AUSTRALIAN PARLIAMENTARY PRACTICE DOCUMENTED

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Erskine May's Parliamentary Practice,[1] the procedural bible of the House of Commons, is about to lose its place as the inevitable reference guide for Australian parliamentarians. At the end of 1981 the *House of Representatives Practice*[2] was published, joining the long established *Australian Senate Practice*[3] to provide the first complete Australian guide to the procedures of both Houses of the Commonwealth Parliament. The old editions of *May's Parliamentary Practice*, reciting the procedure of the Commons at the turn of the century,[4] have some residual importance for the Federal Parliament (of which more later) but that too is likely to disappear. Within a few years, *May's* will disappear from the shelves of parliamentary clerks in Canberra and be relegated to library shelves for the benefit of students of British politics and parliamentary affairs.

The Australian replacement of *May's* has been a long time coming. Mr JR Odgers produced his first edition of *Australian Senate Practice* in 1953. Revised editions followed fairly regularly, the fourth appearing in 1972 and the fifth (and still current) edition in 1976. But it was not until 1975 that the House of Representatives decided that it was proper to begin working on an equivalent and to put on record some of its answers to Mr Odgers.

The *House of Representatives Practice* has joined Odgers' work after six years of effort. It is a massive publication—966 pages with 20 chapters and 32 appendices, plus the Constitution, Statute of Westminster, House Standing Orders, and a quite substantial bibliography.

The origins of the *House of Representatives Practice*, and much of its content, are intimately connected with the Senate book. The successive editions of *Australian Senate Practice* provide a valuable catalogue of the development of the Senate's powers and of Mr Odgers' justifications for the exercise of those powers. But it was not until 1970 and 1971 that those in and associated with the House of Representatives began to take any serious notice of developments in the Senate, particularly the creation of a series of committees to look at all areas of government activity and at all sections of the departmental estimates in the Appropriations Acts.

There were proposals for the creation of similar committees in the House, but these were not acceptable either to the government of the day or to subsequent governments. But the unease at those developments is reflected in the following sentence from *House of Representatives Practice*.[5]

> The establishment of estimates committees, although clearly within the competence of the Senate, has been regarded by some as incompatible with the constitutional and traditional parliamentary powers and position of the popularly elected House of Representatives.

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[1] The full title is *Erskine May's Treatise on the Law Privileges, Proceedings and Usage of Parliament* (19th ed 1976) by D Lidderdale.

[2] J A Pettifer, A R Browning and J K Porter (eds), *House of Representatives Practice* (1981) (hereinafter Pettifer).

[3] J R Odgers, *Australian Senate Practice* (5th ed 1976).

[4] Erskine May, *Parliamentary Practice* (10th ed 1893) and (11th ed 1906).

[5] Pettifer, *op cit* 34.

Note that it does not say by *whom* these developments were regarded as incompatible. Fortunately this style of expressing disapproval of the Senate is used only rarely in the book. Mostly the editors are able to rely on quotations from Professor Colin Howard and others to express the criticisms they themselves would like to level.

This indirect style contracts with that of Mr Odgers, who tends to avoid identifying detractors of the Senate, but readily takes on its defence in his own name. For example, he attributes the argument that the Senate functions purely as a party House and not a States House to "some observers"[6] or "(t)he claim is often made that Government control of the Senate is essential for effective government, but performance does not support that claim."[7] The contribution by Odgers is far more polemical than that of the *House of Representatives Practice*. The editors try to stress House of Representatives' functions and to avoid mentioning the Senate at all, so far as possible, but occasionally comment is unavoidable. The Chapter on "Disagreements between the Houses" includes a section on the "Impact of the Supply provisions" which includes the statement:

> . . . a rejection of supply by the Senate resulting in the fall of a Government strikes at the root of the concept of representative government."[8] [For "representative" we should read "responsible"]

The Senate reply is that Australia is also a federation, and that fact does in itself place limits on responsible government. In fact the debate over responsible government and federalism is well represented in these two books, and it could be a useful exercise for the two views to be extracted and placed handily together for anyone interested in the debate.

There is another important contrast between the Senate and the House of Representatives books which should be noted. The Senate book has tended to take a very historical approach to Senate practice. When any issue about procedure is dealt with, the Senate book is more likely than not to include references to all the rulings of various Presidents since the Senate was created, including appropriate quotations. The House of Representatives book takes a slightly different approach. It sets out to state the present position of the House of Representatives, and it recognises that precedent does not necessarily have much influence on what the Speaker will decide. On the latter point it is worth quoting at some length the remarks of the editor on procedural difficulties concerning question time:[9]

> Questions without notice by their very nature raise significant difficulties for the Chair. The necessity for the Speaker to make instant decisions on the application of the many rules on the form and content of questions is one of his most demanding tasks. Because of the importance of Question Time in political terms, and because of the need to ensure that this critical function of the House is preserved in a vital form, Speakers tend to be lenient in applying the standing orders so that, for example, breaches of only minor procedural importance do not prevent questions on issues of special public interest. The extent of

[6] J R Odgers, *op cit* 5.
[7] *Ibid* 2.
[8] Pettifer, *op cit* 67.
[9] *Ibid* 488.

> such leniency varies from Speaker to Speaker. In addition, some latitude is generally extended to the Leader and Deputy Leader of the Opposition in asking questions without notice and to the Prime Minister in answering them. The result of this liberality in the interpretation of the standing orders is that rulings have not always been well founded and inconsistencies have occurred. Several Speakers have commented that only a small proportion of questions without notice are strictly in order and that to enforce the rules too rigidly would undermine Question Time. Only those rulings which are technically sound and of continuing relevance are cited in this chapter without qualification.

This is an extremely realistic approach, which is reflected also in its assessment of the present situation of a government facing a hostile Senate:[10]

> The Government can only maintain office while it retains the confidence of the House of Representatives. Also its continuance as the Government is subject to the judgment of the electors at periodical general elections. In 1975 a third element came into play when the Government was subjected to the will of the Senate which, in the circumstances, forced the Government to the electors.

Similarly the editors report on the workings of party committees which function outside the control of the Parliament, but which take upon themselves some of the functions which a parliament itself should ideally undertake. The editors merely report on the work of the committees, without expressing any attitudes towards them.[11]

There are minor criticisms which can be levelled at the book—for example it states "(f)rom time to time since Federation the governing party or coalition has not had a majority in the Senate".[12] It then has a footnote pointing to Appendix 20 which merely lists the Appropriation and Supply bills which have been passed by the Senate when the Government of the day did not have a Senate majority. It is a pity the editors were not more precise and did not specify exactly when and for how long a government has been without a Senate majority. (The answer may be found in a useful table in *Australian Senate Practice.*)[13]

However, the book generally is precise and contains an excellent collection of documents, tables and information which will be useful for students not only of parliament but also of government. There are documents on all the dissolutions and double dissolutions of the House of Representatives and on the role of the Governor-General. There is material on the processing of legislation through the House, and on the preparation of Bills before they are presented to the Parliament, and large sections on parliamentary committees and their powers and parliamentary privilege.

Adopting the approach of the editors, one has to be realistic and appreciate that there is no possibility of the publication of an "Australian Parliamentary Practice" (though there will be published in 1988 an extended history of the Federal Parliament which will attempt to cover all

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[10] *Ibid* 75.
[11] *Ibid* 35, 87.
[12] *Ibid* 39.
[13] J R Odgers, *op cit* 6, 7.

its recent activities). In these circumstances, *Australian Senate Practice* and *House of Representatives Practice* have to be considered as companion (as well as competitive) volumes.

Both the Senate and House of Representatives books devote some space to parliamentary privilege, though for the moment the practice in relation to privilege ought to be covered by the edition of *May's Parliamentary Practice* current at the turn of the century.[14] The Constitution, s. 49, states that until the powers privileges and immunities of the two Houses are declared by Parliament, they shall be "those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth". The Commonwealth Parliament still has not produced legislation to declare its own powers privileges and immunities, though a joint parliamentary committee is considering such legislation. Despite the words of the Constitution, privileges and powers have been changing with the practice of the two Houses, and what occurs now when there is a breach of privilege is quite different from what would have been the case in the Commons in 1901. Thus *May's* treatment of privilege is of historical interest, but the actual practice of the Federal Parliament is really to be found in the two Australian practice books. The sooner the Parliament regularises the situation, by legislating under s 49 of the Constitution, the better.

[14] Above n 4.