Procedure and Privileges Committee

First Report re an Order of Reference made Wednesday May 30 2001

1. Report covers ¶1(a) and 2 of Order of Reference

This report relates to ¶1(a) and 2 of the Order of Reference whereby –

> *". . . the Committee is to advise the House whether, in its opinion;*
>
> *(a) any rule, custom or usage of the House contravenes, or appears not to be in conformity with, a written law or rule of law where the relevant provision is mandatory rather than directory;*
>
> *(b) . . .*
>
> *2. The House desires and intends that its rules, customs and usages should always conform with any relevant and applicable law, and any finding or recommendation on a matter considered under paragraph 1(a) is to be expressed accordingly without regard to the justiciability of questions associated with the validity or application of the rule, custom, or usage to which a finding or recommendation relates.*
>
> "

This is the first of what will be a series of reports dealing with the Reference.

2. Purpose of Reference

That part of the Reference considered in this report is an important, preliminary step towards a complete revision of the Council's practice and procedure as it has evolved between 1890 and now. The Committee agrees that the House must be satisfied that its practice and procedure accords with the applicable law and that spent or obsolete provisions have been removed before a revision is commenced.

3. Advice provided to the Committee

The Clerk provided advice (*Appendix A*) identifying rules and usages that he believed were caught by ¶1(a) as he understood the applicable law which is, in summary –

(a) a mere resolution of the Council cannot make law, or place a person beyond reach of the law;

(b) the ordinary rules and usages of the Council regulating its proceedings are procedural and do no more than prescribe the manner and form in which the Council transacts its business;

(c) a rule or order that is more than procedural, eg, it has legislative effect or is coercive in nature and application, is wholly dependent for its validity on sourcing it to a grant of power made or recognized by the general law;

(d) a law is mandatory when any failure to comply with each substantive requirement renders the non-complying proceedings, and the outcome, void and of no effect;

(e) how, and when, the Council exercizes a lawful power in discharging its functions is immune from judicial intervention or direction.

The Committee accepts that the foregoing statements are an accurate reflection of the law in Western Australia. However, a contextual application of these propositions has led to some unanticipated results.

The following matters have been identified as rules and usages on which the Committee should report. But for ¶2 of the Reference, the Committee would not have dealt with the matter of absolute majorities, in the reasonable belief that a court would decline jurisdiction to interfere in the Council's internal proceedings especially, as here, when the rule has no "third party" effect.

4. The matters considered

1. SO's 356, 418 – summonsing of witnesses

Section 5 of the *Parliamentary Privileges Act 1891* confers by express reference to each office, the power to sign a summons, to the President in the case of the Council, and to the Clerk of the Council when required by a committee.

Standing order 356 purports to enable the clerk of a select committee to issue a summons at the chairman's direction to an intending witness. Standing order 418 provides for the Clerk to issue a summons to a witness required to attend on the Council or a committee of the whole and repeats SO 356 in relation to select committees.

The Committee was advised that neither rule has been followed since late 1982 and that s 5 has been applied strictly.

The Committee agrees that the statutory provision is clear and provides no authority for the Council to extend its meaning by standing order.

The Committee **recommends –**

That:

(a) SO 356 be repealed (there is no equivalent provision made for standing committees); and

(b) SO 418 be amended to reflect statutory provisions.

Draft motion giving effect to recommendation:

(a) Standing orders 356, 418 are repealed;

(b) The following standing order is substituted –

418. Witnesses to be summonsed

(1) This order does not apply to a member of the Council.

(2) A summons issued to a person to attend as a witness or to produce documents is to be signed:

(a) by the President if the order is made by the Council;

(b) by the Clerk on the authorization of the chairman if the order is made by a committee.

2. SO's 205, 206 – voting by Deputy President or Acting President

Standing order 205 applies to the Chairman of Committees but in the capacity of Deputy President or Acting President and accords with s 14 of the *Constitution Acts Amendment Act.*

Standing order 206 applies to the Chairman of Committees in that capacity. There is no conflict with s 14 which takes no account of any proceeding involving a vote that is not the Council sitting as the Council. Both rules are silent on voting by Deputy Chairmen.

Despite the clear intent of section 14 of the *Constitution Acts Amendment Act 1899* that it is the President alone who cannot exercize a deliberative vote, there is a longstanding usage, supported by Presidents' rulings, that any member temporarily occupying the Chair is also deprived of a deliberative vote. Despite SO 205, the usage has been extended to include the Deputy President.

The usage and its related rulings reflect the *Constitution Act*'s provisions as they applied to the appointed Council between 1890 and 1893. Section 10 provided –

"*10. The presence of at least five of the members of the Legislative Council exclusive of the member presiding ,shall be necessary to constitute a quorum for the despatch of business; and all questions in the said Council shall be decided by a majority of votes of the members present, other than the President* ***or the member presiding****, and when the votes are equal the President* ***or the member presiding****, shall have the casting vote.*

"

Section 10 ceased to apply on October 18 1893 when Part III of the *Constitution Act* was proclaimed and introduced the elective Council. Section 10 was replaced by section 7 of the *Constitution Act Amendment Act 1893.* Significantly, section 7 deprived the President alone of a deliberative vote. Any reference to "*the member presiding"* was omitted. Section 7, without any substantive alteration, was reenacted in 1899 as section 14 of the *Constitution Acts Amendment Act* and no amendment has been made to it since then.

It is reasonable for the Committee to assume that the change between section 10 and section 7, now section 14, was made deliberately and that Parliament intended that the members of an elected Council should not lose their right to vote when temporarily occupying the Chair. In light of the statutory history, the Committee suggests the usage is untenable.

The Committee **recommends –**

(a) That the current usage be abandoned immediately;

(b) That SO's 205 and 206 be repealed and replaced with a rule that states that the Deputy President and an Acting President may vote from the Chair and that when, as a result, there is an equality of votes, the question passes in the negative.

Draft motion giving effect to recommendation:

Standing orders 205, 206 are repealed and the following is substituted –

205. Voting by Deputy or Acting President

(1) The Deputy President, or any member temporarily occupying the Chair in the Council, is entitled to vote on any question then arising.

(2) In a case of an equality of votes where subclause (1) applies, the question is resolved in the negative.

3. SO 153(c) – Effect of prorogation on question for disallowance

There are 2 ways in which SO 153(c) may be construed in its application to the effects of prorogation on an unresolved question to disallow a regulation.

The first is to concede that to the extent that it purports to disallow a regulation of its own force is to give it legislative effect that has no foundation in law. The second is to hold that the purported disallowance is not the intent and that the words are descriptive of the law's effect following the deeming of the question.

Regardless of what view may be taken, the provision as it stands " . . .*appears not to be in conformity with, a written law* . . ."[¶1(a)] in most cases section 42 of the *Interpretation Act 1984.*

The matter is easily rectified without affecting the Council's intention.

The Committee **recommends –**

That SO 153(c) be amended by deleting any reference to disallowance resulting from deeming an unresolved question to pass in the affirmative on prorogation.

Draft motion giving effect to recommendation:

Disallowance on prorogation

Standing order 153(c) is repealed and the following is substituted –

(c) Where the question on a motion for disallowance remains unresolved —

(a) at the expiration of 10 sitting days after the day on which the motion was moved; or

(b) when Parliament is prorogued,

then:

(c) in relation to paragraph (a) the question must be resolved at the next sitting;

(d) in relation to paragraph (b), upon prorogation the question is deemed to be resolved in the affirmative.

4. Bills requiring special majorities to pass – SO's 276, 277

The Assembly has no rule comparable to the obligation SO 276 seeks to impose on the Clerk of the Assembly. The Committee takes the view that the Council should repeal SO 276 which intrudes into proceedings of the Assembly. The usual certificate attached to bills under SO 247(a) and the Assembly counterpart should be sufficient.

Legislation subject to SO 277 must pass in accordance with section 73(1) of the *Constitution Act* underpinned by section 6 of the *Australia Act(s) 1986* – it is the statutory requirement that must be observed. In that sense, SO 277 is superfluous because the obligation to ensure that the votes are properly and accurately recorded at second and third reading stages of an affected bill is imposed by law, not the standing order. How the House ensures compliance with the obligation should be decided at the material time under the normal rules that provide the means of accurately recording the votes on any question. If the question at second reading passed with no dissentient voice and 18 or more members were present at the time, the need for a division, regardless of the voice vote, may be doubted.

The Committee's preference is to repeal the rule. If the Council decides to retain the substance of SO 277, its ambit should be extended to include any bill whose passage is subject to statutory special majority provisions. It seems illogical to restrict its application to a bill caught by the first proviso to section 73(1) of the *Constitution Act* yet ignore a bill to which subsection (2) applies.

Additionally, a replacement rule ought to reflect that it applies to those bills answering the description in the written law imposing the special majority requirement. The current rule could be read as applying to a bill that the Council held to propose a change in the constitution of either House. Any potential ambiguity in interpretation and application should be resolved in any redraft.

The Committee sees no reason for the self-imposed blanket prohibition against revival contained in SO 277 because of the fetter it places on the Council's discretion at a future time regardless of the particular circumstances.

As a general principle, the Council should be slow to adopt rules that would preclude the House at some future time from exercizing a discretion, or choosing an option appropriate to the merits of the case. Overly-prescriptive rules invite repeated suspension – an undesirable practice in itself.

Moreover, SO 277 was adopted when the rules, at least theoretically, enabled the question for the second reading of a bill to be put more than once. Undoubtedly, the prohibition against revival was intended to prevent that possibility. The current SO 231 was adopted after SO 277 and is expressed as applying despite *". . . any custom, usage or* ***rule*** *to the contrary"*. As a consequence, the procedural limbo created for a bill under SO 277 is displaced by outright extinction under SO 231.

In the Committee's opinion, the fate of a bill that secures a special majority at second reading but fails at third reading should be determined by the House free from rules that circumscribe prospectively the options available without regard to the circumstances. For example, SO 231 does not apply to a third reading leaving the House with the ability to vote on that question more than once without having to suspend standing orders or rescind a previous vote.

The Committee **recommends –**

That –

(a) SO 276 be repealed for the reason that any failure by the Assembly to comply with s 73(1) of the *Constitution Act* is exclusively a matter for that House;

(b) SO 277 be repealed and a rule substituted that applies to any bill whose passage is subject to special majorities;

(c) no provision be made as to revival of such a bill given the effect of SO 231 at 2nd reading stage.

Draft motion giving effect to recommendation:

Standing orders 276, 277 are repealed and the following is substituted -

276. Bills required to pass with absolute majorities

Where a written law requires that a bill must pass the second and third readings with the votes of an absolute majority of the whole number of members, the Council is to divide on each of those questions if there is a dissentient voice.

5. SO 170 – prohibition against suspension

The prohibition appearing at the end of SO 170 is properly described as a self-denying procedural ordinance unsupported by any external grant of power and is completely inoperative. It is a further example of the Council at a particular time attempting to bind how its members must act at some future time regardless of circumstances.

The Committee **recommends -**

That SO 170 be amended by deleting the words ***"This standing order shall not be suspended."***

6. Requirement for question to pass with absolute majority

The Council should note that the Committee makes no recommendation about the requirement in 3 rules that questions, if they are to pass, are required to pass with an absolute majority, ie, 18 members. The absence of a recommendation is not because of any failure to agree by the Committee members.

Standing orders 29 and 30 stipulate that removal of the President or the Chairman of Committees is by vote of the Council passed with an absolute majority. Standing Order 433 permits a suspension of standing orders subject to SO 435 if, when motion is made without notice, the question passes with an absolute majority.

The Committee is unaware of any case where SO's 29 or 30 have been employed. However, frequent resort is had to SO 433 and the absolute majority requirement is applied as a matter of course.

The question is about the capacity of the House to impose an absolute majority for passing a particular question. The instinctive reaction is to acknowledge such an ability as being part of the Council's exclusive right to regulate its own proceedings and beyond question.

Nonetheless, the Committee has had to consider the issue because of section 14 of the *Constitution Acts Amendment Act 1899* and the express provision it makes in relation to votes and majorities. For present purposes it provides that all questions are to be decided by a simple majority of members then present assuming that its quorum requirement is observed at the relevant time. In a 34 member House, 7 votes are the minimum necessary to carry a vote. The question is whether the simple majority provision is mandatory. Because there is no doubt as to its application to all proceedings of the Council, a finding that it is mandatory must result in a finding that any greater requirement imposed by a resolution of the House, whether in the form of a standing order or otherwise, has no force or effect. The finding would be different if the Council can identify another written law that provides the authority to apply special majority requirements in its rules.

Had section 14 not dealt with voting requirements, each Member's right to vote remained an undeniable fact both as a matter of common sense and at common law. Any questioning of the entitlement is answered by section 1 of the *Parliamentary Privileges Act 1891* conferring on both Houses the powers, privileges, rights and immunities of the House of Commons.

Because there are several unassailable legal sources on which voting, and voting procedures, can be asserted without recourse to section 14, its deliberate enactment in 1893 and again in 1899 should be given some weight although it is insufficient, by itself, to persuade the Committee that the simple majority requirement are words of limitation on what might otherwise be a discretionary power of the Council.

However, if the question is dealt with purely as a matter of statutory interpretation, use of the imperative "shall" in prescribing the necessary majority supports the mandatory proposition. In recent years drafting practice has replaced "shall" with "must" where a written law is intended to impose obligations.

Even were the Committee to conclude that section 14 has mandatory effect (the Committee expresses no opinion) it is by no means certain that a court would entertain a legal challenge to the validity of the requirement if only because it relates to certain officers of the Council and their tenure or, under SO 433, proceedings of

the House. In each case, the matters are strictly internal and subject to the House's undoubted right to order its own proceedings.

Nonetheless, the Committee is obliged to raise the issue but has no recommendation to make.

Hon John Cowdell MLC
Chairman

APPENDIX A

PROCEDURE AND PRIVILEGES COMMITTEE

Memorandum of advice re an Order of Reference made Wednesday May 30 2001

This memorandum deals with paragraphs 1(a) and 2 of the Order of Reference which provide–

> ". . . the Committee is to advise the House whether, in its opinion;
>
> (a) any rule, custom or usage of the House contravenes, or appears not to be in conformity with, a written law or rule of law where the relevant provision is mandatory rather than directory;
>
> (b) . . .
>
> 2. The House desires and intends that its rules, customs and usages should always conform with any relevant and applicable law, and any finding or recommendation on a matter considered under paragraph 1(a) is to be expressed accordingly without regard to the justiciability of questions associated with the validity or application of the rule, custom, or usage to which a finding or recommendation relates.
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> "

But for paragraph 2, my advice would have been confined to those matters in para (a) that might be open to legal challenge. Paragraph 2 requires the Committee to consider matters regardless of questions of justiciability. My advice is framed accordingly.

1. The Legal Status of the Legislative Council

The Legislative Council consists of 34 elected members[1] and, in contrast to the Assembly[2], has a continuous existence. Under s 2 of the *Constitution Act 1889*, it is a component of the Parliament of the State and its advice and consent is necessary before a proposed law can be assented to by the Crown and become an Act of Parliament.

Its powers, privileges, rights, and immunities are conferred or defined by the *Parliamentary Privileges Act 1891.* Various enactments have bearing on its proceedings and its members.

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1 *Constitution Acts Amendment Act 1899,* ss 5,6

2 *Constitution Acts Amendment Act 1899,* s 21 – Assembly dissolves after 4 years

The Council is not, however, constituted under any law as a legal person – it has no corporate existence. Unlike incorporated bodies, it cannot sue or be sued[3] and do those things that appertain to legal persons.[4] While the Council's legal status is explicable by reference to the evolution of the House of Commons in English constitutional history, in reality the Council can perform its functions without any need to incorporate, including for current purposes, the ability to regulate its own proceedings.

2. The sources of the Council's power to regulate proceedings

The Council derives its power to regulate its own proceedings from 2 sources. The first is a defined grant conferred by, or ascertainable in, the laws of the State. Section 34 of the *Constitution Act*, requiring the Houses to make standing orders and rules for the stated purposes, is an example of a defined grant.

The more extensive powers flow from s 36 of the *Constitution Act* to s 1 of the *Parliamentary Privileges Act 1891* to the "reception", through that provision, of article 9 of the *Bill of Rights 1689* [5] into the State's general law. From article 9, the Council obtains the exclusive right –

- To determine who is qualified to sit and vote[6];
- To expel any member
- To judge the lawfulness of its own proceedings
- To administer its own affairs within its precincts.

But as the High Court has recently affirmed, a power of coercion or to punish a contempt must be a positive statutory grant:

> *A House is not a legislature. Its resolutions do not make law. If it claims a power not conferred by positive law, its claim must be rejected unless it can point to a power that inheres in its very existence as a legislative chamber or which is essential in the true sense to the carrying out of its functions.*[7]

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3 The UK Houses are in the same position. In 1992, the UK Parliament found it necessary to enact legislation that constituted the Clerks of the 2 Houses as corporations sole for the purpose of entering into commercial contracts and generally carrying on the "business" of the Houses – *Parliament Corporate Bodies Act 1992 (UK)* c 27.

4 Eg, the Council cannot be an employer. The Clerk(s) are officers of the Crown appointed by the Executive Council to serve the Council or the Assembly. Council staff are employed under a discrete statute.

5 *That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.*

6 This right is not affected by statutory grounds for disqualification. However, its power to determine disputed elections is vested in a court of disputed returns but would revive were the court to be abolished without alternative provision being made.

7 *Egan v Willis* [1998] HCA 71 at 23 per McHugh J. At common law, colonial legislatures did not inherit Westminster's penal jurisdiction (derived from Parliament's judicial functions – the "High Court of Parliament") and were restricted to those powers necessary to ensure the orderly conduct of proceedings – the "doctrine of necessity" discussed at some length in *Egan.*

Such powers of the Council are contained in the 1891 Act[8].

At the nub of the Council's reference to the Committee is the **exclusive** right of the House to regulate proceedings and its attendant immunity from judicial interference[9] although the House's continued enjoyment of that exclusivity may have more to do with judicial reluctance.[10] Regardless of the likelihood of judicial review of parliamentary proceedings, paragraph (2) of the reference suggests that parliamentary immunity obliges the House to ensure that its rules practices accord with mandatory, ie, non-discretionary, requirements of the general law where applicable.[11]

3. Practice and procedure

The rules and practices[12] that apply to the Council's business:

> . . . ***assume the existence of a power, but do not operate as a source of power; rather they regulate in certain respects the exercise of a power, which, if it exists, must have some other source.*** *This proposition was not challenged by the appellant in this Court, on the assumption, as I understand it, that the only possible source of power for a Standing Order of substantive operation is s 15(1)(a) of the Constitution Act 1902 (NSW)* [Constitution Act 1889 (WA) s34]*which authorises orders for the orderly conduct of Council business, but does not authorise the making of Standing*

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8 Arguably, s 1 of the 1891 Act was all that was required to confer the plenum of powers specified in subsequent provisions. However, the power to fine in s 8 impliedly repeals the proviso to s 36 of the *Constitution* (powers limited to those of the House of Commons). The Commons last imposed a fine in 1666 and its power was denied in *R v Pitt* (1762) 97 ER 861. Given that the 1891 Act requires a power to be "held, possessed, enjoyed, and **exercized**" by the Commons as one received in February 1891 by the WA Houses, s 8 was a necessity if fines were to be imposed.

9 The usual formula – that the courts decide whether or not a claimed privilege exists in law but will not interfere with any exercize of an admitted privilege – was tacitly accepted by the Commons following the decision in *Stockdale v Hansard* 112 ER 1112 by the enactment of the *Parliamentary Papers Act 1840* which gave statutory protection to the Official Report in place of a Commons' resolution purporting to provide the same protection; an assertion denied in *Stockdale.*

10 *A common thread running through judicial consideration of challenges as to the existence or absence of asserted parliamentary privileges has been the disinclination of the courts to be drawn into factual contests and questions of degree and proportionality. In part, this disinclination arises from the deference historically paid by English courts to the entitlement of Parliament to declare its own privileges.* ***In part, it represents a wise disinclination of judges to be dragged into the political controversies which commonly attend the conduct of business within the Houses of Parliament.***

Egan (supra) at p 32 per Kirby J

11 The reference accepts the *Stockdale* formula (*cf* n 9) that the House by its own resolution cannot change the law or place any person beyond its reach.

12 "rules and practice" describes the hierarchy of the forms under which the Council meets and transacts its business. It includes standing orders, sessional orders, resolutions, rulings of the Chair (in the House and Committee), custom and accepted usage as to the manner or the form in which a standing order has come to be applied, eg, latitude is given to the Leader of the Opposition to comment on actual or intended proceedings where, strictly speaking, the rules make no allowance for that type of intervention.

Orders to require production of documents, and measures to secure production on any failure in that regard.[13]

Put another way, procedural rules and practices are not a species of subsidiary legislation but are the vehicles through which the Council exercizes the powers it derives from the general law. It follows that a rule or practice that is interpreted, applied, or developed inconsistently with the relevant law is a nullity once it is established that the law leaves no discretionary element.

Given the restriction in term of reference 1(a) it is desirable that the difference between "mandatory" and "directory" laws, and their application to Parliament, or parliamentary proceedings, be discussed.

Section 2(1) of the *Constitution Act* provides that the State Parliament may make laws "*for the peace, order, and good government* [of WA]". The High Court has held that those words confer a plenary legislative capacity[14] limited only by the apportionment of powers between the States and Commonwealth under the Commonwealth Constitution and, it must be added for present purposes, any constitutional requirement as to how particular types of legislation must be dealt with in their passage through Parliament. Thus it was said by the Privy Council:

> *"... that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, ... or whether the Constitution is 'uncontrolled' ... . But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process."* [15]

There are a number of State enactments that require passage in each House at the second and third readings with absolute majorities. Under s 73(1) of the *Constitution Act*, a bill that would alter the "*constitution of either House"*[16] is subject to the absolute majority requirement. Similar provision is made for any bill amending the *Electoral Distribution Act 1947*[17] in s 13 of that Act.[18]

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13 ***Egan*** (supra) at p 45 per Callinan J

14 *USSCo of Australia v King* (1988) 82 ALR (High Court)

15 *Bribery Commissioner v Ranasinghe* [1965] AC at pp 197-8

16 In *Wilsmore v WA* (1982) 149 CLR 79, the High Court declined to define the meaning of this expression.

17 Note however, that the entrenchment effected by s 6 of the *Australia Act(s) 1986* is confined to *"a law . . . respecting the constitution, powers or procedure of the Parliament of the State . . ."*. The provision does not apply to the *Electoral Distribution Act* but arguably, given the definition of "Parliament", would include any proposal abolishing or altering the office of Governor without need for the expression provision made in s 73(2).

18 Although the insertion of a "manner and form" provision without observing the same manner and form to make the insertion may raise questions as to its validity, *cf McGinty v WA* (1996) 134 ALR 289 where a "conceptual difficulty" was expressed on this issue.

It is obvious that any departure from manner and form requirements imposed on the House in passing relevant legislation aborts any presumed resulting enactment – there never was a valid Act. In the present context, a manner and form requirement is mandatory and any failure to comply strictly with its terms invalidates the whole process. For example, it would be pointless to enact a validating Act complying with manner and form because the original failure ended in a nullity. Conversely, a provision is directory if non-compliance has no effect on the validity of what was done.[19]

Special majorities illustrate the situation where the law operates on parliamentary procedure for a discrete purpose. However, there are instances where the House erects its own procedural hurdles that are either unsupported by, or "gloss", the general law or, on proper examination, can be characterized as having legislative effect. The question is whether such a rule or practice has any validity.

The standing orders listed in the **Table** impose qualifications that appear not to have the requisite external legal authority.

Table

standing order	Comment
29, 30 – Relate to terms of office of President and Chairman of Committees. Provide for their removal by vote of an "absolute majority" of members, ie, 18 affirmative votes	Section 14 of *Constitution Acts Amendment Act 1899* enacts *inter alia ". . .and* ***all*** *questions which shall arise in the Legislative Council shall be decided by a majority of votes of the members present"* provided always that a quorum, 12 members, is present. A question declaring the presidency vacant is simply that – a question to which s 14 provides that a simple majority is all that is required for it to pass. Support for a simple majority is also found in s 49 of the *Constitution Act* (spent provision) introducing an elective presidency which states: ". . . *and in case of his* [President's] *death, resignation,* ***or removal by a vote of the Council*** *. . ."*. No mention is made of a special majority to effect removal.
356, 418 – Deal with summonsing of witnesses – provide for committee clerk to a select committee to sign summons issued on committee's behalf.	S 5 of the *Parliamentary Privileges Act 1891* specifies that a committee summons is issued by the Clerk of the House under the chairman's authorization. No provision is made for a summons issued by a committee clerk. Both SO's are not currently observed.

[19] In *ALS v WA* (1992 Full Ct WA unreported) the Court held that despite express provisions in the 1891 Act about the receipt by the House itself of documents provided under summons, nevertheless the House was entitled to employ Commons' practice by directing that they be lodged with the Clerk.

433 – Motion without notice to suspend standing orders – motion must pass with an absolute majority.	Contradicts s 14 CAAA (above).
SO's 205, 206 – relate to voting by the Chairman as Deputy or Acting President.	Although not expressly provided for in standing orders, it has been the usage of the Council, supported by rulings from time to time, that the Chairman and Deputy Chairmen of Committees when presiding as the Acting President cannot vote, ie, they are in the same position as the President. The usage contradicts SO 205 which provides that the Chairman is entitled to vote. Although the rule refers to the "Chairman", it should refer to the Deputy President or an Acting President. It is only by comparing SO 205 with 206 that it becomes clear that the former is referring to Council proceedings and the latter to those in a committee of the whole. Section 14 of the CAAA deprives the President of a deliberative vote by way of an exception to the voting rights of members. Questions are decided by majority vote of members present *"other than the President . . . when the votes are equal the President shall have the casting vote."*. The usage should be discontinued on 2 grounds. First, the relevant law does support or authorize it. Second, it is not to be supposed that a member can be deprived of his/her right to vote in a representative chamber by reason only of occupying the Chair in a temporary capacity.
153(c) – provides that upon a prorogation, *"the regulations shall thereupon be disallowed"* where the question for disallowance is unresolved. That question is deemed to pass in the affirmative .	The primary disallowance provision is s 42 of the *Interpretation Act 1984*. As drafted, the rule appears to disallow by its own force rather than as a consequence of the question passing in the affirmative which triggers the operation of s 42. The rule has been redrafted to remove any suggestion that it has force and effect and is confined to the "deeming" provision.

Standing orders 276, 277 are in a somewhat different category. Both are expressed as applying to a bill that alters the constitution of either House, ie, where the second and third readings in each House must pass with an absolute majority.[20] On the enactment of s 6 of the *Australia Act(s) 1986* it is clear that any failure to comply with s 73(1) avoids any purported

[20] *Cf Constitution Act* s 73(1)

enactment. Whatever its status before s 6 had effect, it is clear that the requirement for absolute majorities is now mandatory.[21]

It can be argued that SO's 276 and 277 are superfluous to the extent that they deal with legislation that, for its validity, imposes strict procedural obligations on both Houses. Conversely, if they are seen as useful signposts, it can be argued that they be amended so as to more accurately define **any** bill whose passage is subject to special majorities.

Standing order 276 prohibits the Council from considering such a bill that has originated in the Assembly unless the Clerk of that House has certified on the bill that it passed in accordance with s 73 requirements. Standing order 276 concerns itself with proceedings in the Assembly in contradiction of its own express rules and usages that prevent any reference to those proceedings being made in the Council. Arguably, whether or not the Assembly complied with s 73(1) is of no interest to the Council - the validity of a bill caught by s 73(1), when enacted, is decided elsewhere. All that should be required is the Assembly counterpart to the certificate provided by the Clerk of the Council under SO 247(a).

Standing order 277 requires that the absolute majority on second and third readings of a s 73(1) bill be determined by a division. Any failure results in the bill dropping off the notice paper. Consideration of a bill that is laid aside may be resumed by restoring it to the notice paper by motion after notice.

The prohibition against revival in the same session is based upon the "same question" rule contained in SO 170. Subject to SO 231 which "kills" a bill where the second reading is defeated, it is open to the House to vote on a third reading a number of times for the reason that the question is *"that the bill be **now** read a 3rd time"*. Thus, while the House may decline the bill its reading "now", it may agree to it at a later time. Standing order 231 was adopted in 1984 for the express purpose of preventing the second reading question being put more than once. Although the basis for prohibiting revival may be questioned, the Committee may wish to consider whether, given SO 231, such a self-denying ordinance has any practical use.

Lastly, SO 170 provides that it cannot be suspended. Such a provision is a nullity. Quite apart from there being no external power conferred on the Council to make such a rule, it is at odds with the ability of the House to order its proceedings as it thinks fit. The absurdity of the provision is demonstrated by the fact that while it forbids suspension of SO 170, it says nothing about its repeal. The prohibition is easily avoided by repealing SO 170 and substituting another rule, albeit in identical terms minus the prohibition.

4. Recommendations

For the reasons given in this memorandum, the following **recommendations** are made to the Committee. The text of the rules, in their amended form(s), is contained in the Appendix.

1. That –

   (a) SO's 29 and 30 be amended by deleting the requirement for removal of the President and the Chairman by an absolute majority;

   (b) SO 433 be amended by deleting the requirement for an absolute majority for suspension of standing orders without notice.

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[21] Although s 73(6) does not apply to a subs (1) bill, a Council member would probably have the requisite standing to challenge validity of a bill said not to have passed in accordance with subs (1).

2. That SO 356 be repealed (there is no equivalent provision made for standing committees) and SO 418 be amended to reflect statutory provisions.

3. That SO's 205 and 206 be repealed and replaced with a rule that states that the Deputy President and an Acting President may vote from the Chair and that when, as a result, there is an equality of votes, the question passes in the negative.

4. That SO 153(c) be amended by deleting any reference to disallowance resulting from deeming an unresolved question to pass in the affirmative on prorogation.

5. That SO 276 be repealed for the reason that any failure by the Assembly to comply with s 73(1) of the *Constitution Act* is exclusively a matter for that House.

6. That –

   (a) SO 277 be repealed and a rule substituted that applies to any bill whose passage is subject to special majorities;

   (b) no provision be made as to revival of such a bill given the effect of SO 231 at 2nd reading stage;

7. That the prohibition against suspension in SO 170 be deleted.

Clerk of the Legislative Council

APPENDIX – DRAFT STANDING ORDERS

Removal of President and Chairman

Standing orders 29, 30 are repealed and the following is substituted –

29. Term of office of President and Chairman of Committees

The President and the Chairman of Committees continue in office until death, resignation, or removal by vote of the Council.

Suspension of standing orders

Standing orders 433, 434 are repealed and the following is substituted –

433. Motion for suspension

Any member may move to suspend standing orders with or without notice but not so as to interrupt a member who is speaking.

Summonsing of witnesses

Option 1:

Standing orders 356, 418 are repealed.

Option 2:

(a) Standing orders 356, 418 are repealed;

(b) The following standing order is substituted –

418. Witnesses to be summonsed

(1) This order does not apply to a member of the Council.

(2) A summons issued to a person to attend as a witness or to produce documents is to be signed:

(a) by the President if the order is made by the Council;

(b) by the Clerk on the authorization of the chairman if the order is made by a committee.

Voting by Deputy or Acting President

Standing orders 205, 206 are repealed and the following is substituted –

205. Voting by Deputy or Acting President

(1) The Deputy President, or any member temporarily occupying the Chair in the Council, is entitled to vote on any question then arising.

(2) In a case of an equality of votes where subclause (1) applies, the question is resolved in the negative.

Disallowance on prorogation

Standing order 153(c) is repealed and the following is substituted –

(c) Where the question on a motion for disallowance remains unresolved —

(a) at the expiration of 10 sitting days after the day on which the motion was moved; or

(b) when Parliament is prorogued,

then:

(c) in relation to paragraph (a) the question must be resolved at the next sitting;

(d) in relation to paragraph (b), upon prorogation the question is deemed to be resolved in the affirmative.

Special majorities

Standing orders 276, 277 are repealed and the following is substituted -

276. Bills required to pass with absolute majorities

Where a written law requires that a bill must pass the second and third readings with the votes of an absolute majority of the whole number of members, the Council is to divide on each of those questions.

SO 170

Standing order 170 is amended by deleting the words *"This standing order shall not be suspended."*