005) 278, NP (22.6.2005) 295. The entry includes the date the bill was referred and at what stage further consideration is once again listed in the relevant section of the N*otice Paper*.

92 Standing order 176.

93 Standing order 178.

94 See, for example, MoP 2004-08/959, 961.

95 For a background on the historical development of the committee of the whole procedure, see *An Introduction to the procedure of the House of Commons*, Lord Campion, 3rd edn, pp. 25-9.

96 In the final years of the Fourth and Fifth Assemblies (2001 and 2004), 52.6% and 51.5% respectively of bills agreed to were amended at the detail stage.

paragraphs 11.70 to 11.74). Often, leave of the Assembly is granted to enable consideration of clauses together or consideration of the bill as a whole. Debate may proceed on each question proposed. Apart from the Member in charge of the bill, Members are restricted to speaking for two periods on each question for a limited period of time (see also paragraph 11.78). Members may vote against clauses they oppose; they may move amendments to clauses; and they may move that new provisions be inserted in the bill. Flexibility is provided in that the standing orders contain provisions to allow consideration of clauses to be postponed and clauses to be reconsidered.

Order of consideration during the detail stage

11.70 The standing orders are very specific about the order of consideration of the provisions of bills during the detail stage and the order of consideration of amendments. On occasion, the provisions may appear unnecessarily complicated. There is, however, reason and logic behind them (based on procedures that have evolved over the years). They protect the Assembly from reaching decisions on the order of consideration and the content of amendments which, while they may appear reasonable at the time, in fact, could lead to confusion and ill considered legislation.[97]

11.71 The Assembly's standing orders stipulate that, with certain exceptions, the order of the consideration of a bill at the detail stage shall be:

(a) clauses as printed and new clauses (including their headings), in their numerical order;

(b) schedules as printed and new schedules, in their numerical order;

(c) postponed clauses (not having been specifically postponed until after certain other clauses);

(d) the dictionary;

(e) the preamble; and

(f) the long title.[98]

11.72 Exceptions to this order are:

- for the consideration of the main appropriation bill for the year, when any schedule expressing the services for which the appropriation is to be made must be considered before the clauses and, unless the Assembly otherwise orders, the schedule must be considered by proposed expenditures in the order in which they are shown;[99]
- the common practice of the Assembly to grant leave for a bill to be considered as a whole at the commencement of the detail stage, to permit groups of clauses to be considered together, or to allow the remainder of a bill to be considered as a whole; and

97 Mistakes do occur. On 11 December 1991 the Crimes (Amendment) Bill (No. 5) 1991 was considered at the detail stage. The bill was, by leave, taken as a whole and six amendments were moved together, by leave, and agreed to. In fact, amendment six was inconsistent with amendments three, four and five. The bill was later recommitted, the relevant resolutions rescinded, and consideration of the bill at the detail stage recommenced, see MoP 1989-91/686-7. On 21 December 1994, during consideration of the Commercial and Tenancy Tribunal Bill 1994, the bill, likewise, was by leave taken as a whole at the detail stage. The government having, by leave, moved three groups of amendments to the bill at different stages (in addition, other Members moved amendments) it later emerged that the Assembly had agreed to two amendments to omit a particular paragraph (paragraph 6(c)) and substitute another paragraph or paragraphs. It being held that standing order 191 did not give authority to omit either amendment, the bill as agreed to was in due course certified by the Clerk and notified in the Territory Gazette with both paragraphs included (though re-lettered in accordance with the usual procedures). See MoP 1992-94/725-9 and *Tenancy Tribunal Act 1994*, Advice of the Clerk, dated 9 November 1994. (The title is the title of the bill as amended during Assembly consideration.)

98 Standing orders 179 and 180. Consideration of the preamble and the title stand postponed as amendments agreed to during the detail stage may necessitate an amendment to the title and preamble.

99 Standing order 180. See paragraphs 11.221 to 11.271 on subordinate legislation.

- when the Assembly, by specific order, sets a different order for the consideration of a bill at the detail stage.[100]

11.73 This order of consideration must be followed, as far as possible, in any reconsideration of a bill ordered by the Assembly.[101]

11.74 The enacting words in a bill are not considered during the detail stage, though standing order 181 stipulates that an amendment may be moved 'to any part of the bill'.[102]

Consideration of each clause

11.75 As each clause is reached, the Speaker announces the number of the clause and must propose the question 'That the clause be agreed to,'[103] though in practice the Speaker may propose 'That clause [citing the specific number of the clause] be agreed to' or that a proposed new clause or schedule be agreed to, in accordance with the provisions of standing order 180.

11.76 Once proposed, each question is open to debate (and amendment). It takes precedence of other questions until resolved, unless superseded by the questions that an amendment be agreed to, that consideration of a clause be postponed or that the debate be adjourned. Debate must be confined to the relevant provision of the bill as set out in standing order 180 or to an amendment before the Assembly.[104]

11.77 Should a Member oppose a clause in a bill, he or she does not move that the clause be omitted. The Member simply votes against the clause—that is, votes 'No' when the question 'That the clause be agreed to' is put. Any schedule of amendments circulated will usually indicate when a Member will oppose a clause. However, should the Assembly grant leave for a bill to be considered as a whole (for groups of clauses to be considered together or for the remainder of the bill to be considered as a whole), practice has allowed a Member to move that a clause be omitted (though this does raise the possibility of a clause being carried without majority support).[105]

11.78 On any question before the Chair at the detail stage, any Member (with the exception of the Member in charge of the bill) may speak only twice for a period not exceeding 10 minutes on each occasion.[106] The standing orders do not specify any speaking periods for the Member in charge of a bill (be it an executive bill or a private Member's bill).[107] At the conclusion of a Member's speech, should no other Member seek the call, the Chair may

100 See, for example, MoP 1989-91/603-4. For an example of a bill having been declared an urgent bill during consideration in detail and a specific order being set down for the consideration of the remaining stages and the reconsideration of specified clauses in the order for the allotment of time, see MoP 1989-91/647-8. For an example where the order of consideration was varied as a result of the drafting of a particular bill (there being no clauses 68 to 99), see MoP 2001-04/442.

101 Standing order 180.

102 And see *Odgers'*, p. 247, where there are precedents for amendments being made to enacting words on instructions to the committee of the whole.

103 Standing order 179.

104 Standing order 183.

105 See *Odgers'*, p. 247, regarding the possibility of a clause or item being carried without a majority in these circumstances. If the question is negatived with the votes equally divided, the amendment is negatived and the clause or item remains, notwithstanding that it does not have majority support. In the Senate, therefore, the question is put separately on any clause or item which is opposed thus ensuring that the risk of a clause or item being carried without a majority is avoided.

106 Should the Assembly be considering an appropriation bill for the ordinary annual services of the year, the Minister in charge or a Minister responsible for a department or appropriation unit may speak for 'periods not specified'.

107 Standing order 69(e).

allocate the call to the Member who has just spoken to enable him or her to speak for the second period.[108]

11.79 Debate must be relevant to the question proposed—ie, Members must confine themselves to the subject matter of the clause or the provision being considered.[109] Therefore, the scope of the debate may be limited. Should leave of the Assembly be granted for the consideration of a group of clauses together or for the consideration of the bill as a whole, the scope of the debate is widened.[110]

11.80 Standing orders permit the Assembly to order that a question be divided and to order that reports of committees and other matters be considered by parts.[111] The question 'That the clause be agreed to' has been divided by order of the Assembly.[112]

11.81 Once the question 'That the clause (or the clause as amended) be agreed to' is resolved, the Speaker then proposes the question on the next clause.

Postponement of clauses or other provisions

11.82 Standing orders provide for a clause or other component of a bill, or a clause or other component which has been amended, to be postponed.[113] Practice in the House of Representatives provides that a clause, or clauses which have been taken together by leave and any amendments moved thereto, may also be postponed.[114] Postponement may be specified—eg, until after consideration of a specific clause or clauses,[115] an occurrence[116] or it may be open. If the postponement order does not specify a particular time or occurrence, postponed clauses are considered after the schedules or any proposed new schedules[117] and (in the event of the possible necessity for consequential amendments) before the dictionary.

11.83 Consideration of clauses can be postponed by way of a motion which may be moved prior to or during that consideration. The motion is open to debate and amendment.

Amendments

11.84 A Member may seek to alter the terms of a bill by proposing an amendment to any part of it. The amendment must relate to the long title of the bill; it must be relevant to the subject matter of the bill; and it must otherwise conform with the standing orders.[118] An amendment is a subsidiary motion. Therefore, the question on the amendment temporarily

108 This does not necessarily mean that Members are restricted to speaking twice during the consideration of a clause; the restriction applies to 'each question before the Chair'. A Member who has already spoken twice to the question 'That the clause be agreed to' may therefore speak for a further two periods on subsequent questions such as those proposed on amendments, or on a motion to postpone consideration of the clause or that the clause, as amended, be agreed to.

109 Standing order 58.

110 And see *House of Representatives Practice*, p. 366.

111 Standing order 133.

112 MoP 1998-2001/190-1, MoP 2001-2004/1685 (the Assembly ordering that a proposed amendment be divided during detail stage consideration). For an example where a Member having, by leave, moved that three new clauses be inserted in a bill and the question agreed to with the Assembly later ordering that the question be reconsidered and further ordering that the question be divided, see MoP 1995-97/908-11, and see MoP 1998-2001/1586 where, clauses having, by leave, been considered together, the Speaker having ascertained that it was the wish of the Assembly to do so, put the question on the clauses seriatim.

113 Standing order 185.

114 *House of Representatives Practice*, p. 370.

115 MoP 1989-91/605, MoP 1998-2001/1236. This course may be followed in cases where it is agreed that the decision the Assembly makes on a particular provision of a bill is critical to the direction it takes in considering other clauses or circulated amendments.

116 See *Odgers'*, p. 247 where consideration of a clause was postponed until a Minister produced certain information or documents.

117 Standing order 180. MoP 1998-2001/1236. Or after the remainder of the bill has been taken as a whole, by leave, and agreed to—MoP 1995-97/155-6.

118 Standing order 181.

supersedes the original question. Should the Assembly agree to an amendment, the original question is proposed, as amended.[119]

11.85 A question, having been proposed (eg, 'That the clause be agreed to' or that 'Ms X's amendment be agreed to'), may be amended by:

- omitting certain words only;
- omitting certain words in order to substitute other words; or
- inserting or adding words.[120]

11.86 In addition, a Member may propose that new clauses or schedules be inserted in a bill or that a preamble be inserted in a bill.

Inadmissible amendments

11.87 Standing order 201 prohibits a Member, other than a Minister, from moving an amendment to a money proposal (as specified in standing order 200) if that amendment would increase the amount of public money of the Territory to be appropriated. Amendments to bills have been ruled out of order pursuant to this provision (see paragraphs 11.221 to 11.271 on subordinate legislation).

11.88 In addition, an amendment may not be moved if it:

- transgresses the anticipation rule;[121]
- transgresses the same question rule;[122]
- does not come within the long title of the bill and is not relevant to the subject matter of the bill;[123]
- is substantially the same as one already negatived or, unless the bill has been reconsidered (in whole or in part), is inconsistent with one that has already been agreed to;[124]
- is made to a part of a question after a later part has been amended, or after a question has been proposed on a question thereto (unless that proposed amendment has, by leave, been withdrawn);[125]
- contains words that are determined to be offensive or disorderly.[126]

11.89 The relevancy rule states that amendments must be within the scope of a bill and must be relevant to the subject matter of a bill. It is applied strictly in the Assembly—perhaps more strictly than in the House of Representatives.[127] In a key ruling in 2003 Speaker Berry stated:

> The question arises whether amendments proposed to be moved … are within the title or relevant to the subject matter of the bill. The long title is fairly broad

119 Standing order 184.
120 Standing order 138.
121 Standing order 130.
122 Standing order 136. Standing order 136 has been suspended to permit a Member to move an amendment—MoP 1998-2001/1250. See footnote 137 in Chapter 9: Motions.
123 Standing order 181. And see MoP 1995-97/714, Assembly Debates (25.6.1997) 2040 (the bill, the Health and Community Care Services (Validation of Fees and Charges) Bill 1997 had a restrictive title [A Bill for an Act to remove any doubt about the validity of certain determinations and fees and charges under the *Health and Community Care Services Act 1996*] and the amendments clearly fell outside of the title (one of the amendments proposing to alter the title)). The Minister proposing the amendments was actually granted leave by the Assembly to proceed to move the amendments. And see MoP 1998-2001/623 and, in particular, the ruling by Speaker Berry (upheld by the Assembly) on 8 May 2003.
124 Standing order 188. MoP 1998-2001/671. And see standing order 141.
125 Standing order 142.
126 Standing orders 53 to 57. See comments by Speaker McRae at Assembly Debates (19.5.1993) 1615-6 regarding an amendment proposed to the Radiation (Amendment) Bill 1993 the preceding evening.
127 *House of Representatives Practice*, p. 367.

and one could make the assumption that, because the bill amends the principal act, any amendment that also amends the principal act would be in order.

However, the practice of the Assembly has been not to allow amendments that are outside the scope of the bill. Examples could be, for example, where the long title of a bill was "A Bill for an Act to amend the *Motor Traffic Act 1937*" and the bill dealt with speed limits outside schools. If our practice were followed, an amendment dealing with the weights and dimensions of articulated vehicles would be ruled out of order, even though it was within the long title of the bill.

The basis of such practice and rules is to ensure that "business, especially legislation, is conducted in an orderly, open and predictable manner devoid of surprise, haste or sleight of hand". I refer members to *Odgers' Australian Senate Practice*, 10th edition, page 19. Even if other members were alerted to the amendment, it could not be guaranteed and it would be hard to assume that community groups or other interested parties would be aware of such a proposal contained in an amendment.

That is particularly relevant in this Assembly because we have a unicameral Assembly and there is no house of review or place of review in relation to legislation passed here.[128]

11.90 Speaker Berry then went on to address the amendments in question and ruled certain of them out of order. A motion of dissent from one of the rulings was moved. The ruling was upheld by the Assembly.

Procedure on amendments

11.91 A Member may not propose an amendment unless:

- it is in writing and signed by the Member; and
- copies of the amendment are immediately available for circulation to Members.[129]

11.92 Prior notice is not required of amendments (nor are they printed in the *Notice Paper*), though the texts of important amendments are often circulated prior to consideration of the bill. The practice is that amendments are lodged with the Clerks (usually at the table). They make any necessary arrangements for their printing and, with the authorisation of the Member, their circulation.

11.93 A Member proposing an amendment is not precluded from reading out the terms of the amendment when moving it. However, the more common practice is to move in the terms 'I move the amendment [or amendment No. X] circulated in my name.' As the terms of amendments must be circulated in the Chamber, a Member cannot require that the Speaker read the terms of an amendment.[130]

11.94 On an amendment being moved, the question that is then proposed in the Assembly by the Speaker is 'That the amendment be agreed to.'[131] The question on the amendment thus supersedes the question 'That the clause [or other provision] be agreed to,'

128 Assembly Debates (8.5.2003) 1799-1804; MoP 2001-04/724-5.

129 Standing order 182. The Speaker having drawn attention to the fact that copies of an amendment were not available for circulation to members as required by standing orders, the Assembly adjourned the debate until a later hour in the day. MoP 1998-2001/523. In the Seventh Assembly, a temporary order was adopted to refer Government amendments to the Standing Committee on Justice and Community Safety. MOP 2008-12/117-8.

130 Standing order 60.

131 In fact, the Speaker is normally more precise in proposing the question on amendments during consideration of a bill at the detail stage—proposing the question in the form, for example, '…that Ms X's amendment No. [] be agreed to' or '…that Mr Y's amendment to Ms X's amendment No. [] be agreed to'.

and the amendment proposed must be disposed of before another amendment to the original question may be moved.[132]

11.95 When amendments are moved together by leave of the Assembly, the question 'That the amendments [or Ms X's amendments Nos Y to Z] be agreed to,' is that which is proposed and put.

11.96 In considering amendments circulated and in allocating the call, the Speaker will seek to call Members in a sequence that ensures each of their amendments is considered and dealt with in the order in which they procedurally apply to the clause or other provision of the bill under consideration. This ensures that the provisions of standing orders 141 and 142 are met and that the Assembly progresses through its consideration of the bill in an orderly and consistent manner.

11.97 An amendment may be moved to a proposed amendment. Should an amendment be moved to an amendment (this is not unusual in the Assembly; an amendment has been moved to an amendment to an amendment) the question 'That the amendment to the amendment be agreed to' supersedes the question 'That the amendment be agreed to'.[133]

11.98 The Speaker then works back to the original question, with the question on each amendment being resolved separately. When an amendment is agreed to, the main question must be put, as amended.[134] Should the amendment be negatived, the question must be put as originally proposed.[135] Thus, the Assembly must vote on, say, the amendment to the amendment, then on the amendment (or the amendment as amended), then on the original question 'That the clause [or the clause as amended] be agreed to.'

11.99 Amendments may be withdrawn by leave of the Assembly.[136]

New clauses

11.100 Should a Member propose that a new clause or a new schedule (or even a new preamble)[137] be inserted in a bill, he or she does so at the appropriate stage in the order of consideration by moving (when no question is before the Assembly) 'That proposed new clause [citing the number] be inserted in the bill,' or 'That proposed new schedule [citing number where appropriate] be inserted in the bill.' The Speaker then proposes the question, which is open to debate and amendment. A proposed new clause must comply with the standing orders. It may be ruled out of order for the same reason as an amendment may be ruled out of order.

11.101 As with other amendments, the terms of any new clause or new schedule proposed must be provided in writing, must be signed by the Member proposing it, and copies must be immediately available for circulation to Members in the Chamber.

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132 Standing order 143. The Chair would not be precluded from proposing and putting the question on amendments in the form as printed and circulated as determined by standing order 138 (for example, 'That the words proposed to be omitted stand part of the question') though the practice in the Assembly (where Members vote by way of a call of the Assembly and therefore are not required to cross the floor to vote in the negative on a question) is for the Speaker to propose and put the question in the form 'That the amendment be agreed to'. For a discussion of the practice of the House of Representatives see *House of Representatives Practice*, pp. 366-7 and see paragraphs 9.70 to 9.93.

133 During Assembly consideration of the Residential Property (Awareness of Asbestos) Amendment Bill 2004, the *Minutes of Proceedings* record: 'On the motion of Ms Dundas, her amendment No. 1 to Mrs Cross' proposed amendment to Ms Gallagher's proposed amendment (see schedule 4) was made, after debate'. See MoP 2001-04/1685.

134 Standing order 146.

135 Standing order 147.

136 Standing order 144.

137 MoP 1992-94/219.

11.102 As is the practice in the House of Representatives, should more than one new clause be proposed to be inserted in a bill, each new clause is considered and dealt with as a separate question. However, amendments to insert several new clauses, which may constitute a new part or division, may be moved together, by leave.[138]

Completion of the detail stage

11.103 Once the Assembly has completed its consideration of a bill's clauses, schedules and dictionary, it next considers the preamble to the bill (if any) and then its long title. If any amendment has been made to the bill that necessitates an amendment to the long title, the standing orders provide that the long title must be amended, and the question proposed 'That the title, as amended, be agreed to.'[139] This provision suggests that an amendment may only be moved to the title if an amendment to the bill necessitates this.

Reconsideration of bill

11.104 Any Member may move that a bill be reconsidered, either in whole or in part.[140] Should the Assembly so order, for the purpose of speaking opportunities and times, the practice has been for any questions proposed to be considered new questions. Thus, Members may speak again for a further two periods on each question before the Chair.

11.105 Once any questions on the title are resolved and the detail stage completed, the Speaker must put the question 'That this bill be agreed to' or 'That this bill, as amended, be agreed to' forthwith. The question must be determined without amendment or debate.[141]

Bill passed

11.106 Once a bill has been agreed to, no further question on it may be put, and it has been passed by the Assembly.[142]

11.107 Should the question on the agreement be negatived, the bill proceeds no further (as is the case should the question on the agreement in principle be negatived). The bill may be re-introduced in a later calendar year.[143]

11.108 In cases of particular necessity, however, the Assembly has rescinded resolutions agreeing to bills and it has reconsidered these bills. The Assembly recommits bills usually by overriding the requirements of standing order 137. It does this by suspending the standing order or by way of a motion moved by leave (unanimous consent required), having subsequently ordered that the resolutions of the Assembly agreeing to particular amendments, clauses or other questions and agreeing to the bill or the bill, as amended, be rescinded. Further, the Assembly has, by special order, set out at what stage the bill is to be reconsidered (and when)[144] or the specific scope of any reconsideration.[145]

138 *House of Representatives Practice*, p. 369.

139 Standing order 186.

140 Standing order 187. See, for example, MoP 1989-91/587-8, 619, 654 (a number of clauses including clauses as amended), MoP 1995-97/910 (an amendment inserting three new clauses reconsidered), MoP 1998-2001/977, 1105; MoP 1998-2001/1249, 1432; MoP 1998-2001/1002 (clause reconsidered, by leave, during detail stage consideration).

141 Standing order 189. For comment on the origin of the rule see *May*, p. 4. On occasions the Assembly has granted leave for debate to ensue on the question.

142 Standing order 190.

143 See, for example, Community Referendum Bill 1995—negatived on 14 December 1995 (MoP 1995-97/247) and reintroduced as the Community Referendum Bill 1996 on 27 June 1996 (MoP 1995-97/389); Utilities (Network Facilities Tax) Repeal Bill 2007—negatived on 14 November 2007 (MoP 2004-08/1275) and reintroduced as the Utilities (Network Facilities Tax) Repeal Bill 2008 on 5 March 2008 (MoP 2004-08/1381). But see paragraphs 11.191 to 11.201.

144 Usually forthwith.

145 For example, see MoP 1989-91/686; MoP 1992-94/801-2 (the order rescinded the resolutions agreeing to the bill as amended and the resolution in relation to a specific clause and restricted the Assembly's reconsideration to those questions); MoP 1995-97/292-3 (the order rescinding the resolution agreeing to the bill in principle and providing that the question 'That this Bill be agreed to in principle' be reconsidered forthwith) and MoP 1995-97/971 (the order (as amended) rescinding the resolution agreeing to the bill as amended and providing for the reconsideration of clauses 5 and 8 of the bill).

Urgent bill

11.109 Should a Member in charge of a bill, or a Member acting on behalf of that Member, declare that a bill is urgent, the question 'That this bill be considered an urgent bill' must be put and, if agreed to, that Member may forthwith move a motion specifying the time which shall be allotted to the various stages of the bill.[146] One declaration of urgency and one motion for the allotment of time have even been moved in relation to three bills after standing and temporary orders were suspended to allow that course to be followed.[147]

11.110 Debate on the motion to declare a bill urgent or on the motion for the allotment of time shall in each case not exceed 15 minutes with each Member speaking for no more than five minutes. Both questions are open to debate.[148]

Clerical, grammatical or typographical amendments

11.111 Corrections to clerical, grammatical and typographical errors are often made by the Clerk with the Speaker's authority pursuant to standing order 191 (and often following suggestion by the Office of Parliamentary Counsel). The scope of such amendments is particularly limited and, in making amendments of this nature, the Clerk refers to the principles governing the making of printing corrections as set out in Bennion,[149] particularly Rule 4 which states (in reference to the United Kingdom context):

> Where the text of the House Bill contains a misprint, and it is clear what the correct version should be, it is for the Public Bill Office to correct the error. If it is not clear what the correction should be the error must be allowed to remain (unless, there being further stages of the Bill's progress to come, the error can be put right by an amendment).[150]

11.112 The Speaker is now obliged to advise the Assembly of such amendments.[151]

11.113 The practice is that certain formal amendments, particularly revisions of cross-referencing following the insertion or deletion of provisions by the Assembly, can be made by the Clerk prior to a bill's certification.

Certification and notification of enactment

11.114 As the Territory does not have an official position analogous to an administrator or a state governor, there are therefore no assent procedures for legislation as is the case in comparable Australian legislatures. Originally, the Self-Government Act, complemented by the certification provisions in the standing orders, set out the process whereby proposed laws took effect.[152] The Territory has since enacted legislation providing for the notification of Acts and

146 Standing order 192. See MoP 1989-91/97-8, 647-8; MoP 1992-94/ 83-4 (three bills); 1995-97/449-51; MoP 1998- 2001/20; MoP 2004-08/1204-5.

147 MoP 1992-94/83-4.

148 Standing order 69(f). MoP 1992-94/295.

149 F.A.R.Bennion MA, *Statutory Interpretation—A Code*, Butterworths, 1997, Third Edition, pp. 148-9.

150 For discussion of the scope of such amendments, see the paper presented by the Clerk of the South Australian House of Assembly, *Twenty Fourth Regional Conference of Presiding Officers and Clerks, Port Vila, Vanuatu, 26-29 July 1993*, Transcript of Proceedings, pp. 121-38.

151 Standing order 191.

152 They took effect upon the date of notification in the Territory *Gazette* of their having been passed by the Assembly (unless the proposed law otherwise provided) with the Chief Minister being responsible for the publication of the notification; Self-Government Act, section 25. The notification had also to indicate the place or places where copies of the proposed law could be purchased. In the event of copies of the law not being available for purchase as notified, the Act made provision for the tabling of a statement advising the Assembly of the fact and giving of reason why they were not so available. Subsection 25(6) of the Act provided that the original provisions ceased to have effect on and after the commencement of an enactment providing for the publication of notice of the passing of a proposed law by the Assembly by an alternative means and the commencement of such a law.

these provisions are now contained in Chapter 4 of the Legislation Act (which provides for both the numbering and notification of Acts).

11.115 However, before an Act can be notified Assembly standing order 193 requires that, after a bill has been passed, the Clerk must certify a copy of it as being a true copy of the bill passed by the Assembly. The Speaker must then ask parliamentary counsel to notify the making of the proposed law. The Clerk's certificate reads as follows:

> I hereby certify that the above is a true copy of the [short title of bill], which was passed by the Legislative Assembly on [date].

11.116 The certificate is signed and dated by the Clerk. In the event that the title of the bill has been amended during its passage through the Assembly, the certificate reflects that fact by stating:

> I hereby certify that the above is a true copy of the [amended short title of bill], which originated in the Legislative Assembly as the [short title of bill as presented] and was passed by the Legislative Assembly on [date].

11.117 In the case of a bill for an entrenching law, the certificate differs again (see paragraphs 11.121 to 11.123).

11.118 The Legislation Act[153] also provides that, should a proposed law be passed by the Assembly, the Speaker must ask parliamentary counsel to notify the making of the proposed law. Parliamentary counsel is obliged to establish and maintain in electronic form a register of Acts and statutory instruments (the ACT Legislation Register).[154] The making of the proposed law is notified in the register by entering a statement that the law has been passed by the Legislative Assembly and the text of the law.[155]

11.119 The Speaker notifies parliamentary counsel of the passing of a bill by forwarding a paper copy of the Act as certified by the Clerk in accordance with standing order 193, together with a letter of transmittal asking parliamentary counsel to notify the making of the proposed law. At the same time, the Assembly Secretariat forwards to parliamentary counsel an unsigned electronic version of the Act and an unsigned electronic copy of the letter of transmittal. It is also the practice for the Speaker to nominate a particular day for the notification of the passing of each proposed law in accordance with subsection 28(3) the Legislation Act.

153 Subsection 28(1).

154 *Legislation Act 2001*, Chapter 2.

155 *Legislation Act 2001*, subsection 28(4) specifically provides that the making of the proposed law is notified in the Legislation Register by entering in the register (a) a statement that the law has been passed by the Legislative Assembly; and (b) the text of the law. If it is not practical to do so, the making of the proposed law is notified in the *Australian Capital Territory Gazette* by (a) publishing the text of the law in the Gazette; or (b) publishing in the Gazette a statement (i) that the law has been passed by the Legislative Assembly; and (ii) of the place or places where copies of the law can be obtained (whether by purchase or otherwise). *Legislation Act 2001*, subsection 28(5). If, on the date of gazettal, no copies are available at the nominated places, parliamentary counsel must give to the Minister responsible for the administration of the Act a statement that the copies were not available and explaining why they were not available and the Minister must present the statement to the Assembly not later than six sitting days after the gazettal date; *Legislation Act 2001*, subsections 28(4)-(9). For a precedent where a similar statement was presented to the Assembly (prior to enactment of the Legislation Act) see MoP 1989-91/192.

The ACT Legislation Register and website

Chapter 2 of the *Legislation Act 2001* provides that parliamentary counsel must establish a register of Acts and statutory instruments (the ACT Legislation Register).

The register must contain:

- authorised republications of laws currently in force;
- Acts as made;
- subordinate laws as made;
- disallowable instruments as made;
- notifiable instruments as made;
- commencement notices as made;
- resolutions by the Legislative Assembly to disallow or amend subordinate laws or disallowable instruments;
- bills presented to the Legislative Assembly;
- explanatory statements for bills and amendments to bills presented to the Assembly;
- explanatory statements and regulatory impact statements under Chapter 5 of the Legislation Act for subordinate laws and disallowable instruments;
- notifications of the making of Acts, subordinate laws, disallowable instruments, notifiable instruments and commencement notices; and
- notifications of the disallowance or amendment of subordinate laws and disallowable instruments by the Legislative Assembly.

Parliamentary counsel may enter additional material in the register if he or she considers that it is likely to be useful to users of the register.

The register is at <http://www.legislation.act.gov.au>.

Numbering of Acts

11.120 Section 27 of the Legislation Act provides that the Acts passed each year are to be numbered as nearly as practicable in the order in which they are passed.[156]

ENTRENCHING LAWS AND ENABLING LAWS

Entrenching laws

11.121 The Self-Government Act empowers the Assembly to pass a law called an entrenching law. An entrenching law imposes certain special conditions on the manner and form of making particular enactments, including enactments that amend or repeal an entrenching law). The conditions envisaged are a special voting majority in the Assembly (two-thirds of Members) and/or support of a specified majority of the electors at a referendum. Once the entrenching law is passed by the Assembly, it must then be submitted to referendum. If approved by a majority of electors of the Territory, it takes effect.

156 *Legislation Act 2001*, section 27.

11.122 The purpose of the entrenching process is similar to that of the laws governing amendments to the Constitution. It recognises that certain laws are of fundamental importance to the legal structure of a jurisdiction or to the processes of government in that jurisdiction and should be subject to change only if clear popular support for such change can be demonstrated. The entrenchment process permits an Assembly to bind later Assemblies to a certain extent. This has occurred in relation to the electoral system in use in the Territory.

11.123 The authority to pass entrenching laws is found in section 26 of the Self-Government Act. In introducing the Self-Government Bill into the House of Representatives, the responsible Minister described the purpose of section 26 as extending:

> … to the people of the Territory, who are not party to the Australia Act, the general provisions of that Act, which allow the States to entrench laws relating to the Constitution, powers and procedures of their parliaments.[157]

11.124 The key elements of section 26 are:

- the entrenching law itself must be submitted to a referendum of the electors of the Territory[158] and must be approved by a majority of electors;
- while the entrenching law is in force, any enactment to which it applies has no effect unless made in accordance with the entrenching law; and
- if an entrenching law imposes requirements (or restrictions) on other enactments, the same requirements apply to the entrenching law.

There are therefore two basic categories of laws (and therefore proposed laws) in question: **entrenching laws** and **enactments to which entrenching laws apply** (which may include proposed laws that amend or repeal the entrenching law).

11.125 An entrenching law may apply to a specific piece of proposed legislation—for example, the 'Bill for an Act to entrench the *Community Referendum Act 1995*', or it may apply to a class of legislation. For example, the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* applies to 'any law that is inconsistent with any of the following principles of the proportional representation (Hare-Clark) electoral system'. Section 4 of the Act then lists eleven characteristics of the ACT electoral system that cannot be altered other than by legislation which complies with the entrenching law.

11.126 All bills for entrenching laws must:

(a) pass the Assembly, and

(b) be submitted to a referendum of the electors of the Territory.

These particular hurdles may not necessarily apply to an enactment to which an entrenching law may apply. For example, an entrenching law might simply require that a law to which it applies must pass the Assembly with a special majority. However, if an entrenching law imposes requirements on other laws, those same requirements apply to the entrenching law itself. That is, if an entrenching law requires that a proposed law to which it applies must be passed by the Assembly with a two-thirds majority, then the entrenching law must also pass the Assembly with a two-thirds majority.

11.127 The Assembly has considered two bills for entrenching laws. The Proportional Representation (Hare-Clark) Entrenchment Bill 1994 was agreed to by the required majority of Members and approved by a majority of electors at a referendum, becoming law as

157 H.R. Deb. (19.10.1988) 1925.

158 An elector of the Territory is defined in the Act as a person who is entitled to vote at a general election.

the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*.[159] The Community Referendum Laws Entrenchment Bill 1995 failed to pass the Assembly and, thus, was never put to a referendum.

11.128 In addition, the Assembly has considered two proposed laws to which the entrenching law applied.

- The Proportional Representation (Hare-Clark) Entrenchment Amendment Bill 2001 proposed to amend the entrenching law already enacted, Though agreed to by a majority of Members of the Assembly, it did not pass the Assembly by the required two-thirds majority set by the principal (entrenched) Act[160] (thus failing at the first hurdle), and it did not further proceed.
- The Electoral (Entrenched Provisions) Amendment Bill 2001 was a proposed law to which the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* applied. It was agreed to by the Assembly by more than the two-thirds majority of Members required by the principal (entrenched) Act (and thus did not need to be submitted to a referendum and passed by a majority of electors).[161]

Assembly procedure

11.129 Bills for entrenching laws and bills to which entrenching laws apply are not given any special notation or identification marks when presented in the Assembly.[162] Standing orders make no specific provisions affecting their consideration.[163] Such bills are introduced and are considered by the Assembly in the same manner as other bills until the conclusion of the detail stage.

11.130 The provisions of subsection 26(5) of the Self-Government Act are invoked once the Speaker, pursuant to standing order 189, puts the question 'That this bill be agreed to' or 'That this Bill, as amended, be agreed to,'[164] if:

- the bill (in the case of a bill for an entrenching law) includes the requirement that an enactment (including the bill itself) or enactments be passed by a special majority of Members; or
- the bill is subject to the provisions of an entrenched enactment that requires it be passed by a special majority of Members.

11.131 In these cases, even if there is no call for a vote, the practice of the Assembly has been that the Speaker, having stated the question, will direct the Clerk to call the Assembly. Each Member, on being called, will signify 'Aye' or 'No' in accordance with the provisions of standing order 160.

11.132 Should the bill not achieve (be passed by) the special majority required, it will be of no effect in that it has not been validly or effectively 'passed by the Assembly' within

159 This Act, at subsection 5(1) specifies '… that any amendment or repeal of this Act' requires a two-thirds majority of the Members of the Assembly and a majority in a referendum, whereas subsection 5(2) specifies that a law to which the Entrenchment Act applies must be passed either by a simple majority in the Assembly and a majority at a referendum or a two-thirds majority of the Assembly.

160 Subsection 5(1) of the principal Act providing that the principal Act, or any amendment or repeal of the principal Act, has no effect unless passed by at least a two-thirds majority of Members and a majority of electors at a referendum.

161 *Proportional Representation (Hare-Clark) Entrenchment Act 1994*, subsection 5(2).

162 Of the former, the long titles of the bills presented to date clearly identified them as bills for entrenching laws. Of the latter, the short and long title of the Proportional Representation (Hare-Clark) Entrenchment Amendment Bill 2001 clearly identified it as a bill to amend an entrenching law, and the short title, explanatory memorandum and Minister's presentation speech identified the Electoral (Entrenched Provisions) Amendment Bill 2001 as a bill to which an entrenching law applied.

163 Standing order 194 relates to the certification by the Clerk that an entrenching law has been passed by the Assembly and approved at a referendum.

164 Assuming that proceedings have reached this stage.

the meaning of subsection 25(1) of the Self-Government Act[165] and there will be no further proceedings on the bill, irrespective of the provisions of standing order 134. In the precedents to date, the special majority required for relevant bills considered by the Assembly has been 'at least' a two-thirds majority of Members—taken to be at least 12 Members.

11.133 Details of proceedings to date on relevant bills are set out at Appendix 22.

Certification and later proceedings

11.134 Once passed by the Assembly, all entrenching laws must be submitted to a referendum of the electors of the Territory, as provided by enactment,[166] as must those laws where this is required by an entrenching law. The Assembly has provided for this by enacting the *Referendum (Machinery Provisions) Act 1994*.

11.135 In addition, standing order 194 provides:

> Whenever a bill for an entrenching law has been passed by the Assembly and approved by a majority of the electors of the Territory at a referendum, it shall be so certified by the Clerk and the Speaker shall then ask Parliamentary Counsel to notify the making of the proposed law.

11.136 In the case of the one entrenching law passed by the Assembly—the Proportional Representation (Hare-Clark) Entrenchment Bill 1994—the bill was initially certified by the Clerk as having passed the Assembly and was transmitted to the Electoral Commissioner.[167] The actual terms of the certificate (printed on page one of the text of the bill) are set out below:

> This Bill for an entrenching law passed the Legislative Assembly on 8 December 1994 by a special majority as required by section 26 of the *Australian Capital Territory (Self-Government) Act 1988* and section 5 of this Bill. It is transmitted to the Electoral Commissioner for submission to a referendum of the electors of the Territory in accordance with the provisions of the *Referendum (Machinery Provisions) Act 1994*.

11.137 The trigger mechanism for a referendum to proceed is contained in the provisions of the *Referendum (Machinery Provisions) Act 1994*. Section 5 provides that the Act applies in relation to a 'referendum law'—that is, an enabling law (see paragraphs 11.145 and 11.146), an entrenching law (a law required to be submitted to a referendum under subsection 26(2) of the Self-Government Act) or a law required by an entrenching law to be submitted to a referendum.[168]

11.138 The Act[169] makes provision for the timing and conduct of referendums. It establishes that a poll for a referendum shall be held:

- either on the polling day of the next ordinary election; or

165 Advice of the ACT Government Solicitor of 3 May 2001.

166 Self-Government Act, subsection 26(2).

167 At the same time the Speaker formally advised the Chief Minister of the course being followed. The Chief Minister at that time having responsibility for publishing notices of proposed laws having been passed pursuant to subsection 25(1) of the Self-Government Act.

168 *Referendum (Machinery Provisions) Act 1994*, section 5 and Dictionary.

169 The purpose of which is to provide default machinery provisions that are to operate to the extent to which they are not actually inconsistent with the actual provisions of a referendum law, thus ensuring referendums are conducted in the same way as elections, as far as practicable, and avoiding the necessity for specific referendum laws to address general machinery provisions (see *Referendum (Machinery Provisions) Act 1994*, section 5 and Assembly Debates (22.9.1994) 3279).

- in the case where a referendum law provides for a referendum day other than polling day, on a day fixed by the executive in writing unless the referendum law itself provides otherwise (although certain days are precluded).[170]

11.139 The Act also contains a range of provisions governing the conduct of referendums. For example, it provides that, as soon as practicable after the count is concluded, the Electoral Commissioner must prepare a notice setting out the numbers so counted and declaring the result of the referendum.

11.140 On 16 March 1995, the Electoral Commissioner advised the Clerk of the result of the referendum for the entrenchment of the Proportional Representation (Hare-Clark) Entrenchment Bill 1994, including a copy of the *Territory Gazette* notice declaring that a majority of the electors entitled to vote at the referendum had approved the entrenching law.

11.141 The Clerk, however, did not certify the bill immediately in accordance with the provisions of standing order 194. Certification was delayed until receipt of advice from the Registrar of the Supreme Court that no application had been made to the Supreme Court (as the Court of Disputed Elections) disputing the validity of the referendum.[171] This course was based on the practice of the House of Representatives of delaying certification of Constitution alteration bills approved by the electors until ascertaining whether a petition disputing the referendum had been lodged and until any dispute had been determined. In addition, legal advice sought at the time concluded that it was reasonably practicable for the Clerk not to certify the entrenching law before the expiry of the period in which the referendum result could be challenged.[172]

11.142 Following the receipt of advice from the Registrar of the Supreme Court that no application had been made disputing the validity of the referendum, the Clerk certified the bill as follows:

> I certify —
>
> (a) that the above is a true copy of the Proportional Representation (Hare Clark) Entrenchment Bill 1994 which was passed by the Legislative Assembly on 8 December 1994 by the majority of Members required by paragraph 5(1) of the Bill; and
>
> (b) that the entrenching law was submitted to a referendum of the electors of the Territory in accordance with subsection 26(2) of the *Australian Capital Territory (Self-Government) Act 1988* of the Commonwealth and approved by a majority of the electors.
>
> The period allowed by law for making an application to the Court of Disputed Elections disputing the validity of the referendum has now expired without any such application having been made.

11.143 In accordance with standing order 194, the Speaker then presented the bill to the Chief Minister for notification.[173]

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170 *Referendum (Machinery Provisions) Act 1994*, section 7. The day cannot occur (a) between the commencement of a pre-election period (defined by the Electoral Act as meaning the period of 37 days ending on the end of polling day for an election) and the expiration of 36 days after the polling day for the relevant election or (b) on a polling day for the election of Senators or a general election of Members of the House of Representatives or a referendum held under a law of the Commonwealth unless the Minister makes appropriate arrangements with the appropriate Commonwealth Minister for the poll for the referendum to be held on that day.

171 Received on 27 April 1995.

172 *Certification of bills for entrenching laws under standing order 194*, Legal Opinion, Parliamentary and Constitutional Section, Constitutional and Law Reform Branch, Attorney General's Department, 30 March 1995.

173 Note that the Legislation Act, at section 28, now requires the Speaker to ask parliamentary counsel to notify the making of a law.

11.144 Where special conditions apply to the making of a law other than the requirement to submit the law to a referendum, the Speaker submits the proposed law to parliamentary counsel for notification and the Clerk certifies that the special conditions have been met. For example, the Electoral (Entrenched Provisions) Amendment Bill 2001, having been agreed to by the Assembly by the special majority of Members as set by the principal (entrenched) Act, was certified by the Clerk as follows:

> I certify that the above is a true copy of the Electoral (Entrenched Provisions) Amendment Bill 2001 which was passed by the Legislative Assembly on 15 June 2001 by at least a 2/3 majority of members of the Legislative Assembly as required by paragraph 5(1)(a) of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*.

Enabling laws

11.145 In addition to making provision for referendums of the electors of the Territory for entrenching laws and laws that entrenching laws require to be submitted to referendum, the *Referendum (Machinery Provisions) Act 1994* makes provision for enabling laws to be submitted to referendum. An enabling law is defined by the Act as a law that provides for a matter, including a proposed law, to be submitted to a referendum and is included in the dictionary definition of 'referendum law'.[174] To date, the Assembly has not considered an enabling law.

11.146 The Referendum (Machinery Provisions) Act provides the general mechanisms for the conduct of referendums required to be held by laws of the Assembly, except to the extent that the actual referendum law provides otherwise.[175]

MONEY BILLS

Self-Government Act

11.147 The Self-Government Act gives the ACT a capacity to raise revenue similar to that of the states and the Northern Territory. All moneys received by the Territory—taxes, fees and other charges, income from investment and commercial activities—form the public money of the Territory, which is regulated under enactment passed by the Assembly. Funds may not be withdrawn or appropriated from the public moneys—except by way of legislation passed by the Assembly.

11.148 The key sections of the Self-Government Act that govern (and ensure the primacy of the Assembly in regard to) the control of the public money of the Territory are:

- section 57 (public money), which provides that:
  - the public money of the Territory (the revenues, loans and other money received by the Territory) shall be available for the expenditure of the Territory; and
  - the receipt, spending and control of the public money of the Territory shall be regulated as provided by enactment;

174 The Assembly might consider that, with regard to a particular matter, the views of the electorate should be sought directly by making that matter the subject of a referendum. It would do this by passing an enabling law setting out the question and requiring that it be submitted to the electorate at a referendum.

175 *Referendum (Machinery Provisions) Act 1994*, subsection 5(2).

- section 58 (withdrawals of public money), which provides that (with one exception) no public money of the Territory shall be issued or spent except as authorised by enactment and that the public money of the Territory may be invested as provided by enactment;[176] and
- section 65 (proposal of money votes), which provides that:
  - an enactment, vote or resolution (proposal) for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister.

However, it is important to note that section 65 does not prevent a Member other than a Minister from moving an amendment to a proposal made by a Minister unless the amendment is to increase the amount of the public money of the Territory to be appropriated.

11.149 The provisions of section 65 relating to 'the financial initiative of the Crown' have received considerable attention in the short life of the Assembly.

11.150 The Self-Government Act also sets out provisions for financial relations between the Commonwealth and the Territory,[177] including borrowing from the Commonwealth. In addition, certain provisions originally included in the Self-Government Act relating to controls by the Commonwealth over the Territory's borrowings have now been repealed. These are section 61 (borrowing from persons other than the Commonwealth), section 62 (guarantee of borrowing), section 63 (borrowing not otherwise permitted) and section 64 (guarantees by executive).[178]

Financial initiative of the Crown

11.151 In addition to sections 57 and 58 of the Self-Government Act ensuring the primacy of Assembly control of the public money of the Territory, section 65 ensures that it is only the executive of the day that may initiate or move to increase appropriation proposals in the Assembly. This is a principle of long standing that is referred to as the financial initiative of the Crown.[179]

11.152 Section 65, which is modelled on section 56 of the Constitution, provides that:

> **Proposal of money votes**
>
> (1) An enactment, vote or resolution (***proposal)*** for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister.

176 See subsection 16(4) of the Act where, in the event of a dissolution of the Assembly by the Governor-General and the subsequent appointment of a commissioner, should it be necessary to issue or spend public money of the Territory when not authorised to do so by or under enactment, the commissioner may do so with the authority of the Governor-General.

177 Section 50: the Commonwealth being obliged to conduct its financial relations with the Territory so as to ensure that the Territory is treated on the same basis as the States and the Northern Territory, having regard to the special circumstances arising from the existence of the national capital and the seat of government of the Commonwealth in the Territory together with other guarantees. (This section was repealed in 1994.)

178 Sections 61, 62, and 63 were repealed by the *Arts, Sport, Environment, Tourism and Territories Legislation Amendment Act 1991* (No. 3 of 1991), the repeal being a result of a 1990 decision by the Loan Council that the states and territories would gradually assume full responsibility for raising and servicing their government debt (see H.R. Deb. (14.02.1991) 653). Section 64, which required the Territory to obtain the approval of the Treasurer of the Commonwealth before making guarantees for the discharge of certain obligations, was repealed by the *Australian Capital Territory Self-Government Legislation Amendment Act 1992* (No. 10 of 1992), the provisions reflecting the views that the Territory legislature should have greater responsibility for its own affairs (see H.R. Deb. (6.11.1991) 2467).

179 It is of interest to note that during Senate consideration of the self-government legislation in November 1988, an amendment proposing that a law etc for the disposal or charge of the public moneys of the Territory may be proposed by any Member and shall not be passed unless a nominated committee of the Assembly approved the provision of the public moneys of the Territory for the purpose of the proposal. The amendment was negatived, the government viewing it as different from any provision operating in the States and the Northern Territory in relation to money bills and, as a matter of effective and sensible budget management, the initiation of money bills needed to be retained in the hands of the executive. The opposition supported the government. Sen. Deb. (24.11.1988) 2813-4.

(2) Subsection (1) does not prevent a Member other than a Minister from moving an amendment to a proposal made by a Minister unless the amendment is to increase the amount of public money of the Territory to be appropriated.

11.153 The principle is one of long standing and, though greatly enhancing the power of the executive, is seen as fundamental to good government. As Anson put it, it is:

> … the great safeguard of the tax-payer against the casual benevolence of the House wrought upon by the eloquence of a private member [or] against a scramble for public money among unscrupulous politicians bidding against one another for the favour of democracy. [180]

11.154 In addressing the issue of amendments in the context of the rules regulating financial procedures in the United Kingdom House of Commons, May states:

> The House of Commons has long found it necessary to place restrictions on the moving of amendments in order to keep intact the principle of the financial initiative of the Crown …

He goes on to contend:

> The Crown's recommendation lays down the maximum amount of a charge on public funds or on the people, as well as its objects and purposes. An amendment infringes the financial initiative of the Crown not only if it increases the amount, but also if it extends the objects and purposes, or relaxes the conditions and qualifications expressed in the communication by which the Crown has recommended a charge.[181]

11.155 The principle reflects the fact that it is the executive that is responsible for the management of the public finances of the Territory and the administration of those finances. For the Assembly to impose expenditure proposals initiated by non-executive Members on the Government must be seen as inimical to the principles of good government.[182]

11.156 The current form of section 65 of the Self-Government Act was inserted following approaches from the Territory to the Commonwealth Parliament in 1994. The new provisions sought to remove uncertainty which flowed from the original wording. The explanatory memorandum to the amending bill stated:

> Subsections 65 (1) and (2): amended to ensure that the initiative of the Government in introducing legislation in the Assembly on financial matters is no greater or less than that of the Commonwealth Government under section 56 of the Constitution. The reference in the present section 65 to the 'object or effect' of a proposed law, and the absence of reference to 'appropriation'

180 Gordon Reid, The *Politics of Financial Control*, Hutchison University Library, London, 1966, pp. 41-3. Reid is quoting the 1886 view of Sir William Anson. For further discussion on the background to the rule and its application in the Commonwealth Parliament see the comments by Reid at pp. 41-5, and also *Quick and Garran*, p. 681.

181 *May*, pp. 856-7.

182 See comments (on section 56 of the Constitution) by *Quick and Garran* where they also quote from Hearn's *Government of England*—'We are so accustomed to the general practice, and the deviations from it have been so inconsiderable, that its importance is scarcely appreciated. Those, however, who have had the experience of the results which followed from its absence, of the scramble among the members of the Legislature to obtain a share of the public money from their respective constituencies, of the 'log-rolling', and of the predominance of local interests to the entire neglect of the public interest, have not hesitated to declare that 'good government is not attainable while the unrestricted powers of voting public money and managing the local expenditure of the community are lodged in the hands of an Assembly.'. *Quick and Garran*, p. 681.

> suggests that section 65 covers proposals to increase the Territory's possible financial liabilities without actually appropriating public moneys. This is not intended.[183]

11.157 The executive's exclusive responsibility in this regard has significant practical implications for the passage of financial measures through the Assembly. As *House of Representatives Practice* states in relation to that legislature:

> … the constitutional and parliamentary principle that only the Government may initiate or move to increase appropriations or taxes—plays an important part in procedures for the initiation and processing of legislation.[184]

These procedures are substantially reflected in the provisions of the Self-Government Act and the standing orders of the Assembly.

11.158 It should be noted that, unlike the House of Representatives, the Assembly has not further enhanced the hand of the executive over and above the constitutional provisions by imposing restrictions on non-executive members initiating proposals to impose taxes. It has, however, enhanced the hand of the executive by imposing certain additional restrictions (initially by way of resolution) on non-executive Members proposing amendments to expenditure proposals (see paragraphs 11.162 and 11.178 to 11.190) and, by statute, obviating the need for the executive to seek 'supply' by making provision for a standing supply provision in the Financial Management Act (see paragraphs 11.163 and 11.202 to 11.208). In relation to taxation matters, the Assembly has significantly restricted Members' ability to target a discrete portion of a subordinate law imposing a tax, charge or fee in a motion of disallowance or a motion to amend a subordinate law.[185]

Standing orders

11.159 Standing orders 200 and 201 relating to money proposals were amended in 1994 to reflect amendments to the Self-Government Act. They state that:

> **Money proposals submitted – without notice**
>
> 200. An enactment, vote or resolution for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister. Such proposals may be introduced by a Minister without notice.

183 The explanatory memorandum to the Arts, Environment and Territories Legislation Amendment Bill 1993 (as enacted Act No. 6 of 1994, Cwlth). Note that while section 56 of the Constitution refers to the requirement for 'a message of the Governor-General' recommending a proposed appropriation, in effect ensuring executive support for the proposal, there is no reference to such a message as the Territory does not have an Administrator or a Governor as is the case in the Northern Territory and the states.

184 *House of Representatives Practice*, p. 407

185 Prior to the commencement of the Legislation Act, the *Subordinate Laws Act 1989* made provision for the disallowance by the Assembly of a subordinate law (or disallowable instrument) or 'a provision of that law'. The reference to the disallowance of a provision of a subordinate law was omitted from the new provisions that came into effect in September 2001, though, at page 21, the explanatory memorandum to the Legislation (Access and Operations) Bill 2000 stated that the new provision 'would restate' the relevant subsections of the *Subordinate Laws Act 1989*. The omission is potentially one of significance. The reason is that, given the Assembly's inability to amend subordinate laws where the amendment would have the effect of waiving or changing any fee, charge, penalty or other amount payable to the Territory and the exclusion of determinations of fees or charges by a Minister from the amendment provisions (Legislation Act, subsection 68(1)), a Member's ability to target a discrete portion of such a subordinate law in a motion of disallowance has been lost. The provision enabling the Assembly to amend subordinate laws was originally proposed in the Subordinate Laws (Amendment) Bill 1993. The restricting provisions were inserted in the bill during Assembly consideration. See Assembly Debates (23.2.1994) 149-80; (20.4.1994) 1025-6. Though not directly relevant, note that when, in April 1994, the Assembly considered the original amendment to the Subordinate Laws Act to enable it to amend subordinate laws, the proposal (as amended) specifically excluded amendments to subordinate laws that would have the effect of waiving or changing any fee, charge, penalty or other amount payable to the Territory.

Limitations on amendments

201. A Member, other than a Minister, may not move an amendment to a money proposal, as specified in standing order 200, if that amendment would increase the amount of public money of the Territory to be appropriated.

11.160 Prior to the adoption of these standing orders in their current form, there had been considerable controversy and frustration in the Assembly over the application of the former standing orders in regard to the initiation of legislation. Members had been prevented from proceeding with their sponsorship of bills in the Assembly. The original provisions could operate to virtually exclude private Members from proposing business in the Assembly. There was a need to strike a balance between the rights of private Members to initiate proposals, and to have them decided by the Assembly, and the executive's exclusive responsibility for initiating the expenditure of the Territory's money.[186]

11.161 Since the adoption of the new standing orders in 1994, no private Members' bills proposed in the Assembly have infringed the provisions of standing order 200.[187]

11.162 In March 2008 the Assembly further amended the standing orders by adopting standing order 201A, thus incorporating in the standing orders the terms of a 1995 resolution further restricting the scope of amendments that non-executive Members may move to money proposals. The new standing order provides:

201 A. An amendment in accordance with standing order 201 must be in accordance with the resolution agreed to on 23 November 1995 – i.e. 'That this Assembly reaffirms the principles of the Westminster system embodied in the "financial initiative of the Crown" and the limits that that initiative places on non-executive Members in moving amendments other than those to reduce items of proposed expenditure.'

Financial Management Act

11.163 The Territory initially regulated the receipt, spending and control of the public money through provisions of the Audit Act until, in 1996, it enacted the *Financial Management Act 1996*.[188] This law now regulates the management of the public money of the Territory.[189]

11.164 The Financial Management Act confirms that the appropriation of the public money of the Territory must be by way of an enactment. Section 6 of the Act provides

186 The new standing orders were adopted, the Assembly agreeing to a recommendation of the Standing Committee on Administration and Procedures—*Standing Orders 200 and 201*, Report of the Standing Committee on Administration and Procedures, 7 June 1994, MoP 1992-94/633. Subsection 65(1) of the Self-Government Act had originally provided 'An enactment, vote, resolution or question (any of which is in this section called a "proposal") the object or effect of which is that to dispose of or charge any public money of the Territory shall not be proposed in the Assembly except by a Minister.' For a summary of the application of the earlier procedures, see *Standing Orders 200 & 201 and their interpretation,* Report of the Standing Committee on Administration and Procedures, December 1990.

187 But see paragraphs 11.188 and 11.189 re the concerns of Speaker Cornwell regarding the provisions of the Financial Management Amendment Bill 2001 (No. 2) vis-à-vis the resolution of the Assembly of 23 November 1995.

188 Its long title is 'An Act to provide for the financial management of the government of the Territory, to provide for the scrutiny of that management by the Legislative Assembly, to specify financial reporting requirements for the government of the Territory, and for related purposes.'

189 The Act replaced the *Audit Act 1989* (originally the Audit Ordinance 1989 (No. 37 of 1989) made by the Governor-General under the *Seat of Government (Administration) Act 1910* on 9 May 1989), which was repealed by the *Financial Management and Audit (Consequential and Transitional Provisions) Act 1996*.

that 'no payment of public money[190] must be made otherwise than in accordance with an appropriation.' The dictionary to the Act defines an appropriation as 'an appropriation of public money by any Act including this [the Financial Management] Act'.

11.165 The Act also includes a number of provisions governing the form and content of appropriation bills, the preparation and presentation of budget papers and the reporting requirements of the Territory and individual departments. It also sets out rules for the management of the Territory and departmental budgets, financial reporting requirements, the financial management responsibilities of chief executives, the management of the Territory bank account, departmental bank accounts, investment, borrowings and trust moneys, and financial provisions for territory authorities.

11.166 In relation to the Assembly's consideration of money bills, particular provisions of the Act are:

- section 5: unless the Assembly provides otherwise, the first appropriation bill relating to a financial year must be introduced into the Assembly no later than three months after the beginning of the financial year; and
- section 8: provides for the possibility of an Appropriation Act making separate appropriations in relation to each department for:
  - the provision of outputs by the department;
  - any capital injection to be provided to the department; and
  - any payments to be made by the department on behalf of the Territory.

11.167 Sections 9 and 9A provide for appropriations to be expressed net of payments that a department receives for the provision of outputs and input tax credits that apply to those outputs. These sections also authorise departments to apply that income to 'paying the expenses and liabilities of the department'. Sections 12 and 12A specify what must be included in a proposed budget for a department, a Territory authority or a Territory-owned corporation respectively.

11.168 At section 7, the Act provides for an 'automatic' supply period at the beginning of a financial year if an appropriation bill for that year has not been passed by the Assembly.[191] The Treasurer, within strict limits, is authorised to make payments to meet the requirements of government, but not so as to exceed in total half of the amount appropriated in the previous financial year. With the passage of the Appropriation Act, payments made by the Treasurer under this section 'are taken for all purposes to have been made out of money appropriated by that Act'. This provision has been utilised on a number of occasions.[192]

190 The definition of 'public money' in the Financial Management Act differs from that in the Self-Government Act, the former excluding money held by the Territory as trust money and certain other moneys received by the Territory from Territory-owned corporations and Territory authorities.

191 It used to be the practice of the Commonwealth Parliament that the budget was presented in August and the appropriation bills for that financial year debated thereafter. Thus, it could be that appropriations were not passed until some months into the financial year. To cover the period from the start of the financial year until the passage of the appropriation bills, the Parliament used to pass supply bills in the previous financial year to make interim provision for the first few months of the following financial year.

192 See, for example, MoP 1998-2001/934, where the appropriation bill was defeated and an amended appropriation bill was not passed until 10 July 2000 (MoP 1998-2001/939), and MoP 2004-08/1205, where the appropriation bill for the financial year 2007-08 was passed on 30 August 2007. See also paragraphs 11.202 to 11.208 for a fuller discussion of the interpretation of this section.

Procedure on appropriation bills

Introduction

11.169 Appropriation bills must be introduced by a Minister and may be introduced without notice.[193] Though section 65 of the Self-Government Act (and standing order 200) envisages that an appropriation may be initiated by resolution,[194] section 6 of the Financial Management Act makes it clear that no payment of public money may be made otherwise than in accordance with an appropriation Act.

11.170 The Financial Management Act makes provision for the form of appropriation Acts. An appropriation Act may make separate appropriations in relation to each department for:

- the provision of outputs by the department;
- any capital injection to be provided to the department; and
- any payments to be made by the department on behalf of the Territory.

It also specifies the form of any separate appropriation in relation to a Territory authority or Territory-owned corporation.[195] It also makes provision for net appropriations for outputs, capital injections and payments on behalf of the Territory.[196]

11.171 Section 10 of the Act obliges the Treasurer, immediately after the presentation of the bill for the first Appropriation Act relating to the year, to present to the Assembly the proposed budgets for the Territory, each department and each Territory authority and Territory-owned corporation for the year. A consolidated financial management statement in relation to the general government sector and the public trading enterprise sector must be included in the budget papers. Where the executive seeks a supplementary appropriation (additional expenditure not provided for in the budget) at any time during the financial year, section 13 requires the Treasurer to present supplementary budget papers and specifies the information that must be included in those papers.

Motion for agreement in principle

11.172 Standing orders contain two provisions relating to the consideration of the question that a bill be agreed to in principle that are unique to the consideration of appropriation bills in the Assembly:

- the relevancy rule in debate is relaxed in that, on the motion for agreement in principle to appropriation bills for the ordinary annual services of the executive, matters relating to public affairs may be debated;[197] and
- for consideration of the main appropriation bill for the year, there is no time limit specified for the speeches of the mover of the motion 'That this bill be agreed to in principle' and the

193 Standing order 200.

194 Section 65 of the Self-Government Act is based upon section 56 of the Constitution. The use of the term 'a resolution for the appropriation of public money' may relate to the financial procedures in the colonial legislatures and the United Kingdom House of Commons at the time of Federation (and used by the House of Representatives until 1963) when certain Bills were based upon financial resolutions. At that time financial procedures were more complex, involving consideration by the Committee of Supply and Ways and Means. The procedure in relation to the main appropriation bill of the year culminated with formal consideration by a committee of ways and means, after which a bill to give effect to the resolution was brought in and usually passed formally and immediately.

195 *Financial Management Act 1996*, section 8. Prior to the amendments made by the *Financial Management Legislation Amendment Act 2005* this provision regarding the form of appropriation Acts was proscriptive.

196 *Financial Management Act 1996*, sections 9, 9A and 9B.

197 Standing order 58(b).

Member next speaking (the practice of the Assembly is to limit the time for the Member next speaking (Leader of the Opposition) and also the time of crossbench Members to no more than the time taken by the mover of the motion).[198]

Procedures following agreement in principle

11.173 The practice of the Assembly in relation to the main appropriation bill for the year has been to refer it to a Select Committee on Estimates following agreement to it in principle. The committee is established to examine the expenditure proposals contained in the bill, together with any revenue estimates proposed by the Government in the budget.[199] Appropriation bills introduced subsequent to the main appropriation bill for the year have also been referred to estimates committees or to the Standing Committee on Public Accounts.[200]

11.174 Reports of estimates committees include recommendations which may relate to specific items of expenditure, to overall financial management, to other budgetary issues or to the presentation of the budget papers themselves. Following presentation of a committee report, the government provides a response outlining its attitude to the various recommendations and indicating which, if any, it is prepared to act on. The practice is that motions are moved to take note of the respective papers.

11.175 After the estimates committee has reported and the government response has been presented, the Assembly then proceeds to the detail stage of consideration of the bill. Normally the Assembly agrees to permit the orders of the day for the consideration of the report of the estimates committee and the government response to be called on and debated cognately with the order of the day relating to the appropriation bill.[201] At the commencement of consideration of the detail stage, the Speaker reminds the Assembly that leave of the Assembly has been granted for a cognate debate and that Members can speak to the bill, the relevant parts of the estimates committee report and the government's response to that report.[202]

Detail stage consideration

11.176 An appropriation bill is generally quite a short document.[203] Basically, it defines expenditure in terms of the Financial Management Act. The actual amounts to be appropriated are contained in a schedule to the bill and the detail of expenditure for individual departments and agencies is included in the budget papers. Standing order 180 sets the procedure to be followed in consideration of the bill. The schedule listing the services for which an appropriation is to be made must be considered before the clauses, and the schedule must be considered in the order in which proposed expenditures are shown, unless the Assembly orders otherwise. Thereafter, the general provisions of standing order 180 apply.

198 Standing order 69(d).

199 See, for example MoP 2004-08/1005-6, 1060.

200 For example, Appropriation Bill 2003-2004 (No. 2) (MoP 2001-04/823-4) and Appropriation Bill 2003-2004 (No. 2) (MoP 2001-04/1210). Appropriation Bill 1999-2000 (No. 3) was referred to the Select Committee on Estimates already appointed to consider Appropriation Bill 2000-2001, the resolution of appointment having been amended (MoP 1998- 2001/881). Appropriation Bill 2002-2003 (No. 2) was referred to the Standing Committee on Public Accounts (MoP 2001-04/560). The Assembly has declined to refer appropriation bills to select committees; see for example MoP 1998-2001/473-4 (Appropriation (Bruce Stadium and CanDeliver Limited) Bill 1999), and MoP 1998-2001/497 (Appropriation Bill (No. 2) 1999-2000).

201 MoP 2004-08/784.

202 Assembly Debates (22.8.2006) 2420.

203 For example, the text of the 2007-2008 bill is only four pages including the title page, commencement and definitions clauses. The schedules add another five pages. Schedule 1 lists the amount appropriated for each agency and schedule 2 simply lists the subdivisions within agencies. In contrast, the budget papers, which include the Treasurer's budget speech, comprise four volumes and approximately 1 000 pages.

11.177 Since 1996 the practice of the Assembly in considering the schedules has been slightly different from that set down in standing order 180, reflecting the changed layout of appropriation bills since the enactment of the Financial Management Act. The order of consideration is as follows: the first schedule is considered part by part (consisting of net cost of outputs, capital injection and payments on behalf of the Territory); then the clauses, Schedule 2 and the title are considered.[204]

Amendments to appropriation bills

11.178 Some amendments proposed to appropriation bills have caused the Assembly to review the application of standing order 201 and to impose even tighter restrictions than those set by the standing order and the Self-Government Act. This culminated in the adoption of standing order 201A in March 2008.

11.179 Prior to the adoption of standing order 201 in its current form, an amendment was proposed during detail stage consideration of the Appropriation Bill 1993-1994 to insert a new clause in the bill. The amendment did not propose to increase the amount appropriated, but proposed restricting the use the executive could make of the money appropriated. The proposed new clause read:

> The executive shall not use money appropriated by this, or any other, Act for the purpose of reducing: (a) the number of persons employed as teachers in schools or colleges in the Territory; or (b) the number of teaching hours provided overall in those schools and colleges taken as a whole.

11.180 After reference to the unprecedented nature of the amendment and its potential effect, the Speaker, after taking further points of order on the matter (and the sitting having been suspended for a short period), ruled that the amendment was in order. The amendment was agreed to by the Assembly after some debate.[205]

11.181 The issue came to a head in November 1995 during Assembly consideration of the Appropriation Bill 1995-1996. Prior to the detail stage, the Assembly considered whether it would be in order for a non-executive Member to propose to the Assembly an amendment or amendments, the object of which was to transfer a sum of money from the Treasurer's Advance[206] to one of the divisions relating to the Department of Education and Training. In the weeks leading up to the consideration of the relevant stage of the bill, legal opinions were obtained on the matter. These, together with a memorandum by the Clerk on the issues, were presented in the Assembly on 23 November 1995.[207]

11.182 Standing order 201 limited the ability of non-executive Members to move amendments to money proposals. It provided that a Member, other than a Minister, may

204 See, for example, Assembly Debates (22.8.2006) 2420-1. See also, in contrast, MoP 2001-04/125 (Appropriation Bill 2001-2002 (No. 2)); the proposed amounts to be appropriated were set out in clause 6 of the bill; so the bill was considered in the ordinary way.

205 MoP 1992-94/490-1; Assembly Debates (25.11.1993) 4178-99. There was an earlier precedent: in 1989, it appeared that a Member could not obtain drafting assistance to prepare an amendment to the Legislative Assembly (Members' Staff) Bill (to facilitate the employment of consultants by Members) as the amendment would contravene section 65 of the Self-Government Act; see Assembly Debates (2.11.1989) 2393. An interesting sequel to the inclusion of this clause was that the status of the 1993 amendment (the inclusion of section 11) was queried two years later and the Speaker undertook to obtain advice on the matter: Assembly Debates (14.12.1995) 3049, 3063. Advice was received and circulated to Members later that month. The advice concluded that the effect of the section could not be said to extend beyond the 1993-94 financial year; see section 11 of the Appropriation Act 1993, Advice of Andrew Barram, Acting Director, Parliamentary and Constitutional, Attorney-General's Department, 20 December 1995.

206 The Treasurer's Advance is a contingency fund appropriated for the Treasurer to use in the case of any unforeseen expenditure arising.

207 MoP 1995-97/202.

not move an amendment to a money proposal, as specified in standing order 200,[208] if that amendment would increase the amount of public money of the Territory to be appropriated. Unlike [then] standing order 292 of the House of Representatives (and the more restrictive provisions later formalised in standing order 201A), standing order 201 did not specifically exclude a non-executive member from moving an amendment that would extend the objects and purposes or alter the destination of the appropriation recommended.

11.183 The advices focused, in part at least, on the meaning of the words 'enactment, vote or resolution' (especially 'vote'), conceding that the 1988 explanatory memorandum to the Self-Government Bill envisaged that certain types of transfers were permitted on the motion of non-executive Members.[209] However, they concluded that, whilst it would be in order for a non-executive Member to move to amend an appropriation unit to reduce the amount of money appropriated, it would not be in order to move an amendment that would have the effect of transferring funds from the Treasurer's Advance to one of the education appropriation units—in effect, to increase the amount appropriated but offsetting that increase by a corresponding reduction in another appropriation unit.

11.184 The advice of the Clerk concluded:

> The standing orders do not contain a prohibition on non-Executive Members proposing amendments that would transfer or alter the destination of the moneys to be appropriated, except they do prohibit non-Executive Members moving an amendment to a 'proposal' (ie. Enactment, vote or resolution) that would increase the amount of the public money of the Territory to be appropriated. Whether such an amendment as proposed would be in order depends on the definition of 'enactment, vote or resolution for the appropriation of public moneys', especially, in this context, the term 'vote'.[210]

The advice referred to the provisions of standing order 180, the practice of the Assembly to that time and practice elsewhere. The view of the Clerk was that the most ready identification of 'vote' in the context of the Assembly's consideration of the appropriation bill was that it referred to a division as listed in part II to the schedule of that bill. The advice went on to state that any amendment to decrease the amount of the proposed expenditure in a vote or division would be in order, as it would be a vote against a proposed expenditure. To propose an amendment to increase the amount of a proposed expenditure in a particular vote or division would be out of order, even if the amount to be appropriated by the bill overall remained the same. It would be in order, however, to move to transfer money within a vote (for example, from capital expenditure to recurrent expenditure within the same division). This would not now be the case given the 23 November 1995 resolution and (new) standing order 201A.

11.185 Matters came to a head on the second day of consideration of the bill at the detail stage, the Assembly having earlier rejected a proposal that the schedule be taken as a whole and the Speaker having ruled out of order an associated motion to have the schedule considered a single 'vote'.[211] Standing orders having been suspended to allow the Manager of Government Business to move a motion concerning amendments to appropriation bills, the Assembly resolved:

> That this Assembly reaffirms the principles of the Westminster system embodied in the 'financial initiative of the Crown' and the limits that that initiative places

208 That is, an enactment, vote or resolution for the appropriation of the public money of the Territory.

209 The explanatory memorandum stated 'Sub-clause 64(2) enables Members of the Assembly to move amendments to monetary proposals made by a Minister but only to decrease or transfer the amount proposed.'

210 MoP 1995-97/202.

211 MoP 1995-97/190; Assembly Debates (21.11.1995) 2219-23.

on non-Executive Members in moving amendments other than those to reduce items of proposed expenditure.[212]

11.186 Later that evening during consideration of the proposed expenditures in the schedule to the appropriation bill, amendments moved by non-executive Members were ruled out of order as they conflicted with the earlier resolution of the Assembly. The amendments would have:

- increased the amounts of proposed expenditure;[213]
- placed restrictions on the use the executive could make of moneys appropriated;[214] and
- given directions on how moneys received were to be credited.[215]

11.187 As a result of the Assembly's agreement to the 23 November 1995 resolution, whilst clearly amendments moved by Ministers to increase the amounts appropriated have been in order,[216] as have amendments moved by non-executive Members proposing to decrease the amount to be appropriated,[217] amendments sponsored by non-executive Members were ruled out of order, as they would be in conflict with the resolution of the Assembly. The amendments proposed the:

- transfer of funds within a line of appropriation to a department (from capital injection to net cost of outputs);[218] and
- insertion of a new part into schedule 1 of the Appropriation Bill 2006-2007.[219]

11.188 On 20 June 2001 the Speaker made a statement to the Assembly concerning the provisions of the Financial Management Amendment Bill 2001 (No. 2), which was a private Members' bill. The bill proposed to insert a new section 66AA in the Financial Management Act which would provide that no payment of public money may be made for a free school bus scheme unless the scheme had been approved expressly by a resolution of the Assembly.

11.189 The Speaker advised the Assembly that the bill did not contravene the provisions of standing orders 200 and 201, though he reminded Members of the resolution of the Assembly of 23 November 1995. He stated that the issue was one that had considerable significance for the governance of the Territory as well as for the rights of non-executive Members. He further advised that he did not propose to rule the bill out of order at that stage on the grounds that it conflicted with the 1995 resolution as the standing of the resolution in relation to the bill was not beyond doubt.[220] The bill was rejected by the Assembly later that day.

11.190 In its December 2007 review of the standing and other orders of the Assembly, the Standing Committee on Administration and Procedure suggested that the resolution of 23 November 1995 be incorporated as a standing order to reflect the practice of the Assembly

212 MoP 1995-97/201-03; Assembly Debates (23.11.1995) 2362-83. An amendment to remove all words after 'principles of' and substitute 'Council style government embodied in Liberal Party policy which allows full participation by all members of the Assembly' was negatived, Ayes 4, Noes 13, and the question that the principal motion be agreed to was resolved in the affirmative, Ayes 13, Noes 4.

213 MoP 1995-97/204-5 (the Assembly, having negatived a motion of dissent, upheld the ruling).

214 MoP 1995-97/206, 207.

215 MoP 1995-97/206 (the Assembly, having negatived a motion of dissent, upheld the ruling); MoP 1995-97/206-7, 207 (2).

216 MoP 1998-2001/484; MoP 1998-2001/938; MoP 1998-2001/1369, 1375.

217 MoP 1998-2001/517-8; MoP 2001-04/771-2, 773, 777-8; MoP 2004-08/801, 805.

218 MoP 2004-08/220, 226.

219 MoP 2004-08/802, 807. A Member tried to frustrate a government proposal to close a number of schools by preventing any appropriation for that purpose. The new part would have identified 'school closures' as a specific output class and denied it any funding.

220 MoP 1998-2001/1494, 1495-6; Assembly Debates (20.6.2001) 2143. It should be noted that it is not uncommon for non-executive Members to move amendments to bills amending the Financial Management Act; see MoP 1995-97/912-3; MoP 1998-2001/1163; MoP 2004-2008/406-7.

over the preceding 12 years.[221] In March 2008 new standing order 201A was adopted by the Assembly as recommended.[222]

Appropriation bill negatived

11.191 On 29 June 2000 the Appropriation Bill 2000-2001 was considered by the Assembly. The bill included a controversial proposal to fund a trial of a supervised heroin injection facility in Canberra. Despite the relevant appropriation for the Department of Health and Community Care having been agreed to earlier in the evening, the question 'That this Bill, as amended, be agreed to' was negatived eight votes to nine with three crossbench Members supporting the opposition in voting against the bill. The Chief Minister immediately moved 'That the Assembly do now adjourn' and, after a short debate, the Assembly adjourned until the next scheduled sitting day, 29 August 2000. [223]

11.192 The Assembly in fact met on 10 July 2000 in response to a request by an absolute majority of Members. Following consideration of certain necessary procedural motions, the Minister for Justice and Community Safety presented the Supervised Injecting Place Trial Amendment Bill 2000, which proposed to delay the introduction of the trial until 1 January 2002 at the earliest. The bill, which addressed the concerns leading to the defeat of the appropriation bill, was agreed to.[224]

11.193 Following a further suspension of standing and temporary orders, the Assembly rescinded the critical vote taken on the morning of 30 June and reconsidered certain questions in relation to the main schedule of the appropriation bill. Government amendments to the bill having been agreed to, the Assembly then agreed to the question 'That this Bill, as amended, be agreed to'. The question was passed on the voices.[225]

11.194 During debate on 10 July, there was discussion concerning the action of the opposition (in particular) and crossbench Members in 'blocking supply', the propriety of such action and its effect. In the days preceding this debate there had been conjecture as to the position of the Government, the defeat being seen as a rejection of the Government on a critical matter of policy, namely its budget for the forthcoming year.

11.195 Certain matters stand out. Though the appropriation bill was rejected, supply was assured. Section 7 of the Financial Management Act 1996 ensures that, subject to certain conditions, funds are available to cover this contingency. Thus, there was no immediate budgetary crisis.[226]

11.196 As to blocking supply, Members are not obliged to vote in favour of any question arising in the Assembly, including the critical questions on the main appropriation bill of the year. The Self-Government Act vests in the Assembly the power to make laws for the peace, order and good government of the Territory. Subsection 18(2) of the Act provides that questions shall be decided by a majority of votes of the Members present and voting, unless a special majority is required by the standing rules and orders. Section 58 of the Self-Government Act also makes it clear that public moneys may be appropriated only by legislative enactment.

221 Standing Committee on Administration and Procedure, *Review of standing orders and other orders of the Assembly*—Volume 1, Report 2, December 2007, pp 54-5.

222 MoP 2004-2008/1388-9.

223 MoP 1998-2001/934; Assembly Debates (29.6.2000) 2367-9.

224 See comments by the Minister at Assembly Debates (10.7.2000) 2372-3 and the debate following.

225 MoP 1998-2001/935-9.

226 See paragraphs 11.168 and 11.202 to 11.208.

11.197 It would be wrong to assume that there is a convention or legitimate expectation that Members will always vote in favour of appropriation bills, particularly the main appropriation bill for the year.[227] To obtain the passage of its budget is a major test the executive must meet each year. To suggest that, by convention, Members must vote in favour of the budget contradicts the clear intent of the Self-Government Act. It also implies a significant and undesirable shift in the balance between the legislative and executive branches and places a huge restriction on the power of the opposition and other non-executive Members.

11.198 The executive already possesses a significant advantage through the control it exercises by way of the standing supply provision, the provisions of standing orders 200 and 201, the resolution of 23 November 1995 and standing order 201A.

11.199 It is not unusual in the Assembly for an executive to be defeated on important issues, including its legislative proposals. It would be open for a Chief Minister to treat a defeat on a key issue as one of lack of confidence and to test the support of the Assembly by submitting his or her resignation to the Speaker. However, none has chosen to do so.[228] Should an executive lose the confidence of the Assembly, sections 19 and 40 of the Self-Government Act make provision for a resolution of no confidence in a Chief Minister, and these provisions have been utilised on occasion (see Chapter 6: Executive).

11.200 Though the significance of the Assembly's rejection of the appropriation bill in June 2000 should not be dismissed, supply was assured (albeit with limitations) and particular circumstances did apply. The executive was able to obtain the support of an absolute majority of Members for an early recall of the Assembly and for a legislative initiative to address a key issue which contributed to the defeat. It also gained support to rescind the earlier resolution of the Assembly and for an amended appropriation bill. Had the Assembly declined to rescind the resolution and the executive failed to gain agreement for an appropriation bill for the forthcoming year, the executive would have had to consider its position.

11.201 In the unlikely event of an impasse developing and no party in the Assembly being able to form a government and gain support for its budget, the Assembly could be seen to be incapable of effectively performing its functions. In that circumstance, the Governor-General might act on advice and dissolve the Assembly in accordance with section 16 of the Self-Government Act and a general election would ensue.

Standing supply provision

11.202 Following the defeat of the Appropriation Bill 2000-2001 in the Assembly on 30 June 2000, advice was sought concerning the provisions of section 7 of the *Financial Management Act 1996* (payments authorised on lapse of appropriation). The basis of the request was that with the exception of what were believed to be limited standing appropriations and the provisions of the Financial Management Act, the bill that had been rejected had proposed to make authorisation for the payment of all public money for the Territory for the financial year that had just commenced on 1 July 2000.

227 There has been debate in Australia as to whether a legal prohibition or an established convention limited the power of second chambers of bicameral parliaments to reject or delay supply, particularly with regard to the Australian Senate's actions in 1975. With regard to a unicameral legislature, in the absence of any clear legislative or constitutional provision, there can be no suggestion that a government must be granted supply.

228 For discussion of precedents in the House of Representatives, see *House of Representatives Practice*, First edn, pp. 417-23.

11.203 Section 7 of the Financial Management Act provides:

> If, before the end of a financial year, no Act other than this Act has been passed appropriating public money to meet the requirements of the next financial year, the Treasurer may pay the amounts necessary to meet those requirements subject to the following provisions:
>
> (a) the authority of the Treasurer under this section ceases on the commencement of the first Appropriation Act for the next financial year;
>
> (b) on that commencement all payments made under this section for the next financial year are taken for all purposes to have been paid out of money appropriated by that Act;
>
> (c) the payments made under this section for any purpose must not exceed, in total, 1/2 of the amount appropriated by Appropriation Acts for the immediately previous financial year for that purpose.

11.204 The explanatory memorandum to the 1996 bill relating to this section states:

> This clause makes provision for the supply period at the beginning of a financial year. The provision obviates the necessity for the passage of a separate Supply Bill before the beginning of the financial year. Under the provision, authority to incur expenses is continued by reference to the Appropriation Act or Acts for the immediate past year.

11.205 The advice was sought specifically concerning the limitations section 7(c) of the Financial Management Act placed on the Treasurer's authority to pay the sums to meet the requirements for the financial year that had just commenced, with particular reference to:

- the meaning of the words 'meet[ing] the requirements of the financial year' and the restrictions this may place on new spending initiatives;
- the extent to which section 7 restricts the Government's ability to utilise the Treasurer's Advance; and
- the amount that would be available to the Government from the Treasurer's Advance (taking into account the total amount that had been appropriated by Appropriation Acts for the preceding financial year)[229].

11.206 The advice received[230] addressed a number of matters of definition and practices elsewhere. It concluded that the permissible payments under section 7 of the Financial Management Act were up to half the amount allocated to each department by the Appropriation Acts in 1999-2000 (the preceding year) according to the categories of output, capital injection and payments on behalf of the Territory.[231] The advice further stated that the amount allocated to a department could not be viewed as a global sum, section 7 of the Act requiring the expenditure to be related to the individual categories—that being the 'purpose' of the appropriation.

11.207 In relation to the sum available for expenditure, the advice concluded that, since section 7 referred to the amount appropriated by Appropriation Acts, it therefore seemed that

229 Appropriation Acts for the preceding financial year were *Appropriation Act 1999-2000*, *Appropriation (Bruce Stadium and CanDeliver Limited) Act 1999*; *Appropriation Act (No. 2) 1999-2000* and *Appropriation Act 1999-2000 (No. 3)*. Advice was also sought on a further question as to whether there was an avenue open to the government to fund the First Home Owner Grant Scheme through the *Goods and Services Tax (Temporary Transitional Provisions) Act 2000* (when enacted).

230 *Financial Management Act 1966*, Advice to the Clerk of the Legislative Assembly for the Australian Capital Territory from Dennis Pearce, Special Counsel, Phillips Fox Lawyers, 7 July 2000.

231 It was argued that the purpose (section 7(c)) for which an amount is appropriated by an Appropriation Act must be derived from section 8 of the Financial Management Act (section 8 has since been amended) and the form of the appropriations themselves—the three categories of payment (outputs, capital injections and payments on behalf of the Territory).

the total amount appropriated for the 1999-2000 financial year for the purposes referred to in section 8 was available.[232]

11.208 Due to the difficult language of [then] section 18 of the Financial Management Act and the relationship between that section and section 7, the advice found it more difficult to provide a definitive answer to the question of the use that could be made of the Treasurer's Advance, considering that the better (and safer) view was that section 7 could not provide for an advance to the Treasurer because of the limits imposed on that appropriation by then section 18.

Expenditure of public money without authorisation by enactment—Bruce Stadium redevelopment

11.209 There has been one case in the history of the Assembly where public moneys were paid without proper legislative authorisation. It is worth considering that case in some detail as a reminder of the vital importance of having an independent Auditor-General reporting directly to the Assembly and of proper scrutiny by the legislature of expenditure by the executive.

11.210 In 1999 and 2000 the question of the legality of payments made by the executive towards the redevelopment of a major sporting arena in the Territory, Bruce Stadium, occupied much of the attention of the Assembly. The issue resulted in the resignation of the Chief Minister, thus pre-empting the Assembly's consideration of a motion of no confidence.

11.211 The payments at issue totalled some $24 million, $9.7 million having been paid in financial year 1997-98 and $14.3 million in financial year 1998-99. The following provides a brief summary of what occurred.[233]

- The executive had originally committed $12.3 million towards the redevelopment of the stadium, the total cost of the redevelopment being expected to be $27.3 million. The difference of $15 million was to be provided from other sources, mainly commercial users of the facility. The *Appropriation Act 1997-1998* had provided $5.6 million as a capital injection for the project and *Appropriation Act 1998-1999* provided $6.7 million.
- By early December 1997, the $5.6 million appropriated for that year being committed and the other funding not having eventuated, the executive agreed that funds from the government's Central Financing Unit be used to enable the continuation of the redevelopment and that a commercial vehicle for the redevelopment be established by the government. These new financing arrangements were to be in place, including private sector financing arrangements, by 30 June 1998.
- By the end of the 1997-98 financial year, $9.714 million had been drawn from the Central Financing Unit and paid into a Bruce Stadium redevelopment bank account. The moneys had been used to pay contractors engaged on the redevelopment. No external financing of the project was in place.

232 That meant that the appropriations provided for in the *Appropriation (Bruce Stadium and CanDeliver Limited) Act 1999* were not relevant as they related to previous financial years.

233 This summary is a condensation of that provided by the Auditor-General at pages 1 and 2 of Report 11 (Lawfulness of Expenditure) of *Auditor-General's Reports Nos 1 to 12 of 2000—Reports of the Performance Audit of the Redevelopment of Bruce Stadium*, September 2000.

- On 26 June 1998 the Under Treasurer sought a loan from the Commonwealth Bank of Australia for $9.714 million,[234] the bank agreed to the loan on 30 June 1998, and the money was paid into the same Central Financing Unit bank account from which the $9.714 million had been drawn.
- On 1 July 1998—in the new financial year—the Central Financing Unit repaid the $9.714 million loan to the Commonwealth Bank.
- With construction continuing throughout 1998-99, a further $21 million was expended on the redevelopment—$6.7 million being provided from funds appropriated in *Appropriation Act 1998-1999* and a further $14.3 million being drawn from the Central Financing Unit.
- On 19 May 1999 the Chief Minister issued financial management guidelines with intended retrospective effect—the intended effect being that payments made from the Central Financing Unit would be retrospectively authorised as a 'prescribed' investment under section 38(1)(e) of the *Financial Management Act 1996*. Under section 38(2) of the Act, prescribed investments could be made without appropriation. Thus, the retrospective effect of the guidelines would have made the expenditure lawful.[235]

11.212 As outlined in paragraph 11.148, sections 57 and 58 of the Self-Government Act make specific provisions relating to the control of the public money of the Territory (the revenues, loans and other money received by the Territory). The sections stipulate that the receipt, spending and control of the public money of the Territory shall be regulated as set down by enactment, that no public money shall be issued or spent except as authorised by enactment and that the public money may be invested as provided by enactment. Also of direct relevance were section 6 of the Financial Management Act (no payment of public money shall be made otherwise than in accordance with appropriation) and section 38 (making provision for the investment of public money).

11.213 The Auditor-General's report on the financial audits for the year ending 30 June 1998, which was tabled on 10 December 1998, alerted the Assembly to the Auditor's serious concern about the matter. The report included this significant finding:

> This year $14.7m was spent in cash on the Bruce Stadium redevelopment; this exceeded the $5.6m received as a capital injection for the project; the shortfall was met by borrowing $9.7m from the Commonwealth Bank; $17.4m has been expended on the redevelopment to year end with a further $10m committed at balance date.[236]

11.214 On 18 June 1999 the Auditor-General wrote to all Members advising that the Audit Office would be conducting a performance audit of the redevelopment of Bruce Stadium and outlining tentative objectives of the audit.[237]

11.215 The Leader of the Opposition gave notice in the Assembly of a motion of no confidence in the Chief Minister on 22 June 1999. The motion was extensively debated later that month. The Leader of the Opposition focused on the legality of the actions of the executive in spending public money without the authorisation of an enactment.[238] The motion of want of

234 The Under Treasurer had sought the approval of the Treasurer to the borrowing on 28 June and the Treasurer had initialled the request.

235 The guidelines were repealed by further guidelines issued on 3 June 1999.

236 *Financial audits with years ending to 30 June 1998*, Report No. 9 1988, p. 51; see also MoP 1998-2001/288.

237 Report 1 (Summary Report) of *Auditor-General's Reports Nos 1 to 12 of 2000—Reports of the Performance Audit of the Redevelopment of Bruce Stadium*, September 2000, p. 1.

238 MoP 1998-2001/427, 433-5; Assembly Debates (30.6.1999) 1769-883. This was not the only occasion the Assembly considered the issue. See, for example, the order of the Assembly for the production of documents of 5 May 1999 (MoP 1998-2001/403-5, 406-8, 438-48, 468-73 (presentation of documents).

confidence was amended to one of censure of the Chief Minister for her failure to ensure that the requirements of the *Financial Management Act 1996* were met in relation to the funding of the redevelopment of Bruce Stadium. The motion, as amended, was agreed to.

11.216 Efforts to obtain private sector finance were abandoned in June 1999 and the $24.014 million was retrospectively appropriated by the *Appropriation (Bruce Stadium and CanDeliver Limited) Act 1999*.[239]

11.217 The Auditor-General's reports on the redevelopment of Bruce Stadium (there were 12 volumes) were presented to the Assembly on 25 September 2000.[240] In volume 11, addressing the lawfulness of the expenditures, the audit concluded that:[241]

> **The payments made for the redevelopment in excess of the amounts appropriated were not lawful at the time they were made.**
>
> This opinion is based on:
>
> 1. *Section 6* of the *Financial Management Act 1996* was not complied with in that expenditure on the redevelopment was made without being appropriated by the Legislative Assembly;
> 2. Expenditure on the redevelopment was not of a nature which constituted an investment in accordance with *Section 38(1)* of the Act;
> 3. Guidelines issued under *Section 67(2)* of the Act cannot be given retrospective effect to make lawful the unappropriated expenditure on the redevelopment;
> 4. *Section 37(1)* of the Act was not complied with in that money for the redevelopment was withdrawn from the Territory bank account without being authorised by a warrant signed by the Treasurer in accordance with an appropriation;
> 5. *Section 58* of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) was not complied with in that public money of the Territory was spent on the redevelopment without authorisation by enactment; and
> 6. *Section 31* of the *Financial Management Act* was not complied with in that the responsible Chief Executives did not ensure that moneys spent by their departments were within the appropriations made for their departments; nor did they ensure their department's officials complied with the Act.
>
> **The overnight borrowing was not lawful.**
>
> This opinion is based on:
>
> 7. *Section 40* of the Act was not complied with in that the $9.714m overnight borrowing on 30 June 1998 was not reasonably characterisable as being in the interests of, or for the benefit of, the Territory.[242]

239 An Act to retrospectively appropriate money for the purposes of the redevelopment of the Bruce Stadium and for the purposes of CanDeliver Limited was presented on 1 July 1999 and debated and agreed to on 2 July 1999. See MoP 1998-2001/453, 485-6. A motion proposing to refer the bill and other related expenditure proposals to a Select Committee on Appropriations on 1 July 1999 was negatived; see MoP 1998-2001/473-4.

240 MoP 1998-2001/1011.

241 Paragraph 17(3)(b) of the Auditor-General Act 1996 makes provision for audit opinions in a report of a special financial audit or a performance audit providing that the Auditor-General 'is to set out the reasons for opinions expressed in the report'.

242 Report 11 (Lawfulness of Expenditure) of *Auditor-General's Reports Nos 1 to 12 of 2000—Reports of the Performance Audit of the Redevelopment of Bruce Stadium*, September 2000, p. 5.

11.218 On 10 October 2000, the sitting day following the presentation of the major report of the Auditor General on the matter,[243] a further notice of a motion of no confidence in the Chief Minister was lodged by the Leader of the Opposition.[244]

11.219 At the next meeting of the Assembly on 18 October 2000, the Speaker announced that he had received a letter from the Chief Minister tendering her resignation as Chief Minister. The Assembly then proceeded to elect a Chief Minister, following which the Speaker advised that the notice of the motion of no confidence would be withdrawn from the *Notice Paper*, it having been called upon and the Member who gave notice of it having failed to move the motion.[245]

11.220 In August 2001 the Standing Committee on Finance and Public Administration (incorporating the Public Accounts Committee) presented its report on the *Review of the Auditor-General's Reports of the Performance Audit of the Redevelopment of Bruce Stadium*. The committee's report made 13 recommendations which were aimed at fostering in the government a strengthening of the internal controls in those areas where the Auditor-General had discovered breaches of the Financial Management Act.[246]

SUBORDINATE LEGISLATION

Introduction

11.221 The power to make the laws for the peace, order and good government of the Territory rests with the Assembly.[247] However, the Assembly, by enactments, has also delegated its power to make laws to the executive and others.[248] This form of law is generally known as subordinate law or delegated legislation. The term 'delegated legislation' has been defined thus:

> Delegated legislation is a convenient general description for a legislative instrument made by a body to which (or a person to whom) the power to legislate has been delegated.[249]

11.222 The Self-Government Act defines 'subordinate law' as meaning 'an instrument of a legislative nature (including a regulation, rule or by-law) made under an enactment'.[250]

11.223 Delegated legislation is used to enable a person, usually a Minister, to make decisions having legal authority which vary or fill in the detail of a law made by the Assembly. This avoids the necessity of relatively minor matters of an administrative character being the subject of primary legislation. However, to maintain scrutiny by the legislature and to ensure that Ministers (and others) do not exceed their power to make delegated legislation, these

243 See MoP 1998-2001/1010. *Auditor-General Act—Auditor-General's Reports Nos 1 to 12 of 2000—Reports of the Performance Audit of the Redevelopment of Bruce Stadium*, September 2000.

244 MoP 1998-2001/1011.

245 MoP 1998-2001/1013-4.

246 Standing Committee on Finance and Public Administration (incorporating the Public Accounts Committee), *Review of the Auditor-General's Reports of the Performance Audit of the Redevelopment of Bruce Stadium*, Report No. 26, August 2001.

247 Self-Government Act, section 22.

248 Part 6.4 of the Legislation Act, for instance, envisages legislative instruments being made by the executive, Ministers, rule making committees established under the *Court Procedures Act 2004*, and courts or tribunals or members of courts or tribunals.

249 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 3rd edn, Butterworths, p. 1. This work (at page 4) discusses the use of the terms 'delegated legislation' and 'subordinate legislation', preferring the former term 'since it encapsulates the essential notion that the legislation is prepared and promulgated by a delegate of the parliament'.

250 But see paragraph 11.229 for the definition contained in the *Legislation Act 2001* section 8.

instruments must be tabled in the Assembly and may be disallowed by the Assembly (see paragraphs 11.241 and 11.242).

11.224 For example, the *Annual Reports (Government Agencies) Act 2004* requires all government agencies to prepare an annual report of their operations. The Act states that certain matters must be included in annual reports. Section 8 of the Act also enables the responsible Minister to issue directions about the form and content of an annual report. Thus, a Minister may add to the statutory reporting requirements but cannot remove requirements contained in the Act. Ministerial directions are notifiable instruments; they must be tabled in the Assembly and they may be disallowed. A Minister may also declare that a particular public agency is a public authority within the meaning of the Act and is therefore subject to the annual reporting requirements.

11.225 Whilst not explicitly vesting the Assembly with the power to delegate its law making power (with the possible exception of giving the executive responsibility for governing the Territory with respect to 'making instruments under enactments or subordinate laws' in schedule 4 of the Self-Government Act), the Act does recognise subordinate laws and there is an assumption that the Assembly will delegate some of its law making power.[251]

11.226 The question of the right of legislative bodies in the Australian states and self-governing territories to delegate their legislative function is addressed in *Delegated Legislation in Australia*. Citing a number of cases from the latter part of the 19th century to recent times, the authors state that the courts have taken a generous view of the rights of legislative bodies to delegate their legislative function. In particular, where a legislature has been given power to legislate 'for peace, order and good government', the widest discretion of enactment has been held to follow.[252]

Subordinate Laws Act

11.227 Prior to the first meeting of the Assembly in May 1989, the Governor-General, acting on the advice of the Federal Executive Council, made the *Subordinate Laws Ordinance 1989*—an ordinance relating to subordinate laws consequential upon the establishment of the Territory as a body politic under the Crown.[253] The Ordinance, which became an Act on 11 May 1989,[254] contained a range of provisions, including those relating to the regulation-making powers of the executive. It also contained provision for the numbering and citation of subordinate laws and disallowable instruments and their notification.[255] Of particular importance from the Assembly's perspective, the Ordinance required subordinate laws and disallowable instruments to be laid before the Assembly within 15 sitting days of their notification. If this were not done, they were taken to be void and of no effect and the Assembly could disallow the law or instrument or a provision of the law or instrument.

251 For instance, the Act requires the courts, etc, to take judicial notice of enactments and subordinate laws (section 30), gives the executive the responsibility for executing and maintaining enactments and subordinate laws (paragraph 37(a)) and, again, in schedule 4 it also gives the executive responsibility for 'Matters arising under instruments made under enactments or subordinate laws'.

252 A qualification to the general power to delegate is that it does not allow a parliament to create a new legislature which can function independently of the parliament establishing it and without being answerable to that parliament. See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 3rd Edn, Butterworths, pp. 284-5. Pearce and Argument also discuss the position with regard to the power of the Commonwealth Parliament to delegate its legislative power. See also the early part of Chapter 15 of Odgers' which discusses the power of the Commonwealth Parliament to delegate the power to make laws.

253 *Subordinate Laws Ordinance 1989*, No. 24 of 1989. The ordinance was made under the *Seat of Government (Administration) Act 1910*. The Act, as amended, was repealed by the *Legislation (Consequential Provisions) Act 2001*.

254 Pursuant to the provisions of subsection 34(4) of the Self-Government Act.

255 On 27 June 1989 the first subordinate law was presented in the Assembly and in that year 20 subordinate laws and 70 disallowable instruments were gazetted. Between 1989 and 2006, an average of 44 subordinate laws and 242 disallowable instruments have been gazetted or notified on the Legislation Register each year.

11.228 Until the enactment of the Legislation Act[256] and the repeal of the Subordinate Laws Act, the provisions of the Subordinate Laws Act primarily governed the exercise of the regulation-making power and the Assembly's supervision of the exercise of that power. The Assembly has enhanced its powers and role in the following areas:

- In 1991 provision was made for the automatic disallowance of a subordinate instrument not considered and negatived within 15 sitting days of its presentation in the Assembly.[257]
- In April 1994 the Subordinate Laws (Amendment) Bill 1993 was passed, enabling the Assembly, within certain constraints, to amend a subordinate law that had been laid before it.
- In June 1994 an amendment added the requirement for compulsory consultation on certain statutory appointments between the appointing Minister and a nominated standing committee of the Assembly. It also made provision for the instruments making statutory appointments to be disallowable instruments.
- In December 2000 an amendment added a requirement that regulatory impact statements accompany subordinate legislation in circumstances where there may be increasing costs placed on the community.

Legislation Act

11.229 The *Legislation Act 2001*, which came into operation on 12 September 2001, sought, in part, to arrange the various kinds of statutory instruments into logical groups, the view being that the then structure of the law governing subordinate laws did not make them easy to use and that provisions overlapped.[258] It also introduced the new concepts of 'notifiable instrument' and 'registrable instrument'.

11.230 A key definition for the purposes of the Act is that of 'statutory instrument', which the Act defines broadly as an instrument[259] (whether or not legislative in nature) made under an Act or another statutory instrument or power given by an Act or statutory instrument and also power given otherwise by law. Statutory instruments include (but are not limited to) subordinate laws, disallowable instruments, notifiable instruments and commencement notices.[260]

11.231 The Act defines 'subordinate law' as a regulation, rule or by-law (whether or not legislative in nature)[261] made under:

(a) an Act; or

(b) another subordinate law; or

(c) power given by an Act or subordinate law and also power given otherwise by law.[262]

256 Act No. 14 of 2001. Presented in the Assembly as the Legislation (Access and Operation) Bill 2000.

257 Prior to the insertion of this provision, subordinate legislation automatically came into effect if motions of disallowance were not dealt with by the Assembly.

258 Legislation (Access and Operation) Bill 2000 and Legislation (Access and Operation) (Consequential Provisions) Bill 2000, explanatory memorandum, pp. 6 and 7.

259 An 'instrument' is any writing or other document; see Legislation Act, section 14.

260 Legislation Act, section 13.

261 Thus making it broader than the definition in the Self-Government Act.

262 Legislation Act, section 8. The explanatory memorandum notes that a subordinate law will usually be made under the power specifically given by an Act for the purpose, but the clause allows for the possibility that, in making the subordinate law, the Act may also draw upon another source of power such as a rule of common law or a prerogative. See Legislation (Access and Operation) Bill 2000 and Legislation (Access and Operation) (Consequential Provisions) Bill 2000, explanatory memorandum, p. 8.

11.232 A 'disallowable instrument' is defined by the Legislation Act as:

(a) a statutory instrument (whether or not legislative in nature) that is declared to be a disallowable instrument by an Act, subordinate law or another disallowable instrument; or

(b) a determination of fees or charges by a Minister under an Act or subordinate law.

11.233 Part 1.2 of the Act also makes provision for notifiable instruments, commencement notices and legislative instruments (a subordinate law, a disallowable instrument, a notifiable instrument or a commencement notice).

11.234 Parliamentary counsel is obliged to establish and maintain an electronic register of Acts and statutory instruments—the ACT Legislation Register.[263] The Legislation Register is an authorised electronic statute book that provides the community with free and quick access to all ACT legislation and related information.[264] In addition to primary laws and bills (and explanatory statements for bills and amendments to bills), the Legislation Act provides that the Legislation Register must contain:

- subordinate laws as made;
- disallowable instruments as made;
- notifiable instruments as made;
- commencement notices as made;
- resolutions passed, or taken to have been passed, by the Legislative Assembly to disallow a subordinate law or disallowable instrument; and
- explanatory statements, and regulatory impact statements under chapter 5, for subordinate laws and disallowable instruments.

Making of subordinate laws and disallowable instruments

11.235 Should an Act authorise or require the executive to make a subordinate law or a disallowable instrument, the subordinate law or disallowable instrument is made by the executive when it is signed by two or more Ministers who are members of the executive and one of the Ministers is the responsible Minister. In addition, it is taken to be made when it is signed by the second Minister signing.[265]

11.236 The provision that the responsible Minister sign the law or instrument was inserted after some controversy in the Assembly (see paragraphs 6.17 to 6.23). The Act defines 'responsible Minister'[266] and the provision does not apply if the responsible Minister cannot sign due to his or her absence from the Territory, illness or being on leave.

Regulatory impact statements

11.237 Where a proposed subordinate law or disallowable instrument is likely to impose appreciable costs on the community, or a part of the community, the Minister administering the authorising law must arrange for the preparation of a regulatory impact statement for the proposed law and the statement must be presented to the Assembly with the subordinate law or disallowable instrument.[267] Part 5.2 of the Legislation Act sets out the requirements for a regulatory impact statement.

263 Legislation Act, section 18.
264 See <http://www.legislation.act.gov.au/about/default.asp>.
265 Legislation Act, section 41.
266 Legislation Act, subsection 41(5).
267 Legislation Act, subsection 34(1) and section 37.

11.238 A Minister may exempt a piece of subordinate law from the requirement to provide an impact statement. However, that exemption must be presented to the Assembly with the subordinate law and the exemption itself is disallowable. If the exemption is disallowed, the Minister must then provide an impact statement.[268]

Notification and numbering

11.239 Part 6.4 of the Legislation Act establishes arrangements for the numbering and notification of registrable instruments (subordinate laws, disallowable instruments, notifiable instruments and commencement notices) that are similar to those for the notification of primary legislation. Authorised persons[269] arrange for notification by parliamentary counsel. The Act also makes provision for regulations to prescribe the requirements that must be met for registration.[270] As for primary legislation, the Act requires parliamentary counsel to notify the making of an instrument on the Legislation Register (or the *Territory Gazette*) and provides that a legislative instrument is not enforceable by or against the Territory or anyone unless it is notified.

11.240 Legislative instruments commence on the day after the day on which they are notified, though there is provision for later and earlier commencement.[271]

Assembly consideration

Presentation

11.241 Subsection 64(1) of the Legislation Act requires that each subordinate law and disallowable instrument must be presented to the Assembly not later than six sitting days after its notification day. A sitting day of the Assembly is defined by the Act as 'a day when the Assembly meets'. Should a subordinate law or disallowable instrument not be presented in accordance with the subsection, it is taken to be repealed.[272]

11.242 Section 65 of the Act gives the Legislative Assembly the power to disallow any subordinate law or disallowable instrument that is presented to it. Disallowance under the provisions of that section 'has effect for all purposes as if it were a repeal made by an Act'.[273]

Consideration by scrutiny committee

11.243 The Assembly has, since its establishment, been aware of the importance of the scrutiny of subordinate legislation and has given the function to an Assembly committee since 1989.[274] The scrutiny function for both bills and subordinate legislation was initially undertaken by a discrete Standing Committee for the Scrutiny of Bills and Subordinate Legislation but since the commencement of the Fourth Assembly (1998) the duties have been allocated to an existing standing committee, currently the Standing Committee on Justice and Community Safety.

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268 Legislation Act, subsections 34(4) and (5). The statement must be presented to the Assembly not later than five days after the regulatory impact statement exemption is disallowed.

269 Subsection 61(12) of the Act defines an 'authorised person' for making a notification request for a legislative instrument.

270 The Legislation Regulations 2003 prescribe the requirements about the form of registrable instruments (including approved forms) and other requirements that must be complied with for the notification of subordinate laws and disallowable instruments.

271 Legislation Act, section 73. Chapter 8 of the Act deals with commencement and the exercise of powers before commencement and see also Legislation Act dictionary.

272 Legislation Act, subsection 64(2). The dictionary to the Legislation Act defines a sitting day as meaning a day when the Assembly meets. This is inconsistent with the practice of the Assembly and other Australian parliaments. A sitting day is a day on which the Assembly commences a sitting and the 'day' continues until the adjournment. Thus, a 'sitting day' may include more than one calendar day. (See Chapter 7: Sittings and adjournment of the Assembly, paragraphs 7.30 to 7.34).

273 Legislation Act, subsection 65(5).

274 MoP 1989-91/101; Assembly Debates (19.10.1989) 1862-7.

11.244 Although there is no formal reference of subordinate legislation (or bills) to the committee, the committee has clearly been directed by the Assembly through its resolution of appointment to examine all proposed laws (within specific, but important, parameters) and report to the Assembly on a regular basis. When considering subordinate legislation, the committee:

> (a) consider[s] whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
> (i) is in accord with the general objects of the Act under which it is made;
> (ii) unduly trespasses on rights previously established by law;
> (iii) makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
> (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
>
> (b) consider[s] whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meet the technical or stylistic standards expected by the Committee; …
>
> (e) report[s] to the Assembly on these or any related matter …

11.245 The committee does not make any comments on the policy aspects of legislation. Its terms of reference require it to consider whether an item of delegated legislation accords with the power delegated by the principal Act; determine that it is not offensive to established legal principles; and ensure that it does not deal with a matter which should, more appropriately, be dealt with by the Assembly in substantive legislation.[275]

11.246 The committee, when considering bills and subordinate legislation, avoids taking partisan positions. Thus, its relationship with the executive is generally cooperative. Much of its comment relates to technical drafting matters, compliance with process or the quality of supporting information provided. As its reports show, the committee has been successful in negotiating with the executive to improve the quality of explanatory and regulatory impact statements and rectifying errors in drafting.[276]

11.247 When the committee notes a significant problem, it will advise the Assembly through its report. It is not the practice of the committee to recommend disallowance. In practice, disallowance is a rare occurrence; where the committee brings a significant problem to light, the executive will generally rectify the matter by revoking the offending instrument and issuing a revised version.

Disallowance or amendment

11.248 The Assembly may disallow or, within certain limitations, amend a subordinate law. The Legislation Act provides that if a notice of motion to disallow a subordinate law or a disallowable instrument is given in the Assembly not later than six sitting days after the day it is presented to the Assembly and the Assembly resolves to disallow the subordinate law or disallowable instrument, it is taken to be repealed:

- on the day after the day the disallowance is notified; or
- if the resolution provides that it takes effect on the day the resolution is passed, that day.[277]

275 Derived from 'Role of the Committee' as printed in the frontispiece of the committee's scrutiny reports.

276 Subordinate legislation may be drafted by parliamentary counsel or by departmental officials, depending on the type of instrument. Thus, there can be considerable variation in the quality of drafting and the compliance with procedural requirements.

277 Legislation Act, subsections 65(1) and (2).

11.249 Also, and of particular importance, the Assembly is taken to have resolved to disallow the subordinate law or disallowable instrument if, at the end of six sitting days after the day the notice is given:

- the notice has not been withdrawn and the motion has not been called on; or
- the motion has been called on and moved, but has not been withdrawn or otherwise disposed of.

11.250 Notices of motions of disallowance are placed on the *Notice Paper* under Assembly business;[278] in relation to each notice and order of the day, the number of sitting days to resolution is indicated on the *Notice Paper.*[279]

11.251 The Assembly has:

- seen fit to take steps to ensure that notices of motions or orders of the day for the consideration of such notices are considered prior to the expiration of the designated number of sitting days;[280] and
- discharged orders of the day for the consideration of motions of disallowance before the expiration of the requisite number of sitting days.[281]

11.252 Though standing order 112 provides that a notice of motion becomes effective only when it appears on the *Notice Paper*, the Assembly has on occasion suspended standing and temporary orders to permit a Member to move a motion to disallow a variation to the Territory Plan on the same day that the Member gave notice to the Clerk.[282] Near the expiration of the Third Assembly, similar action was taken in relation to subordinate laws.[283] The procedure must be regarded as highly questionable unless extraordinary circumstances prevail. The giving of notice is generally required for substantive motions. It allows time for full consideration by Members. Publication on the *Notice Paper* also allows for consideration and comment by the community and it reduces the chances of poor decisions being made.

11.253 The soundness of providing notice is borne out by what occurred in relation to one of these precedents.[284] Having obtained advice from the Government Solicitor that a resolution of the Assembly purporting to amend an instrument 'pursuant to the [then operative] *Subordinate Laws Act 1989*' was of no effect, the Speaker was obliged to write to the responsible Minister and inform him of this fact.

11.254 A motion to disallow an instrument made under the *Legislative Assembly (Members' Staff) Act 1989* called upon the Chief Minister to make a new determination to be effective from that day.[285] Pursuant to provisions that now no longer apply, the Assembly has also considered a motion to disapprove of three determinations made pursuant to the *Remuneration Tribunal Act 1973* of the Commonwealth.[286]

278 Standing order 77(j). The standing order provides that 'Assembly business' include any notice of motion to amend, disallow, disapprove or declare void and of no effect any instrument made under any Act of the Assembly which provides for the instrument to be subject to amendment, disallowance or disapproval of the Assembly or subject to a resolution of the Assembly declaring the instrument to be amended or void and of no effect or any other order of the day to consider such a motion.

279 NP (16.11.2005) 667.

280 MoP 1989-91/548 and NP (17.10.91) 2087 (there were 14 sitting days remaining). And see MoP 1989-91/621 and NP 138 (3.12.1991) 2226-7 where the Assembly ordered that notices relating to two motions of disallowance be called on together and one question put on both motions.

281 MoP 1989-91/477; MoP 1995-97/634.

282 See MoP 1992-94/545-6. There was a notice of motion in identical terms on the *Notice Paper* with five sitting days remaining for resolution, NP 96 (3.3.1994) 1517.

283 See MoP 1995-97/967, 968-9.

284 Cited at footnote 39.

285 MoP 1998-2001/229. The motion was later withdrawn.

286 MoP 1995-97/124. 'Disapprove' is the term used in the Remuneration Tribunal Act, having the same effect as disallowance.

11.255 The Assembly has considered motions to disallow provisions of instruments.[287]

11.256 Where a subordinate law is disallowed or a disallowable instrument, not having been called on or disposed of and thus is taken to be disallowed, the Speaker is required to request parliamentary counsel to notify the disallowance. Upon being so requested, parliamentary counsel must notify the disallowance in the Legislation Register (or, if not practicable, in the Gazette).[288] A disallowance under the provisions of the particular sections of the Act (section 65) has effect for all purposes as if it were a repeal made by an Act.[289]

11.257 Where a subordinate law or disallowable instrument that had amended or repealed an Act or statutory instrument[290] has been taken to be repealed (due to it not having been presented to the Assembly within six sitting days of its notification or having been disallowed by the Assembly), section 66 of the Legislation Act makes provision for the revival of a law that had been affected (from the date of the effective repeal) as if the disallowed law had never been made.

11.258 In addition, should the Assembly resolve to disallow a subordinate law or statutory instrument, the Legislation Act prohibits the making of a subordinate law or disallowable instrument the same in substance within six months of the date of disallowance unless the Assembly were to rescind the resolution of disallowance or, by resolution, approve the making of a subordinate law or disallowable instrument in the same terms (or same in substance) as the original.[291]

11.259 Prior to the commencement of the Legislation Act, the *Subordinate Laws Act 1989* made provision for the disallowance by the Assembly of a subordinate law (or disallowable instrument) or 'a provision of that law'. The reference to the disallowance provision of a subordinate law was omitted from the new procedures that came into effect in September 2001.[292] The omission is one of significance. A Member's ability to target a discrete portion of a subordinate law in a motion of disallowance was lost. This arose from the Assembly's inability to amend subordinate laws where the amendment would have the effect of waiving or changing any fee, charge, penalty or other amount payable to the Territory, and the exclusion of determinations of fees or charges set by a Minister (see paragraph 11.151).[293]

11.260 The provisions set out in section 68 of the Legislation Act are similar to those in place for the disallowance of a subordinate law, namely:

- notice of a motion to amend the subordinate law or disallowable instrument must be given in the Legislative Assembly not later than six sitting days after the day it is presented to the Assembly;
- should the Legislative Assembly pass a resolution to amend the subordinate law or disallowable instrument, it is amended accordingly:
  - on the day after the day the amendment is notified; or
  - if the resolution provides that it takes effect on the day the resolution is passed, that day;

287 MoP 1998-2001/812. MoP 1998-2001/1203-5—the motion was to disallow six provisions of an instrument but was amended to make it one of amendment to the instrument. The motion, as amended, was agreed to. MoP 1998-2000/849-50 (motion agreed to). MoP 1998-2001/732 (motion agreed to). MoP 1998-2001/1336 (motion, as amended, agreed to)

288 Legislation Act, section 65A. The section also provides for the Speaker to determine that notification be made on a particular day and sets out the details required of the registration.

289 Legislation Act, section 65.

290 And the repeal or amendment had commenced.

291 Legislation Act, section 67.

292 Though, at p. 21, the explanatory memorandum to the Legislation (Access and Operations) Bill 2000 stated that the new provision 'would restate' the relevant subsection of the *Subordinate Laws Act 1989*.

293 Legislation Act, subsection 68(1).

- the Assembly is taken to have passed a resolution to amend the subordinate law or disallowable instrument if, at the end of six sitting days after the day the notice is given:
  - the notice has not been withdrawn and the motion has not been called on; or
  - the motion has been called on and moved, but has not been withdrawn or otherwise disposed of.

In the latter circumstances, the resolution that takes effect is that set out in the original motion. An amendment so made has effect for all intents and purposes as if it had been made by an Act.[294]

11.261 The Assembly has considered motions to amend subordinate laws.[295] On one occasion, a motion to disallow six provisions of an instrument was altered to an amendment.[296]

11.262 The Speaker is required to request parliamentary counsel to notify amendments to subordinate legislation (and may determine the day of notification). Parliamentary counsel must notify the disallowance or amendment in the Legislation Register (or, if not practicable, in the *Territory Gazette)*.[297]

11.263 In addition, the 'six months' rule also applies to subordinate laws and disallowable instruments that have been amended. No subordinate law or disallowable instrument the same in substance as the amended law may be made within six months from the day the amendment was made, unless the Assembly rescinds the resolution that made the amendment or, by resolution, approves the making of a subordinate law or disallowable instrument in the same terms (or the same in substance) as the original.[298]

11.264 The question arises about what happens should the Assembly's term end[299] or the Assembly is dissolved by the Governor-General[300] within six sitting days after a notice of motion to disallow or amend a subordinate law or disallowable instrument is given in the Assembly, and at the time of the dissolution or expiration:

- the notice has not been withdrawn and the motion has not been called on; or
- the motion has been called on and moved, but has not been withdrawn or otherwise disposed of.

In both cases, the subordinate law or disallowable instrument is taken to have been presented to the Legislative Assembly on the first sitting day of the Assembly after the next general election of Members of the Assembly.[301]

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294 And the provisions of section 83 of the Act (Consequences of amendment of statutory instrument by Act) apply.

295 MoP 1998-2001/594, 595 (there were a number of amendments); MoP 1998-2001/805 (the motion was amended and, as amended, was agreed to).

296 MoP 1998-2001/1203-5. The motion, as amended, was agreed to.

297 Legislation Act, section 69. The section sets out details of the notification. On 11 December 1997 the Assembly agreed to a motion, as amended, providing that an instrument made pursuant to the *Independent Pricing and Regulatory Commission Act 1997* be amended by omitting a nominated requirement in relation to the conduct of an investigation by the Independent Pricing and Regulatory Commission to determine ACTEW Corporation's charges specified under subsection 16(1) of the Act. The motion had sought to amend the relevant terms of reference pursuant to (the then operative provision of) the *Subordinate Laws Act1989*. The Speaker later sought legal advice as to whether the amendment was caught by subsection 6(18) of the [then] Subordinate Laws Act (which provided that an amendment to a subordinate law other than a regulation, rule or by-law made or deemed to have been made under section 6 of the Act, was of no effect.) Advice having been received from the Government Solicitor that the resolution of the Assembly was of no effect, the Speaker wrote to the responsible Minister and informed him that no further action (requiring the relevant Minister to have such amendments notified in the Gazette (under the then provisions)) was dictated by the Subordinate Laws Act. (Letter from the Speaker to the Minister for Urban Services, 31 December 1997—*Re: Terms of reference under sections 15 and 16 of the Independent Pricing and Regulatory Commission Act 1997, Sections 6(17), 6(18), 6(19), 10—"Regulation Rule or By-Law"—"Subordinate Law"*, Advice of the Government Solicitor to the Acting Clerk, 23 December 1997).

298 Legislation Act, section 70.

299 See Chapter 7, Sittings and adjournment of the Assembly.

300 Pursuant to section 16 of the Self-Government Act.

301 Legislation Act, section 71.

Variations to the Territory Plan

11.265 In addition to the requirements that the responsible Minister may refer any draft variation to the Territory Plan to the appropriate standing committee of the Assembly (and consider any recommendations made by the committee), the *Planning and Development Act 2007* stipulates that plan variations (and associated documentation) must be presented to the Assembly within five sitting days after the day of its approval. The Assembly may, on motion of which notice has been given, by resolution, within five sitting days, reject the variation or any provision of it.[302]

11.266 A motion in these terms has been agreed to.[303] The Assembly has also divided the question when considering a motion to reject a proposed variation[304] and, on the Assembly negativing a motion to reject a proposed variation, the Speaker has directed that a notice of motion on the same matter be removed from the *Notice Paper.*[305]

11.267 An amendment has been moved to a motion moved pursuant to notice to disallow a proposed variation. The amendment proposed to add words which would restrict the ambit of the disallowance. Both the amendment and the motion were negatived.[306]

Appointments to statutory positions

11.268 Where a Minister has the power under an Act to appoint a person to a statutory position, the Minister must consult with:

- a standing committee of the Assembly nominated by the Speaker for the purpose; or
- should there be no nomination in force, the Assembly committee responsible for the scrutiny of public accounts.[307]

The instrument making or announcing the appointment is a disallowable instrument.[308]

11.269 A statutory position is defined by the Legislation Act for the purpose of this provision as 'a position (including as a member of a Territory authority) established under an Act'. There are exclusions, however. The provision does not apply to the appointment of:

- a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
- a person to act in a statutory position for not longer than six months, unless the appointment is of the person to act in the position for a second or subsequent consecutive period; or
- a person to a statutory position if the only function of the position is to advise the Minister.[309]

302 *Planning and Development Act 2007,* section 79. The Act also makes provision for the plan variation (or provision specified in the motion) to be taken to have been rejected should the notice not have been called on, or been called on and moved but not withdrawn or otherwise disposed of.
303 MoP 1998-2001/572.
304 MoP 1989-91/665.
305 MoP 1989-91/665-6; NP 142 (11.12.1991) 2280.
306 MoP 1989-91/573, 576.
307 Legislation Act, sections 226 to 229.
308 Legislation Act, section 229.
309 Legislation Act, section 227. In advice to the Clerk of 31 March 2004, the Government Solicitor advised that the provisions of subsection 227(1) of the Act did not apply where appointments are made by the executive, as distinct from a Minister.

11.270 The committee may make a recommendation to the Minister about the proposed appointment and the Minister must not make the appointment until he or she has received a recommendation or until 30 days have passed since the consultation took place (whichever happens first).

11.271 In making the appointment, the Minister must have regard to any recommendation received.