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CONSTITUTION, SECTION 53

FINANCIAL LEGISLATION

AND THE HOUSES OF THE COMMONWEALTH PARLIAMENT

PAPERS PRESENTED TO
THE SENATE AND THE HOUSE OF REPRESENTATIVES

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Department of the Senate
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FOREWORD

Section 53 of the Constitution makes provision for the powers of the Houses of the Commonwealth Parliament in relation to financial legislation. The section provides that the two Houses have equal powers in relation to all proposed laws (bills), except that:

- bills to appropriate money or to impose taxation may not originate in the Senate
- the Senate may not amend a bill for imposing taxation or for appropriating money for the ordinary annual services of the government
- the Senate may not amend a bill so as to increase any proposed charge or burden on the people.

Where the Senate may not amend a bill, it may request the House of Representatives to do so.

These provisions are usually described as limitations on the power of the Senate in respect of financial legislation, but they are procedural limitations only, not substantive limitations on power, because the Senate can reject any bill and can decline to pass any bill until it is amended in the way the Senate requires. In particular, the difference between an amendment and a request is purely procedural: in one case the Senate amends a bill itself, in the other it asks the House of Representatives to amend the bill. In both cases the bill is returned to the House of Representatives for its agreement with the proposed amendment. In the absence of agreement the Senate can decline to pass the bill.

The provisions of section 53 therefore have a purely procedural application, to determine whether amendments initiated by the Senate should take the form of amendments made by the Senate or requests to the House of Representatives to make amendments. The only effect of choosing a request instead of an amendment is that a bill makes an extra journey between the Senate and the House.

In the application of the procedural limitations, questions of interpretation have arisen.

There is an agreement between the Senate and successive governments as to what constitutes the "ordinary annual services of the government". This agreement has been modified by supplementary agreements from time to time, and the meaning of that provision is fairly settled.

There has been disagreement recently, however, over the question of what constitutes an increase in a "proposed charge or burden on the people". The disagreements have been stated to be disagreements between the Houses, or, more accurately, disagreements between the Senate and the ministry which always controls the House, but in fact they have been disagreements between the Clerks of the Houses, only incidentally involving the members from time to time. The reason for this is that, as a procedural question seldom having any practical political importance, it has not attracted the sustained attention or consideration of members in recent years.

It is agreed that the provision refers to the impact of amendments on appropriations which are not appropriations for the ordinary annual services of the government, but its interpretation is not straightforward because of the way in which legislation appropriating money has been framed by governments in recent times. There are now several Commonwealth statutes which appropriate money of indefinite amounts and for an indefinite time. Some convoluted legislative provisions govern the actual expenditure of money under these appropriations. When amendments are proposed to those provisions, it is often difficult to determine how the amendments would affect the amount of the appropriation, quite apart from the actual expenditure under the appropriation.

In response to this difficulty, as illustrated by a number of pieces of legislation brought forward since 1981, the Clerk of the Senate suggested that an amendment should not be put in the form of a request unless it is clear that the amendment would increase expenditure under the relevant appropriation. This suggestion was made in the hope of achieving some consistency in choosing amendments or requests, rather than out of any wish to defend the powers of the Senate, because, as has been indicated, the question is purely procedural. The officers of the House of Representatives, however, treating the matter as one of preserving the powers of that House, have rejected the suggested test and insisted that all cases must be determined on their merits, an approach which has led to inconsistencies in the past.

This disagreement has had the effect of having one bill returned to the Senate for an amendment to be converted into a request. As has been indicated, that is the maximum effect the disagreement can have.

The issues raised, however, have had the merit of drawing attention to a much more serious matter: the erosion of parliamentary control over expenditure by recent legislation.

This volume brings together the various papers prepared by the Clerk of the Senate and by the Office of the Clerk of the House of Representatives on the question, and two earlier relevant papers. However unimportant and esoteric the matter may seem, its context, as suggested, is worthy of some serious consideration, and it is hoped that this collection will be useful to those who may wish to give it that consideration.

Harry Evans

22 March 1993

**CONSTITUTION, SECTION 53 — AMENDMENTS AND REQUESTS —
DISAGREEMENTS BETWEEN THE HOUSES**

Since 1981 there have been several disagreements between the Senate and the House of Representatives as to whether certain Senate amendments made to certain bills should have been put in the form of requests to the House of Representatives to make the amendments, because of one of the provisions contained in section 53 of the Constitution. Resolutions have been passed by the House of Representatives expressing the view that Senate amendments should have taken the form of requests.

On 6 March 1989 and again on 25 June 1992 papers were tabled in the Senate containing detailed analyses of the matters in issue and the rationale of the advices which had been provided to Senators. Surprisingly, these documents appear not to have been brought to the attention of members of the House of Representatives, and the decisions of the House have been made without regard to the matters raised in those documents. The House has acted on statements by the Speaker without debate of the issues, unlike the Senate which has on several occasions debated the issues, with a variety of views being expressed.

In the most recent case of disagreement, relating to the *Local Government (Financial Assistance) Amendment Bill 1992*, during the debate in the House of Representatives the Rt. Hon. Ian Sinclair, MP, expressed a wish "to have an opportunity to understand why the Clerks in the other place believe the resolution [amendment] to have been within the Senate's powers" (*House of Representatives Debates*, 24/6/92, p. 3804). It is regrettable that the House has not been given that opportunity hitherto.

This paper represents a further attempt to set out the issues involved in the hope that future determinations of the Houses will be made with an awareness of those issues.

Constitutional provisions

Section 53 of the Constitution imposes three conditions upon the Senate:

- (a) the Senate may not amend a bill imposing taxation;
- (b) the Senate may not amend a bill appropriating money for the ordinary annual services of the Government; and
- (c) the Senate may not amend a bill so as to increase any proposed charge or burden on the people.

Section 53 also provides that where the Senate may not amend a bill, it may request the House of Representatives to make the amendment, and, in its last paragraph, that apart from these limitations the Senate has equal powers with the House of Representatives in respect of all bills.

It is limitation (c) which is in issue. The assertion by the House of Representatives that an amendment is contrary to that limitation is essentially an assertion that the amendment should have been put in the form of a request that the House of Representatives make the amendment rather than an amendment made to the bill by the Senate.

Interpretation of the relevant provision

The relevant provision of section 53 involves some questions of interpretation. The application of the provision has been much discussed in the Senate in the past, and, in particular, was the subject of an extensive debate in the Senate in 1903.

It is clear from the past expositions that the relevant provision refers to appropriations, that is, proposed or actual statutory authorisations of the expenditure of Commonwealth money. An amendment to a bill which would increase a proposed charge or burden on the people is one which would increase expenditure under the bill out of money proposed to be appropriated for that purpose. This interpretation is usually stated in abbreviated form to the effect that an amendment which would increase an appropriation should be a request.

That shorthand formulation, however, can be highly misleading, and is probably the source of some of the misunderstandings of the issues in the past. The relevant provision does *not* say that the Senate may not amend a bill so as to increase an appropriation. The framers of the Constitution could easily have said that if that is what they had meant or intended. In referring to an increase in a "proposed charge or burden", the provision is clearly not referring simply to an

increase in an appropriation but to the actual effect of an amendment on government expenditure required to be paid out of government revenue.

It is clear therefore that, in order for a request to be required instead of an amendment, three conditions must be met:

- (a) the constitutional provision refers to a *proposed* charge or burden, therefore there must be an appropriation proposed in relation to the provision in the bill which is the subject of the amendment;
- (b) an increase in actual expenditure under an appropriation must be involved, not merely an increase in the amount of the appropriation (i.e., in the amount authorised to be spent) without any indication of an increase in expenditure; and
- (c) an amendment must have the effect of necessarily, clearly and directly increasing expenditure under an appropriation, because, as was pointed out in the debate in the Senate in 1903, unless this principle is applied, virtually every amendment would have to take the form of a request, because virtually any legislative provision may be shown to involve the Commonwealth in expenditure ultimately.

Thus, in determining whether a proposed amendment should take the form of a request, it is necessary to examine the legislative provision in question and the proposed amendment to determine whether the amendment would involve an increase in expenditure, and particularly to determine whether it would of necessity, clearly and directly involve such an increase in expenditure. This involves making a judgement in relation to each amendment.

Source of difficulties of interpretation

On the basis of the foregoing analysis, it would appear at first sight that the interpretation of the relevant provision is relatively easy: if a bill contains a proposed appropriation of money, and an amendment would have the effect of requiring increased expenditure under that appropriation, for example, by increasing the payments which are to be made under the appropriation, the amendment would need to be in the form of a request.

The interpretation of the provision, however, has been complicated in relatively recent years by certain unfortunate features of the framing of government legislation. These features are called

unfortunate because, apart from complicating the interpretation of the relevant provision, they also amount to a removal of appropriation and expenditure from parliamentary control and supervision. These aspects of legislation are as follows.

Standing appropriations. The Parliament has agreed to many bills which contain standing appropriations, usually called special appropriations, that is, appropriations which, when they have been put onto the statute book, continue to authorise the expenditure of money for some years or until they are repealed, and do not have to be renewed by Parliament. Bills to amend those bills are then introduced, and the provisions of the amending bills affect the amount of expenditure to be made under the standing appropriations. It is then necessary to determine whether any particular amendment of the amending bills will increase the expenditure under the appropriation. This determination is further complicated by the fact that these standing appropriations are often also appropriations of indefinite amount.

Indefinite appropriations. The Parliament passes many bills which contain appropriations of indefinite quantity. The provisions in question usually state that the money required for the operation of the legislation is appropriated from the Consolidated Revenue Fund, without any specification of an amount. This drafting device is adopted because it is often not possible for the government to calculate with any degree of accuracy the amount of expenditure which will be required by the legislation concerned, because of uncertainty as to the impact of the legislation. This uncertainty also has the effect of making it difficult to determine whether any particular amendment of the legislation will require increased expenditure. If the government cannot determine how much expenditure will be involved in a piece of legislation, it is asking a great deal that the Senate should determine with certainty whether any particular amendment of the legislation will increase the expenditure.

Separation of appropriations. The use of standing and indefinite appropriations and bills which amend the legislation containing those appropriations means that appropriations are separated from the provisions that affect the expenditure which may be made under them. It may be argued, as indeed it was argued during the 1903 Senate debate, that, on a strict interpretation of the relevant provision in section 53, if a bill does not contain a specified appropriation there can be no question of any amendment to it increasing a proposed charge or burden. This interpretation, while probably strictly correct, has not been followed, and it has been accepted that a bill proposes a charge or burden if it amends other legislation which contains an appropriation. This is a very loose interpretation which could, if carried to its logical conclusion, lead, as was pointed out in the 1903 debate, to virtually every amendment becoming a request, because virtually every amendment has an impact on an appropriation which exists somewhere.

Fortunately the interpretation has not been carried to its logical conclusion, but it does indicate the difficulty of drawing clear lines in the application of the relevant provision if the three suggested conditions are not strictly applied.

Complex provisions. Many bills passed by the Parliament in recent years contain complex provisions which determine whether expenditure is to occur. Usually these provisions take the form of providing that expenditure may occur if certain factors apply, and the expenditure will occur only if the factors apply and relate in a certain way. Specific examples of these types of provisions are referred to in relation to the particular cases discussed below. These kinds of provisions often make it difficult to determine whether there is going to be any expenditure under a bill at all, and, if so, how much, and thereby make it doubly difficult to determine whether particular amendments will have the effect of increasing expenditure.

Discretion conferred on officials. Many bills passed by the Parliament confer discretions on ministers and other officeholders to determine whether payments are made and therefore to determine whether expenditure occurs. In many cases these discretions are not governed by any objective factors. Many appropriations authorise expenditure which is not statutorily required, as it is, for example, by provisions which create entitlements to payments. Expenditure under such appropriations depends on the decisions of officials in the sense that it may be decided to make savings by not spending up to the authorised level, or not spending at all. This is quite different, however, from provisions which explicitly empower ministers and other officials to determine whether payments are made, and if so in what amounts. As will be seen in the following analysis of past cases, these sorts of provisions provide a basis for an argument, which was advanced by the Senate in 1981, that an amendment which merely affects such a discretion need not be a request.

Appropriations of these kinds have been used (or abused) to such an extent in recent times that only about 30 per cent of total government expenditure is now subject to annual parliamentary scrutiny and approval in the annual appropriation bills. The remaining 70 per cent of government expenditure has escaped from parliamentary control through the use of these types of provisions. The following figures show the growth of standing appropriations as a percentage of total government expenditure:

1909-10	10%
1929-30	38%
1949-50	49%
1969-70	56%

1991-92 (est) 72%.

Had the Parliament not fallen into the habit of passing these kinds of provisions (and, it is submitted, it is a very bad habit from the standpoint of parliamentary control and supervision of expenditure), the interpretation of the relevant provision of section 53 would be relatively straightforward. It is because of these kinds of provisions that difficulties of interpretation have arisen.

Proper parliamentary supervision and control of expenditure, and the proper application of section 53 of the Constitution, require that all government expenditure be approved annually in specified amounts by Parliament, with additional and supplementary appropriations when required, and that expenditure of appropriated funds be governed by objective conditions rather than discretions vested in officials. There is no reason for this situation not being achieved, except an executive desire to avoid unwelcome parliamentary attention.

It is ironical that the House of Representatives should be constantly urged to make pronouncements on whether Senate amendments should be requests when it has, over the years, agreed to legislative provisions whereby a far more important issue, parliamentary control and supervision of expenditure, has been seriously neglected.

It is no answer that other countries have extensively used standing appropriations. This means only that other countries have made the same mistake. Generally speaking they have not made the same mistake to the same extent. In the United Kingdom standing appropriations account for only 24% of government expenditure.

Past cases of disagreement

The following are the four cases since 1981 in respect of which it could be said that there was disagreement between the two Houses in relation to amendments and requests, and they illustrate some of the issues of interpretation.

States Grants (Tertiary Education Assistance) Bill 1981. This bill contained a provision whereby a minister was empowered to make certain determinations which could have the effect of reducing the payments otherwise authorised to be made to the states under the bill. A Senate amendment removed the relevant provision. The Senate passed a resolution declaring that it was in accordance with section 53 of the Constitution to amend the bill in that way. The principle which may be drawn from that resolution is that a request is not required for an amendment

which removes a ministerial power which may be exercised in such a way as to reduce expenditure under a bill.

States Grants (Technical and Further Education Assistance) Bill 1988. Under this bill a minister was empowered to authorise payments to a state in respect of expenditure of certain institutions. The minister was not to authorise the payment of an amount that exceeded a prescribed maximum. That maximum was determined by multiplying a certain sum of money by the number of students receiving instruction in the relevant institutions. In calculating the number of students, certain categories of students were to be disregarded. The Senate amendment had the effect of removing the reference to one of the categories of students to be disregarded. The belief that the amendment did not require a request was based on an assessment that the effect of the amendment on the expenditure under the bill would not be sufficiently direct or certain to require a request. Whether the amendment increased expenditure would be determined by whether, because of students falling into the relevant category, the number of students would be thereby increased (this would depend on numbers of students in the other relevant categories), whether the maximum amount payable would thereby be increased and whether the minister would therefore authorise an increased payment. It appeared on the face of the provisions that the connection between the amendment and an ultimate increase in expenditure involved too many links in the chain of causation and would be simply too indirect and uncertain to warrant the amendment taking the form of a request.

Social Security Legislation Amendment Bill (No. 4) 1991. The Social Security Act 1991 and its predecessor statute is a frequently-amended act which contains a standing and indefinite appropriation, and amendments to amending bills have been given rise to difficult questions of interpretation. To this bill the government moved in the Senate a number of amendments, one of which created a category of potential recipients of benefits in respect of whom a certificate could be issued by state or territory authorities. The payment of funds therefore depended upon the exercise of a power conferred not on a Commonwealth official but on state and territory officials. It was not known whether any certificates would be issued by the relevant authorities or whether any benefits would be paid, and subsequent publicity surrounding the bill indicated that the matter was still in doubt for some time after its passage. The view was therefore taken that the effect of the amendment on total expenditure under the bill was uncertain. After the amendments had been passed by the Senate and agreed to by the House of Representatives, a statement was made by the Speaker indicating a belief that the amendment in question should have been a request, and the Office of Parliamentary Counsel, which had prepared the government amendments, changed its view as to whether a request was required.

Local Government (Financial Assistance) Amendment Bill 1992. A provision of this bill empowered the relevant minister to determine a figure which, multiplied by a separately determined factor, produced an amount of a payment to the state of Tasmania, and a ceiling was prescribed for the figure to be determined by the minister. The Senate's amendment had the effect of altering that ceiling. The view was taken that the amount actually expended under the bill would not necessarily be affected by the alteration of the ceiling by the Senate's amendment. Moreover, it was made clear that, if the ministerial power under this bill were exercised in such a way as to increase the payment to Tasmania, payments to the State under other legislation, also determined by ministerial determination, would be reduced by a corresponding amount. It was clear, therefore, that in practice the amendment would not result in additional expenditure. In this case the effect of the amendment was influenced by two different statutory ministerial discretions. Although, as the Speaker suggested in a statement to the House of Representatives, it is somewhat anomalous to be interpreting the question with reference to a ministerial undertaking, it is also highly anomalous to argue that a request is required when it is known that there will be no increase in expenditure.

An issue which has arisen from time to time relates to Senate amendments which remove proposed restrictions on entitlements to payments. The principle has been followed that where a bill proposes to restrict eligibility for payments under an act which contains a standing appropriation, and the Senate's amendments remove or liberalise the restrictions, those amendments do not need to be requests, although their effect is to increase the total of expenditure which would otherwise have occurred had the bill been passed without amendment. This principle appeared to have been accepted by the Office of Parliamentary Counsel hitherto, and is illustrated, for example, by government amendments moved in the Senate to the *Social Security Legislation Amendment Bill 1990*.

These cases indicate the problems of interpretation which arise under the kinds of provisions to which reference has been made. All of them involved assessing the impact of amendments on standing indefinite appropriations which were affected by the bills in question. In none of these cases could it be said that the Senate's amendments would necessarily, clearly and directly lead to increased expenditure under an appropriation.

Other amendments involving standing appropriations

Because there are many statutes containing standing and indefinite appropriations, and those statutes are frequently amended by bills which are the subject of amendments moved in the Senate, there are many amendments in respect of which it could be argued that requests are

required, if the test of a necessary, clear and direct increase in expenditure is abandoned. Virtually every amendment to such an amending bill could have an indirect impact on expenditure under the bill, and a claim could therefore be made that every amendment should take the form of a request.

For the purpose of this paper a study was undertaken of bills which contained standing appropriations, or which amended acts with standing appropriations, and which were amended by the Senate, in this and the previous Parliaments (i.e., since mid-1987). Eight bills were identified as having been the subject of Senate amendments (in some cases multiple amendments) which were the same in principle as the amendments that were the subject of disagreement, and which, according to the pronouncements made in the House of Representatives in the recent cases of disagreement, should certainly have been requests. These amendments included a government amendment to the *States Grants (Schools Assistance) Amendment Bill 1990* which empowered a minister to authorise additional payments to the states.

This study shows either that the interpretation of the constitutional provision by the House's advisers has been remarkably confused and inconsistent, or that a new and more restrictive interpretation is now being applied.

It is suspected that most of these kinds of amendments are dealt with by the House of Representatives without any suggestion that they should be requests because usually their form does not direct attention to the fact that they may involve expenditure. The amendment to the *Local Government (Financial Assistance) Amendment Bill 1992* probably would not have attracted attention as possibly requiring a request except for the fact that it involved altering a figure for a sum of money in the bill. An amendment which had the same effect, that is, altering the limits within which a ministerial determination affecting the calculation of a payment could be made, but which did not involve altering a sum of money, would probably not have been noticed, as the example of the *States Grants (Schools Assistance) Amendment Bill 1990* suggests.

The case of the *Social Security Legislation Amendment Bill (No. 4) 1991* illustrates the statement that, unless the principle of a necessary, clear and direct impact on expenditure being required for a request is adhered to, virtually all amendments to bills amending acts with standing appropriations could be regarded as requiring requests. The Office of Parliamentary Counsel, having decided that the government amendment in question should have been a request, suggested that where there are requests among related amendments (which is somewhat

procedurally difficult because the Houses have to deal with them separately) all the amendments should be turned into requests! This indicates that if the principle is abandoned it becomes impossible to keep any rational distinction between amendments and requests.

The question of a Governor-General's message

From time to time during consideration of these matters, for example, in the Speaker's statement on the *Social Security Legislation Amendment Bill (No. 4) 1991*, it has been suggested that, if an amendment to a bill would, if moved in the House of Representatives, require a Governor-General's message under section 56 of the Constitution, this means that the amendment of the bill should take the form of a request. In the 1989 paper, however, it was pointed out that the production of a Governor-General's message is not a proper test, and that there has been at least one case identified in which a Governor-General's message was produced when it was clear that no message was required, this being conceded by the responsible minister in the Senate. It was stated in that instance that a message had been produced not on any positive determination that it was required but simply as precaution by the Office of Parliamentary Counsel. That Office produces Governor-General's messages without much consideration as to whether they are required. A stock of signed blank messages is kept and a message filled in when thought to be required. The views of the Office are therefore not a good guide in interpreting the relevant constitutional provision. It has been pointed out that, in the case of the *Social Security Legislation Amendment Bill (No. 4) 1991*, the amendments in dispute were moved by the government and were drafted by the Office of Parliamentary Counsel. As was pointed out in the material tabled in the Senate on 25 June 1992, government amendments were circulated by the Office of Parliamentary Counsel to the *Customs Tariff Amendment Bill 1992*, a bill which imposed taxation and which the Senate therefore clearly could not amend. The question of whether requests are required therefore cannot be determined by the way in which Governor-General's messages and government amendments are produced.

A procedural question

In debate in the Senate on the *States Grants (Technical and Further Education Assistance) Bill 1988* (*Senate Debates*, 21/12/88, p. 4809), a Senator indicated that if the question of whether the disputed amendment should have been a request were the only difference of opinion between the Senate and the House of Representatives, he might agree to send the amendment back to the House of Representatives as a request. It is suggested, as it was suggested in the 1989 paper, that this is an approach which is appropriate to the matter at issue. As has already been indicated, the judgement as to whether an amendment should be a request is often not easy to make, and in the

past, in cases of doubt or dispute, the Senate and Senators moving amendments have sometimes deferred to the actual or possible views of the government by putting amendments in the form of requests.

More importantly, this approach is appropriate because the difference between an amendment and a request is one of procedural form only, and does not substantively affect the powers of either House. If an amendment is made in the form of a request this affects only the procedural process whereby the bill is dealt with between the two Houses, in that the amendment is actually made by the House of Representatives and not by the Senate, and the Senate then agrees to the bill as amended at its request. This requires the bill to be returned to the House when the request is made and then returned to the Senate again for the Senate to agree to the bill when the requested amendment is made. In the past the question of whether government amendments to bills in the Senate should be in the form of requests has often been determined by a desire to avoid the inconvenience of the amended bill having to be returned to the Senate.

As was also pointed out in the 1989 paper, neither House has been consistent on the question of when requests are required. The House of Representatives has agreed without question to amendments which certainly should have been requests, and the Senate has made requests which certainly should have been amendments, regardless of whether one applies the principles set out in this paper or follows the past pronouncements of the Speaker. The apparent acceptance of the principle relating to Senate amendments which affect restrictions on entitlements occurred only after there had been inconsistent treatment of such amendments. This absence of consistency in the past reinforces what has been said about a flexible approach to the matter.

Disagreements between the Houses, as was suggested in the 1988 debate in the Senate, should be directed to substantive questions of legislative policy and not to the procedural question.

Although the question of amendments as against requests is a purely procedural question, as a constitutionally-mandated procedure it deserves to be properly interpreted. As has been indicated, unless the principles set out in this paper are followed, the distinction between amendments and requests will be confused, it will be impossible to draw a clear line between them to determine difficult cases, and more and more amendments will be turned into requests because of their apprehended indirect effect on expenditure, to the inconvenience of the Houses, the unnecessary complication of their procedures, and the distortion of the constitutional provision.

If, as suggested earlier in this paper, the past inconsistency is due not to confusion but to the House's advisers recently adhering to a new and more restrictive interpretation of the provision, that interpretation should be made clear.

Even after careful consideration of the principles here set out the Houses may arrive at different conclusions in particular cases. If the principles are observed, however, at least the confusion, inconvenience and distortion of the constitutional provision will be avoided.

(Harry Evans)

CONSIDERATION OF EDUCATION BILLS

AMENDMENTS AND REQUESTS

During the transactions over certain education bills between the Senate and the House of Representatives on 21 December 1988, two matters arose in relation to section 53 of the Constitution. As the action of the Senate in relation to one of those matters was based on advice given orally by Senate officers, and that fact was referred to in debate (Hansard, 21/12/88, p.4809), it is appropriate that that advice now be set down in writing and made available to Senators. It may also be helpful to clarify the questions involved in both matters.

The matter concerning certain Senate amendments to the States Grants (Technical and Further Education Assistance) Bill 1988 should be considered first, because the proceedings on that bill have not been concluded. In its message responding to the Senate amendments to the bill, the House of Representatives suggested that one of the amendments was contrary to section 53 of the Constitution in that it increased a proposed charge or burden on the people.

Section 53 of the Constitution imposes three conditions upon the Senate, as follows:

- (a) the Senate may not amend a bill imposing taxation;
- (b) the Senate may not amend a bill appropriating money for the ordinary annual services of the Government; and
- (c) the Senate may not amend a bill so as to increase any proposed charge or burden on the people.

Section 53 also provides that where the Senate may not amend a bill, it may request the House of Representatives to make the amendment, and, in its last paragraph, that apart from these limitations the Senate has equal powers with the House of Representatives in respect of all bills.

It is limitation (c) which is in issue in relation to the amendment in question. The assertion by the House of Representatives that the amendment is contrary to that limitation is essentially an assertion that the amendment should have been put in the form of a request that the House of Representatives make the amendment rather than an amendment made to the bill by the Senate.

The relevant provision of section 53 involves some questions of interpretation. The application of the provision has been much discussed in the past, and, in particular, was the subject of an extensive debate in the Senate in 1903. A question of whether a Senate amendment should have been a request last arose in 1981, and attached as attachment 1 is an analysis, which was composed at that time, of the meaning of the constitutional limitation and the application of it in the past.

Such an analysis of the relevant provision leads to the conclusion that an amendment to a bill which would increase a proposed charge or burden on the people is one which would increase expenditure required for the bill to operate out of money appropriated for that purpose. This interpretation is usually stated in abbreviated form to the effect that an amendment which would increase an appropriation should be a request. This, however, is not sufficient for a complete and proper interpretation of the provision.

The provision refers to a *proposed* charge or burden, therefore there must be an appropriation proposed in relation to the provision in the bill which is the subject of the amendment.

Secondly, in order to require a request an amendment must have the effect of necessarily, clearly and directly increasing expenditure under an appropriation. As was suggested in the debate in 1903, unless this principle is applied, virtually every amendment would have to take the form of a request, because virtually any legislative provision may be shown to involve the Commonwealth in expenditure ultimately.

Thus, as the analysis suggests, in determining whether a proposed amendment should take the form of a request, it is necessary to examine the legislative provision in question and the proposed amendment to determine whether the amendment would involve an increase in expenditure, and particularly to determine whether it would of necessity, clearly and directly involve such an increase in expenditure. This involves making a judgement in relation to each amendment, and, as in any such judgement, the issue is sometimes a matter of doubt or uncertainty, here particularly because of the complexity of the legislative provisions concerned.

The provisions in question in the States Grants (Technical and Further Education Assistance) Bill 1988, in subsections 12(1), (2) and (3), are to the following effect. The Minister is empowered to authorise payments to a State in respect of expenditure of certain institutions. The Minister is not to authorise the payment of an amount that exceeds a prescribed maximum. That maximum is determined by multiplying a certain sum of money by the number of students receiving instruction in the relevant institutions. In calculating the number of students, certain

categories of students are disregarded. The Senate amendment would have the effect of removing the reference to one of the categories of students to be disregarded.

The argument that this amendment would increase expenditure is as follows. The amendment would have the effect of including a certain category of students in the number of students by which the prescribed sum of money is multiplied, thereby increasing the maximum sum the payment of which the Minister may authorise, thereby increasing the expenditure under the bill.

The advice that the amendment did not require a request was based on an assessment that the effect of the amendment on the expenditure under the bill would not be sufficiently direct to require a request. Whether the amendment increased expenditure would be determined by whether, because of students falling into the relevant category, the number of students would be thereby increased (presumably this would depend on numbers of students in the other relevant categories), whether the maximum amount payable would thereby be increased and whether the Minister would therefore authorise an increased payment. It appeared on the face of the provisions that the connection between the amendment and an ultimate increase in expenditure involved too many links in the chain of causation and would be simply too indirect and uncertain to warrant the amendment taking the form of a request. As has already been suggested, if this sort of indirect effect of an amendment were taken to be sufficient justification for a request, and the same sort of reasoning were applied to other amendments, it would be difficult to avoid virtually every amendment becoming a request.

The amendment may be compared with the two requests for amendments which were made by the Senate, and eventually agreed to by the House of Representatives, in respect of the States Grants (Schools Assistance) Bill 1988. Subsection 22(2) of that bill authorised the Minister to make a payment to a State in respect of certain schools of an amount not exceeding an amount calculated by multiplying a specified figure for the establishment year of the schools by the number of students attending the schools. The effect of the Senate's requested amendments was to insert in the schedule setting out the relevant figures new figures for a year in respect of which the subsection and the relevant schedule did not provide. In short, the requested amendments extended the operation of the relevant provisions into another year and authorised expenditure of money in respect of a new category of schools. These amendments clearly had the effect of increasing the expenditure authorised by the bill, given only that there were schools covered by them.

It may be argued that those requests could have taken the form of amendments, because the relevant provision authorised the Minister to pay the money concerned, and the Minister might

decide not to pay that money. This point, indeed, was made by the Minister himself, for another purpose, in debate in the House of Representatives in finally agreeing to the Senate's requests (Hansard, 21/12/88, pp. 3824-3825), and was suggested by Senator Teague and Senator Hill in debate in the Senate (Hansard, 21/12/88, pp. 4809 and 4813). An amendment which merely increases an amount of money which a Minister may or may not expend, it may be argued, need not take the form of a request. All appropriations are authorisations to expend money, but some legislative provisions make the expenditure of money necessary and unavoidable, for example, provisions which create an entitlement to payments from the Commonwealth. (Often the entitlement is legislatively separated from the appropriation, which creates further problems of interpretation). It may be contended that only amendments to provisions which actually require the expenditure of money, as distinct from provisions which authorise a Minister to expend money, should be regarded as requiring requests.

This conclusion, as the 1981 paper suggests, may be drawn from a resolution passed by the Senate in that year. The resolution, however, related to provisions quite different from the two sets of provisions discussed here. The amendment then in dispute had the effect of removing provisions which empowered the Minister to take certain action to reduce the payments otherwise authorised by the bill. The resolution referred specifically to the particular provisions in question.

In determining whether an amendment need not involve a request on the ground that it would merely restrict or expand the scope of a Minister's discretion, therefore, one must have regard to the nature of the discretion and the effect of the amendment. In provisions such as those in the States Grants (Schools Assistance) Bill, the authorisation to spend is usually taken as actual expenditure and relevant amendments treated as requests accordingly. Where the connection between the amendment and the authorisation to spend is made more indirect and complicated by provisions of the sort contained in the States Grants (Technical and Further Education Assistance) Bill, however, the conclusion may be reached that an amendment rather than a request is appropriate.

In the House of Representatives, the Minister quoted an opinion by the Acting First Parliamentary Counsel which indicated that the amendment to the States Grants (Technical and Further Education Assistance) Bill was one which required a message under section 56 of the Constitution (Hansard, 21/12/88, pp.3777-8; the opinion was also quoted in the Senate at p. 4812).

Section 56 of the Constitution provides:

A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

It is clear that a Bill which may not be initiated in the Senate would require a Governor-General's message in order to be passed by the House of Representatives. In the past where there has been dispute about whether an amendment moved in the Senate infringed the rule concerning a proposed charge or burden on the people, the Government has sought to establish that the amendment should take the form of a request by advising that a Governor-General's message would be necessary if the amendment were passed by the House of Representatives.

In debate on the Trade Practices Revision Bill 1986, Senator Macklin pointed out that a message had been brought into the House of Representatives in connection with the bill. The bill did not contain any appropriation of money, nor did the Trade Practices Act which it amended; the money necessary for expenditure under the Trade Practices Act is appropriated by the annual appropriation bills. There was a clause in the bill which enlarged the category of proceedings in respect of which, under the principal act, financial assistance might be granted by the Attorney-General. The funds necessary for this assistance were not appropriated by the bill or the Act, but were contained in annual Appropriation Bill (No.1), and when the relevant section of the principal act was passed no message was produced. It was clear, therefore, that a Governor-General's message should not have been brought into the House of Representatives in respect of the bill. In response to Senator Macklin, Senator Evans, the Minister representing the Attorney-General, said that the introduction of the message represented an "abundance of caution" on the part of the Office of Parliamentary Counsel. Senator Macklin asked why any caution at all was required, since the requirements of sections 53 and 56 of the Constitution are not justiciable. Senator Evans then conceded that the bill was not an appropriation bill and that the message should not have been produced. (Hansard, 30/4/86, p.2072.)

This incident demonstrated some of the issues of interpretation referred to, and also demonstrated that an opinion by the Office of Parliamentary Counsel that an amendment should have been a request cannot be taken as an infallible answer to the question.

In debate in the Senate on the States Grants (Technical and Further Education Assistance) Bill 1988 (Hansard, 21/12/88, p.4809), Senator Teague indicated that if the question of whether the amendment should have been a request were the only difference of opinion between the Senate

and the House of Representatives, the Opposition might agree to send the amendment back to the House of Representatives as a request. It is suggested that this is an approach which is appropriate to the constitutional matter at issue. As has already been indicated, the judgement as to whether an amendment should be a request is often not easy to make, and in the past, in cases of doubt or dispute, the Senate and Senators moving amendments have sometimes deferred to the actual or possible views of the Government by putting amendments in the form of requests. More importantly, this approach is appropriate because the difference between an amendment and a request is one of procedural form only and does not substantively affect the powers of the Senate.

This leads to the second matter raised on 21 December 1988 in relation to section 53 of the Constitution. In its resolution responding to the Senate's pressing of its requests for amendments to the States Grants (Schools Assistance) Bill 1988, the House of Representatives questioned, as it has in the past, the Senate's right under section 53 to press, that is to insist upon, requests for amendments. The Senate has always asserted its right to press requests. The relevant considerations relating to this question are set out at some length in authoritative texts, but for convenience are briefly summarised in attachment 2.

The connection between the two matters is this. Once it is established that the Senate may repeat requests, and it is suggested that that is established by past transactions between the two Houses and the matters summarised in attachment 2, it is clear that the difference between an amendment and a request is one of procedure, not a substantive limitation on the powers of the Senate. Matters of procedure, particularly those prescribed by the Constitution, are important, but they must be distinguished from enforceable limitations on power. The provisions of section 53 fall into the former and not the latter category. The Senate may well, therefore, consider that it should not insist in every case on its view that an amendment is appropriate rather than a request.

It cannot be pretended that either House has been consistent in deciding when requests are required. The House of Representatives has agreed to amendments which almost certainly should have been requests, and the Senate has made requests which probably should have been amendments. Given past decisions and the variety and complexity of drafting forms adopted by government drafters in recent years, consistency is probably not attainable. Past proceedings clearly show that whether agreement is reached on particular amendments or requests depends on the views taken on the policy behind them, and not on the question of form discussed here.

(Harry Evans)

ATTACHMENT 1

AMENDMENTS AND REQUESTS

During the Budget Session in 1981 there was some disputation and uncertainty in relation to whether certain proposed amendments to Bills should be moved in the Senate in the form of amendments or requests. A request was moved to the Social Services Amendment Bill 1981 to remove from that Bill the provision which would have had the effect of restricting the payment of benefits by altering the provisions relating to persons eligible to receive those benefits, although an amendment was moved to the Social Services Amendment Bill 1976 with virtually the same effect. Proposed amendments to the States Grants (Tertiary Education Assistance) Bill 1981 to remove from that Bill provisions which would have allowed a Minister to make determinations which may have had the ultimate effect of reducing the grants to the States were the subject of debate in the Senate, the Government maintaining that the amendments should have been moved as requests, and the Senate passing a resolution affirming its power to amend the Bill.

As the question of whether particular amendments should be moved in the form of requests is likely to arise again, it may be useful to have some examination of the criteria used to determine the matter and of the way in which it has been determined in respect of Bills in the past.

Section 53 of the Constitution provides that the Senate may not amend any Bill so as to increase any proposed charge or burden on the people. It is in the interpretation of this provision that the difficulty arises. The conventional exposition of this Constitutional provision is to the effect that the Senate may not make any amendment to any Bill which would have the effect of increasing any appropriation. This interpretation, however, raises further difficulties in its application in particular cases. The difficulties revolve around the nature and directness of the effect of an amendment on proposed appropriations or expenditure, since virtually any legislative act of the Commonwealth ultimately involves expenditure, and appropriations for particular purposes are often separated from other legislation relating to those purposes.

The interpretation of the Constitutional provision was the subject of an extensive debate in the Senate in 1903 in relation to the Sugar Bonus Bill 1903. The Senate made a number of amendments to the Bill. The House of Representatives contended that one of the amendments, which extended the eligibility for the bonus, should have been put as a request. In the course of the debate the interpretation of section 53 most favourable to the power of the Senate was put by

Senator Sir Richard Baker. He expounded the view that the prohibition is that the Senate must not increase any proposed charge or burden on the people, and therefore the Bill in question must contain some proposed charge or burden. Sir Richard put the view that if the Senate might not amend any Bill in such a way as to increase expenditure then the Senate would not be able to amend any Bill, because virtually any amendment would involve some expenditure. He referred to a number of amendments which the Senate had initiated and which involved increasing Commonwealth expenditure. He argued that it is not sufficient that an amendment have the effect of increasing an appropriation, because an increase in an appropriation does not necessarily involve any increase in any charge or burden on the people. The difficulty with this view is that it amounts to an interpretation of the Constitutional provision which restricts that provision to taxing measures, but since the Senate is, also in section 53, prohibited from amending a Bill imposing taxation, this leaves the further prohibition of little or no effect. Senator Sir Richard Baker recognised this difficulty and suggested that a way out of it might be to interpret the provision in question as referring to Bills which directly impose a charge or burden but which are not for the imposition of taxation, such as Bills authorizing the raising of loans. This difficulty in Sir Richard's case was pointed out by Senator Sir Josiah Symon, himself a strong supporter of the powers of the Senate. He argued that the provision must refer to appropriation Bills, because it cannot refer to taxation Bills which the Senate is in any case prohibited from amending. He also cited some authorities on British constitutional usage for the proposition that the expression "charge or burden" was commonly used to refer to appropriations as well as to taxation measures. He indicated that there was in his view little difference, in respect of the powers of the Senate, between an amendment and a request. There was also a suggestion in the debate that a request is necessary only where a specified appropriation is increased, and not where an unspecified appropriation is increased, but this cannot be sustained, as it would make the question dependent upon mere matters of form.

It may be said that the view of Senator Sir Josiah Symon has in subsequent history prevailed over that of Senator Sir Richard Baker, as it did in the vote in 1903, on the basis that the Constitutional provision must refer to Bills appropriating monies because it cannot refer to anything else.

The Symon interpretation, however, does not dispose of the very real difficulties raised by Senator Sir Richard Baker. There are two. First, the difficulty that an appropriation does not necessarily involve any charge or burden. This was well illustrated in the 1903 debate by an example given by Senator Millen. Suppose, he said, there was a Bill to make a per capita distribution of the surplus revenue of the Treasury. This would clearly be an appropriation Bill, but if the Senate amended it so as to increase the appropriation to raise the amount of the

distribution it cannot be said that the Senate would be increasing any charge or burden on the people. Secondly, there is the problem that virtually all amendments impinge upon expenditure with varying degrees of directness. To paraphrase another example given in the 1903 debate, an amendment to increase the membership of a statutory board might be said to increase expenditure because the Commonwealth must pay additional allowances for the extra members.

Thus with the separation of appropriation measures from measures governing expenditure and the often uncertain connection between appropriation and charge or burden, it is not sufficient to say that an amendment must be put as a request if it increases expenditure or an appropriation. The question must be asked in relation to each particular amendment to each particular Bill: will this, of necessity and directly, cause an increase in total Commonwealth expenditure which will be a charge on Commonwealth revenue? (That it must affect *total* expenditure was recognised by Quick and Garran.)

It should also be noted that a change in Commonwealth accounting practices, such as the establishment of a fund, cannot be held to determine the question, as this is merely a matter of form. As was pointed out in the 1903 debate, all expenditure is ultimately raised by charges or burdens.

It may be useful to examine the Bills in respect of which the Senate has made requests, to see how the problem has been dealt with, and what conclusions have been drawn, or apparently drawn, in relation to amendments which should be put in the form of requests, in the past. The great majority of Bills in respect of which the Senate has made requests were Bills for appropriating money for purposes which were interpreted as the ordinary annual services of Government, or Bills which were regarded as Bills for the imposition of taxation. There follows a list of Bills not falling into either of those categories in respect of which the Senate has made requests, with a summary of the apparent effect of those requests. In some cases it is difficult to ascertain with certainty the effect of requests without a thorough study of the statutes concerned.

Sugar Bonus Bill 1903 A request to extend the eligibility for the bonus.

Surplus Revenue Bill 1908 A request to extend the period during which certain payments would be made.

War Gratuity Bill (No.2) 1920 A number of requests to extend benefits to ex-servicemen totally and permanently incapacitated.

Meat Export Bounties Bill 1922 Two requests to extend the payment of bounty to certain meat.

Superannuation Bill 1922 A number of requests to extend superannuation rights to certain persons.

Wine Export Bounty Bill 1924 One request to extend the period of the payment of the bounty.

Judiciary Bill 1926 One request to extend pension entitlements of certain Judges.

Wine Export Bounty Bill 1930 One request to extend the payment of bounty in respect of certain vines.

Primary Producers Relief Bill 1936 Two requests to extend the period for application for payments.

National Health Bill and Pensions Insurance Bill 1938 Two requests to extend the period of payment of benefits.

Widows' Pension Bill 1942 Two requests, one to extend payment of benefit in respect of children over sixteen years of age, and one to allow the Minister to make determinations for cost-of-living adjustments to pensions.

Australian Soldiers' Repatriation Bill 1943 Two requests to ensure that pensions would not be payable only where there was "serious" default or breach on the part of a member of the Forces, rather than merely default or breach.

Phosphate Fertilizers Bounty Bill 1963 One request to clarify the power of the Minister to make determinations to allow payment of bounty in respect of certain superphosphate.

Homes Savings Grant Bill 1967 Two requests to extend the eligibility for the payment of grant.

Parliamentary Allowances Bill 1968 Two requests to increase the amount of an allowance and to add an additional special allowance.

Homes Savings Grant Bill 1970 One request to extend the eligibility for the payment of grant by altering the criteria for approval of credit unions.

States Grants (Special Financial Assistance) Bill 1970 One request to increase the grant to one State (the original sum was an error).

National Health Bill 1970 A number of requests to alter eligibility for benefits and to extend benefits.

States Grants (Schools) Bill 1973 One request to increase the grants to the States.

Refrigeration Compressors Bounty Bill 1974 One request to increase the amount of the bounty.

Parliamentary Contributory Superannuation Amendment Bill 1978 One request to reduce the qualifying period for pensions.

Liquefied Petroleum Gas (Grants) Bill 1980 One request to extend the eligibility for grants.

Most of these requests would seem, upon examination of the Bills, to meet the criterion of having the effect of necessarily and directly increasing total expenditure which will be a charge upon revenue. In the cases of five of the Bills, however, it would seem that the requests should have taken the form of amendments, or that it was at least doubtful whether a request was necessary. The five Bills in question are as follows.

Primary Producers Relief Bill 1936 The extension of the time for lodging applications for assistance under the Bill *may* have increased the amount of assistance paid, but it is clear that the amendment did not necessarily or directly lead to an increase in expenditure.

Australian Soldiers' Repatriation Bill 1943 The insertion of the word "serious" in certain parts of the Principal Act may have had the ultimate effect of increasing expenditure, in that persons guilty of non-serious default or breach would no longer be deprived of benefit, but the effect on expenditure seems somewhat tenuous.

Widows' Pensions Bill 1942 The provision empowering the Minister to make determinations for cost-of-living adjustments to pensions did not necessarily or directly lead to an increased expenditure: the Minister may not have used the power, or may have used it to reduce pensions. This case would seem to be the same in principle as that of the States Grants (Tertiary Education Assistance) Bill 1981 in respect of which the Senate made the declaration referred to above.

Phosphate Fertilizers Bounty Bill 1963 The provision in question allowed the Minister to make determinations which may have had the effect of increasing the amount of bounty paid, so that the principle again is that of the States Grants (Tertiary Education Assistance) Bill 1981. Moreover, it was stated in debate that the purpose of the request was merely to clarify the meaning of the provision (the request was moved by the Government at the suggestion of the draftsman).

Homes Savings Grant Bill 1970 The ultimate effect of the request seems to have been that more credit unions would be eligible for registration, so that more people would be eligible for the grant, but the connection between the request and increased expenditure seems tenuous.

It also should be noted that in the case of one Bill, the Television Stations Licence Fees Bill 1964, a request was made which had the effect of reducing fees payable in certain cases. It is clear that the amendment was put in the form of a request not because of any imagined effect upon expenditure, but in the mistaken belief that the Bill was a Bill imposing taxation. This precedent has not been followed.

It is not possible to elaborate the criterion so as to allow all particular cases to be immediately determined with certainty. Each Bill and amendment must be looked at individually to ascertain the effect on expenditure from revenue.

The case of the two Social Services Bills suggests the subsidiary principle that it is not a sufficient condition for a request that an amendment has the effect of preventing the removal of a benefit involving expenditure, such removal being contemplated in the Bill. The case of the States Grants (Tertiary Education Assistance) Bill 1981, and the Senate's declaration, suggests the subsidiary principle that it is not a sufficient condition for a request that an amendment affects the power of a Minister to take action which may increase expenditure.

There may have been other instances in the past in which consideration was given to the moving of amendments by way of requests, and determinations made which would give rise to further subsidiary principles to aid in the interpretation of the Constitutional provision. Unfortunately, such instances are not recorded. It is also not practicable to undertake an examination of all requests moved but not passed in the Senate, or of all amendments moved or passed. The consideration of individual Bills in the future may allow further subsidiary principles to be enunciated.

(Harry Evans)
Principal Parliamentary Officer
(Procedure)

NOTES TO ATTACHMENT 1

1. The debate on the Sugar Bounty Bill is to be found in Hansard, 22 and 23/7/03, pp.2364-2415, 2469-2503.
2. The reference to Quick and Garran is to the *Annotated Constitution of the Australian Commonwealth*, 1901, p.671.
3. The declaration by the Senate in respect of the States Grants (Tertiary Education Assistance) Bill 1981 was as follows:

That the Senate declares that it is in accordance with the Constitution for the Senate to amend the States Grants (Tertiary Education Assistance) Bill 1981 by rejecting clause 6 of the Bill, and by leaving out other provisions of the Bill relating to the power of the Minister to make determinations under clause 6, or alternatively for the Senate to amend clause 6 of the Bill by requiring that any instrument signed by the Minister thereunder be approved by resolution of both Houses of Parliament, or alternatively for the Senate to divide the Bill so as to incorporate in a separate Bill the provisions relating to the imposition of certain fees by tertiary institutions. (The second alternative was added by way of amendment to the motion.)

Clause 6 of the bill empowered the responsible Minister to determine that fees should be paid by certain students undertaking courses in certain institutions. Grants to a State provided for in the bill could then be reduced by an amount of fees which should be collected by institutions in the State. The removal of the power to make determinations under clause 6 therefore had the effect of removing a power of the Minister to reduce the grants to the States specified in the bill.

The Senate deleted clause 6 from the bill.

ATTACHMENT 2

PRESSING OF REQUESTS

The essence of the argument that the Senate may not press a request is that there must be some difference between an amendment and a request, and that that is the difference. This argument disappears if it is concluded that the difference between an amendment and a request is procedural only. The Constitution prescribes a number of matters of procedure, and to say that the difference is one of procedure is not to deny its importance. The distinction between an amendment and a request, according to this view, is closely related to another matter of procedure prescribed by section 53 of the Constitution, the exclusive right of the House of Representatives to initiate bills for appropriating money or imposing taxation. The provision relating to requests preserves that initiative without affecting the substantive powers of the Senate.

The following considerations support this thesis and the right of the Senate to press its requests for amendments.

- (1) There is nothing to prevent the Senate pressing its requests. If the constitution-makers had intended that the Senate be prohibited from pressing a request they would have provided some mechanism for enforcing the prohibition.
- (2) At the Constitutional Convention of 1898 an amendment to insert the word "once" in the relevant paragraph of section 53, to prevent the Senate repeating a request, was defeated.
- (3) Delegates to the Constitutional Conventions, including Sir Edmund Barton, indicated that the difference between an amendment and a request would be one of procedure only, the rationale of the difference being to preserve the right of the House of Representatives actually to alter the text of a bill by amendments involving additional appropriations or taxation.
- (4) The relevant paragraph of section 53 provides that the Senate may "at any stage" return a bill to the House of Representatives with requests. Even if "at any stage" is interpreted as meaning at any stage in the Senate's initial consideration of the bill, as has been suggested as an argument against the pressing of requests, the Senate could press a

request many times by reiterating it at each stage of the consideration of a Bill, and could provide in its own procedures that non-amendable Bills pass through 100 stages.

- (5) Even if the Senate could not press the same request, it could easily circumvent such a restriction, for example, by slightly modifying a request on each occasion on which it was repeated. It cannot be supposed that the constitution-makers intended to impose a prohibition which could so easily be circumvented.
- (6) The Senate has successfully pressed requests on many occasions since 1901.

On the basis of these considerations the right of the Senate to press requests has been supported by many eminent and learned authorities, including Senator Sir Josiah Symon, Senator, later Mr Justice, R.E. O'Connor, and Mr W.M. Hughes, M.P.

It has long been agreed that the provisions of section 53, because they refer to the internal proceedings of the two Houses on proposed laws, as distinct from enactments of the Parliament, are not justiciable, and depend for observation and compliance upon agreement being reached between the two Houses. For example, if the Senate were to pass a bill imposing taxation or an amendment directly increasing expenditure, the only remedy would be for the House of Representatives to decline to consider the bill or the amendment. Similarly, the Senate may decline to pass a bill until its amendments or requests are agreed to by the House.

To say that the provisions of section 53 are not justiciable and rely for enforcement upon the dealings of each House with the other is to say that those provisions are procedural only. A real limitation on legislative power requires a means of legal enforcement. In that respect, section 53 is to be contrasted with section 55, which provides that a law imposing taxation shall deal only with the imposition of taxation, and also provides that a law made in violation of that rule shall be of no effect.

Section 53 is thus a procedural section, prescribing procedural rules for the Houses to observe. Where those rules require interpretation, it is also for the Houses, in their transactions with each other, to supply that interpretation by application. It is suggested that, in their dealings with Senate requests over the years, the Houses have supplied the required interpretation so far as the pressing of requests is concerned.

NOTES TO ATTACHMENT 2

- 1 Proceedings on the amendment moved at the 1898 Convention are at pp. 1996-1998 of the Debates of the Convention.
- 2 Sir Edmund Barton's speech: Adelaide Convention, 1897, Debates p. 557.
- 3 Remarks of Senator Sir Josiah Simon: Hansard, 9/9/02, pp. 15813-28; of Senator O'Connor: *ibid.*, p. 15829; of W.M. Hughes: Hansard, 3/9/02, pp. 15705-6.

**THE LEGISLATIVE PROCESS IN THE PARLIAMENT OF THE
COMMONWEALTH**

AMENDMENTS AND REQUESTS

A BACKGROUND PAPER

[document not scanned]

AMENDMENTS AND REQUESTS

HOUSE OF REPRESENTATIVES PAPER

In June of this year there was a disagreement between the Houses over whether a certain Senate amendment should have been a request, in respect of the Local Government (Financial Assistance) Amendment Bill 1992, and on 18 August a further paper on the subject of amendments and requests was tabled in the Senate. Earlier papers dated 1981 and 1989 were tabled on 6 March 1989. The most recent paper analysed the constitutional point in issue, suggested principles on which it should be interpreted, examined the sources of the difficulties of interpretation as illustrated by the past cases of disagreement, looked at the past inconsistencies in the application of the constitutional provision, and suggested that adoption of the proposed principles would avoid future confusion.

On 9 November 1992 the Speaker tabled in the House of Representatives a paper on the subject, which is largely a response to the Senate papers and which gives expression to the view taken by the House's advisers. The following observations are made on that paper.

Unfortunately, the House paper does not help to resolve the relevant issues. It proceeds by way of setting up and knocking down a number of straw men, arguments which are represented as the arguments in the Senate papers, but which are not in fact advanced in those papers. In particular, it misrepresents the central question in issue, whether a necessary, clear and direct effect on expenditure should be required before a request is contemplated.

Before proceeding to that central issue, I note in passing some of the subsidiary straw men set up by the House paper.

- Both the Speaker's statement on presenting the paper and the summary at the front of the paper suggest that part of the Senate argument is that beneficiaries of some proposed benefit may not apply for it. Such an argument was not advanced in any of the Senate papers. It has not been claimed that a request may be eschewed simply on the basis that beneficiaries may not apply for benefits.
- Much is made (eg., at pp 14-15) of the outcome of the 1903 debate in the Senate, as if that refuted the view taken in the Senate papers. On the contrary, the 1981 Senate paper made it clear that, although the view preferred in the relatively simple case in 1903 was that a charge or burden meant an increase in an appropriation, this did not dispose of the potential difficulties in the relationship of appropriations and expenditure which were raised in the debate at that time, and which have become more pertinent in the context of

modern government drafting practices and complex provisions impinging on expenditure out of standing appropriations.

- It is suggested (at p 10) that the Senate papers dispute that simple increases in the size of ordinary appropriations should be requests. In none of the Senate papers is any such simplistic argument advanced. The Senate papers, on the contrary, suggest that an increase in an appropriation is a necessary but not a sufficient condition for a request. An impact on expenditure of simple increases of ordinary appropriations may readily be determined. Amendments increasing ordinary appropriations are now never moved. Those kinds of amendments are not the problem.
- References are made throughout the House paper to the position of the Senate papers as requiring a demonstration of an increase of expenditure as a matter of "logic". It is not clear what the House paper believes this word to mean, but it is not used in any of the Senate papers, which do not advance any proposition that there must be some logical demonstration of an increase in expenditure, but rest on an analysis of particular provisions.

Turning to the central issue, the need for a necessary, clear and direct effect on expenditure to be demonstrated, the House paper represents the argument of the Senate papers as involving a choice between that position and virtually every amendment becoming a request, and says that this is a false dichotomy. This is a misunderstanding of the point made in the Senate papers. That point is that, without such a principle to guide us through the intricacies of contemporary legislation, we will tend to slide into a position of more and more amendments becoming requests, particularly as the House's advisers become more conscious of the question and make ad hoc decisions in each particular case. As the Senate papers suggested, whether there is an insistence by the House on a request depends largely on whether its advisers detect possible implications for expenditure in Senate amendments. With those advisers now sensitising their noses to scents of money, and lacking any principle on which to determine difficult cases, there will be more and more insistences that amendments become requests. The suggested principle of a necessary, clear and direct effect on expenditure is required by the types of legislation often amended in the Senate, because many provisions have possible, but difficult to determine, impacts on appropriations and expenditure. It would be a different matter if the House paper suggested some contrary principle on which to determine difficult cases, but it suggests no principle at all, a point to which I shall return.

The case of the Social Security Legislation Amendment Bill (No. 4) 1992 is discussed (at p 14) as if it were a question of beneficiaries not applying for benefits. On the contrary, because of the nature of the legislative provisions, it was entirely unclear, as press reports subsequently indicated, whether there would be any beneficiaries at all, or whether the intended class of

beneficiaries was in fact an empty class, because of the convoluted and uncertain way in which membership of the class was determined.

In this connection, the argument in the House paper that regard must be had to the expectations of the legislators in making an amendment founders on this case, because this bill shows that, in the context of the sorts of provisions under consideration, expectations are often a poor guide to actual effects. Expressions of expectations are usually directed to policy hopes rather than the question of the actual effect on expenditure. The government insists on putting forward legislative proposals of this sort, without any real idea of the cost, generating perhaps entirely misplaced expectations, and then requires the Senate to act as if there were precise knowledge of the actual effect.

The House paper avoids any reference to the fact that the amendments to this bill were *government* amendments. This, and other matters referred to in the 1992 Senate paper, indicate that the government's and House's advisers have simply been confused on the distinction between amendments and requests.

The House paper complacently accepts, at p 15, that the Houses will continue to pass legislation the financial impact of which is basically not known. It would be more helpful for the attention of members to be drawn to the suggestion of the 1992 Senate paper that legislating be done more carefully. As long as the Houses persist, in effect, in legislating carelessly at the direction of government the problem in relation to amendments and requests will persist as the least important consequence. The most important consequence is almost complete absence of parliamentary control over expenditure.

The theme of the House paper is simply that all cases must be "determined on their merits". This is a recipe for further confusion, inconsistencies and disputes. As the last Senate paper suggests, the lack of any principle to determine difficult cases simply results in ad hoc decisions and ludicrous inconsistencies, as exactly similar cases are determined in different ways. The eight earlier cases referred to at p 10 of the Senate paper are embarrassing for the ad hoc approach. Those cases indicate the confusion generated by "deciding cases on their merits".

There is probably another basis for this view that all cases should be "determined on their merits". Without any guiding principle the House's advisers are able to insist on their view prevailing in particular cases without regard to the inconsistencies which result. My conversations with House officers about disputed cases invariably end with a statement along the lines of "Well, we will advise the Speaker to rule our way, which he will, and the government will support him". In other words, their view must always prevail, whatever it may be and regardless of any reasoning.

The great difficulty in obtaining any reasonable resolution of this matter is that the House and its members never actually consider it. Mr Sinclair started to consider it in the House in June, but was stopped. Nor is any thought given to the complex legislative provisions which give rise to the problem or to the total neglect of parliamentary control over expenditure involved in those provisions. As a long-serving and senior member of the House said recently, "the House of Representatives is simply not doing its job. It is not examining legislation." (Mr J.J. Carlton, MP, House of Representatives *Hansard*, 12/11/92, p 3305).

The Speaker has indicated that he intends to follow the "approach" set out in the House paper, and, as this is simply determining cases ad hoc, this means that further disputes are bound to arise, because it is impossible to predict whether the House's or the government's advisers will detect a scent of money in particular amendments and which way they will jump. One possible way of avoiding disputes is to have all Senate amendments in the form of requests whenever there is a faint scent of money, and hope that the consequent inconvenience to the government of having Senate amendments constantly returned to the Senate will bring the government's advisers around to adopting some appropriate principles. As the 1992 paper indicates, cases in the past have often been determined simply by the desire to avoid that inconvenience. Such a process might also direct attention to proper control of expenditure, which is the real solution to the problem.

(Harry Evans)

AMENDMENTS AND REQUESTS:

COMMENTS ON SENATE PAPER OF 20 NOVEMBER

On 9 November a background paper on the issue of amendments and requests was tabled in the House of Representatives. On 26 November a response to the paper by the Clerk of the Senate, Mr Evans, was tabled in the Senate. According to Mr Evans, the House paper does not help to resolve the relevant issues, it proceeds by setting up and knocking down a number of straw men, it misrepresents arguments in Senate papers, and the failure to follow a principle he has put forward will cause problems.

The House paper was a discussion paper for Members and any other interested persons. It sought to assist in the understanding of these matters by drawing together relevant information. It analysed the relevant parts of section 53 of the Constitution and drew on the records of debates and on the writings of others, including Mr Evans. It was at pains to avoid misrepresentation, although some paraphrasing was necessary, especially in the summary. To ensure that interested Members had access at first hand to views put forward in Senate papers, a copy of Mr Evans' paper of 31 July 1992 was attached to the House paper and distributed with it.

It is not necessary to comment on each point made by Mr Evans. This note is therefore concerned with the more important issues.

An important matter about which there is disagreement concerns a principle according to which, Mr Evans proposes, cases should be determined. The essence of his proposition is that unless an amendment would of necessity, clearly and directly involve an increase in expenditure, it is available to the Senate and need not be moved as a request.

The House paper rejected this proposition (as it rejected another extreme test which might work against the legitimate interests of the Senate). The proposed principle has some superficial appeal, but, in practice, it is not seen as an appropriate basis on which to determine such matters. Such an approach seems to represent a return to a line of thinking not supported by either House during the major debate on these matters in 1903. It seems to represent a hardening of an approach and one that is not favoured in the Senate's own standard authority, *Australian Senate Practice*.

In practice, the acceptance of such a simple principle could see the Senate pursue as amendments, and not requests, proposals which would in practice cause an increase in expenditure. The real problem arises in relation to establishing whether such an increase is a necessary consequence of a proposed amendment. Such a connection may be difficult to actually prove at the time a matter is being considered. It is quite common, for instance, to establish detailed procedures or mechanisms to govern the operation, at an administrative level, of various schemes involving expenditure. This may involve giving responsibility to a Minister or to particular officials in relation to particular points. The end result may mean that there are a number of steps in the chain of causation before expenditure is in fact increased. Nevertheless it may be the intention of parliamentarians involved to confer a benefit on a group or category of persons. For all practical purposes, and even if the exact increase in

expenditure cannot be predicted, there will most certainly be an increase as a result of the proposal. To insist that, unless such an increase can be proven to be a necessary consequence of the proposal, the proposal may be pursued by the Senate as an amendment, and not a request, could have many a "proposed charge or burden on the people" increased by the Senate. This would be contrary to the provisions of section 53 of the Constitution.

The argument that regard must be had to the expectations of the parliamentarians involved is criticised in the latest Senate paper. It refers to proceedings in relation to the *Social Security Legislation Amendment Bill (No.4)* 1991, and says that, in the context of the sorts of provisions under discussion, expectations are often a poor guide to actual effects. (On that occasion a dispute arose in relation to a Senate "amendment" to extend eligibility for welfare benefits to certain farmers, subject to various conditions. The Senate's right to pursue this as an amendment was disputed because of the impact on expenditure.) On this occasion the Government estimated that the financial impact of the amendment in question would be some\$31.7 million over 2 years, but the very nature of the problems the Senators and Members were grappling with (hardship being suffered by farmers or farming families) meant that a truly reliable estimate of the financial impact – let alone a necessary consequence – could not be established. Such realities do not however mean that regard must not be had to the expectations of these Members involved -indeed to ignore their intentions and expectations would surely be wrong.

The House paper rejected the test proposed in the Senate papers. Equally, and consistent with comments made in *House of Representatives Practice*, it rejected any line which would have what might be called ordinary Senate amendments (amendments having no clear financial impact) objected to just because, ultimately, virtually all legislative provisions may have some impact on expenditure. As the House paper suggested, it is difficult to envisage the House taking such a view – let alone the Senate tolerating it.

The conclusion of the House paper was that neither extreme was appropriate and that it was necessary to look closely at the details of each proposal, in the context of the bill in question and any existing legislation.

The House paper did not offer any particular formula as an alternative to the principle proposed by the Clerk of the Senate. The paper recognised the unavoidable obligation to look at the practical consequences of such proposals, having regard to the plain words of section 53 of the Constitution.

There is no reason to believe that such an open and practical approach will mean that "we" will "tend to slide into a position of more and more amendments becoming requests".

The intention of the House paper was to contribute to discussion on these matters, and to point out some of the principles and the practical issues involved. There was, and is, no intention to adopt any anti-Senate line. The Senate has apparently operated successfully for decades before the principle put forward in the Senate papers was proposed. It is hard to believe that, unless this line is followed, there will now be some sort of decline in the power of the Senate in these matters.

In the absence of agreement on any particular approach, future cases would presumably be considered in the light of the information available to Members and others involved -as have

previous cases. No doubt compromise will be reached on many cases, and it is unlikely that perfect consistency will be achieved on either side of Members' Hall. Nevertheless, one is entitled to presume that these matters will be approached in good faith and with commonsense by all involved. Given this, it is unlikely that there would be any threat or danger to either House as a result of the failure to endorse the principle put forward by the Clerk of the Senate.

This note has not sought to respond to each of the detailed points made by Mr Evans, but two do need comment. After referring to the position of the House and its Members on the issue of amendments and requests, the paper states:

"Nor is any thought given to the complex legislative provisions which give rise to the problem or to the total neglect of parliamentary control over expenditure involved in those provisions" (p. 4).

Such sweeping allegations are easy to make. This one is particularly gratuitous. Presumably it is meant to refer to Members, but if so it ignores the fact that over many years Members of all parties have expressed, in the House and elsewhere, concerns about issues such as the volume and complexity of legislation coming before the House, as well as the impact of some provisions on parliamentary control over expenditure (see, for example, the work of the Procedure Committee and views of Members such as the Hon. G. G. D. Scholes, Mr D. M. Connolly and the Hon. Barry Jones). Ironically, immediately after making this comment, Mr Evans quotes the Hon. J. J. Carlton. While Mr Carlton was complaining in the context of the lack of time available for the House to consider legislation, he was of course aware of and giving thought to the issues – hardly evidence to support the contention "Nor is any thought given to the complex legislative provisions"!

After complaining about what are seen as the dangers of determining cases on their merits, the Senate paper says there is probably another basis for this view: that without a guiding principle the House's advisers are able to insist on their view prevailing in particular cases. It goes on: "In other words, their view must always prevail, whatever it may be and regardless of any reasoning". This paragraph seems to question the motivation of those involved in the House paper. The implication is rejected. Any suggestion that the failure to endorse the proposed principle and the comment that cases would need to be determined on their merits may have been motivated by a desire to ensure the view of the House's advisers could always prevail is nonsense. The simple, if inconvenient, fact is that the line of reasoning put forward by Mr Evans was seen as just as inappropriate as the opposite extreme. Those involved in preparing the discussion paper were not motivated by any desire to achieve an outcome which might in some way help any views they might hold to prevail in future cases. There was no attempt to assert the special rights of either House, the intention was to set down relevant issues and factors for the consideration of Members. The importance of respecting the constitutional provisions was the underlying assumption.

The criticisms of the House paper expressed by the Clerk of the Senate, and his concerns at the consequences of a failure to follow the principle he has proposed, should be taken into consideration by Members when forming their views on the issues. The authors of the House paper have not been convinced that anything needs to be withdrawn from the 9 November paper. Any agreement the Houses might be able to reach to help in resolving future cases would be welcome, but the line favoured by the Clerk of the Senate is not accepted as a good basis on which to proceed.

Clerk's Office
House of Representatives
8 December 1992

THE SENATE

AMENDMENT OF TAXATION AND APPROPRIATION LEGISLATION

Section 53 of the Constitution imposes three limitations upon the powers of the Senate to amend legislation, as follows:

- (a) the Senate may not amend a bill imposing taxation;
- (b) the Senate may not amend a bill appropriating money for the ordinary annual services of the government; and
- (c) the Senate may not amend a bill so as to increase any charge or burden on the people.

Section 53 also provides that where the Senate may not amend a bill it may request the House of Representatives to make the amendment. The distinction between making an amendment and making a request for an amendment is purely procedural, in that the Senate can decline to pass a bill until the House agrees to a request, as it can in the case of an amendment. Section 53 also provides, in its last paragraph, that apart from these limitations the Senate has equal powers with the House of Representatives in respect of bills.

Limitation (a) applies only to bills which impose taxation. Legislation dealing with taxation consists of bills which actually impose the taxation (by the use of the words "tax is imposed" or similar words) and bills which do not impose taxation but which make provision in relation to the levying and collection of taxation. In relation to income tax, for example, there are the income tax bills which actually impose income tax and the income tax assessment bills which deal with such things as exemptions from income tax. Similarly, sales tax is dealt with in sales tax bills and sales tax (exemptions and classifications) bills, the former actually imposing the tax and the latter dealing with the categories of goods on which the tax falls and exemptions from tax.

The reason for taxation legislation being divided between different bills in this way is to be found in section 55 of the Constitution, which provides that laws imposing taxation must deal only with the imposition of taxation and only with one subject of taxation in each law. Because

it refers to laws rather than bills, section 55 is clearly justiciable and has been the subject of judicial interpretation.

Thus the Senate may not amend bills which provide for the imposition of income tax or sales tax but can amend the associated bills which deal with the other matters relating to those taxes. By amending an income tax assessment bill or a sales tax (exemptions and classifications) bill the Senate may alter the incidence of taxation, with the result of freeing some persons or objects from taxation or making some persons or objects subject to taxation, but such amendments are permissible because they are not amendments to the actual imposition of taxation. If the Senate wishes to amend a bill imposing taxation the amendment must be made by way of a request to the House of Representatives.

Judgments of the High Court on section 55 lead to the conclusion that the government's drafters have been, and are, overcautious in strictly limiting the bills which impose taxation to the provisions which actually impose the tax and putting everything else into the other bills. Much of the material now in the income tax assessment legislation and the sales tax (exemptions and classifications) legislation could be validly included in the acts which impose the taxation. This situation, however, does not affect the moving of amendments in the Senate or the conclusions here set out. If a bill does not contain the actual imposition of taxation, it may be amended.

Appropriation bills are similarly divided into appropriation bills for the ordinary annual services of the government and bills which are for services other than the ordinary annual services of the government. Section 54 of the Constitution provides that the two categories of appropriations are to be contained in separate bills. Those appropriation bills which are for the ordinary annual services (usually Appropriation Bills (No. 1) and (No. 3) in each year) are not amendable by the Senate, but the other appropriation bills can be the subject of amendment by the Senate. Like section 53 but unlike section 55, section 54 refers to "proposed laws", ie., bills, and it is therefore considered to be not justiciable. Its interpretation and application is a matter for the two Houses. Section 53 may be regarded as justiciable in part, in so far as its last paragraph requires that laws must be passed by both Houses.

In relation to the prohibition on the Senate amending a bill so as to increase any proposed charge or burden on the people, it has long been accepted that this means that the Senate cannot amend any bill in such a way as to directly increase expenditure under an appropriation, either an appropriation proposed to be made in the bill or an appropriation made by an act which is proposed to be amended by the bill.* Any amendments which would have that effect must be made by way of request. Many amendments made by the Senate may indirectly have the effect

of increasing government expenditure under appropriations, just as some amendments may have the effect of altering the incidence of taxation. The prohibition does not arise, however, unless an amendment relates directly to an actual appropriation proposed in the bill in question or contained in an act proposed to be amended by the bill.

(Harry Evans)

October 1990

- * The basis of this interpretation, expounded in debate in the Senate in 1903, is that the "charge or burden" provision must refer to appropriations because it cannot refer to taxation measures (ie., bills imposing taxation), which cannot be amended in any case. There is, however, at least one circumstance in which the provision may apply to taxation measures. A bill which abolishes a tax or reduces it cannot be regarded as a bill imposing taxation and is therefore a bill amendable by the Senate. If the Senate were to amend such a bill to retain the tax or levy it at a rate higher than that proposed, however, such an amendment may be regarded as contrary to the "charge or burden" provision unless put in the form of a request.

"SUPPLY"

There is a great deal of confusion about the processes by which the Parliament appropriates money for the operations of government and the terminology applying to those processes.

In particular, the word "supply" has come to be used for virtually any appropriation of money, and any rejection or amendment by the Senate of any appropriation bill, or even any bill having any financial content, is liable to be referred to as "blocking supply".

In order to clear up the confusion it is necessary first to clarify the terminology.

"Supply"

Strictly speaking, supply is the money granted by the Parliament in the two supply bills which are usually passed in April-May of each year, and which appropriate funds for the operations of government during the period between the end of the financial year on 30 June and the passage of the main annual appropriation bills. The latter appropriate funds for the whole financial year and are passed in October-November.

The term "supply" may be loosely applied to all of the annual appropriation bills, that is the main annual appropriation bills passed in October-November, the additional appropriation bills passed in April-May and the supply bills, since those bills together annually provide the funds necessary for government to operate. It is not legitimate to apply the term to any other appropriation bills, or to the revenue raising measures properly called tax bills (see below).

The funds appropriated by the supply bills are divided between two bills to separate the provisions which are amendable by the Senate from those which are not amendable by the Senate (see under "Money Bills" below).

"Money Bills"

The term "money bills" may be used to refer to all bills which appropriate money. This includes not only the annual appropriation bills, which consists of the two main appropriation bills passed in October-November and the additional appropriation bills passed in April-May, but also any other bills which appropriate money. There are many bills which appropriate money for particular purposes, and, in most of these, the appropriation is continuing and does not have to be renewed annually.

Under section 53 of the Constitution bills which appropriate money may not originate in the Senate, and it is therefore legitimate to use the term "money bills" to refer to all such bills.

The term "money bills" is also used, however, to refer only to that category of appropriation bills which under section 53 may not be amended by the Senate, that is, bills which appropriate money for the ordinary annual services of the government. Not all appropriation bills fall into this category.

The term "money bills" is also used to include bills which impose taxation, which may not originate in the Senate. Such bills, however, are more properly called tax bills (see "Tax Bills" below).

The annual appropriation bills and the supply bills always appear in pairs because the provisions which appropriate money for the ordinary annual services of the government, and which may not be amended by the Senate, must, under section 54 of the Constitution, be separated from those provisions which appropriate money for services of the government other than ordinary annual services. (The distinction between ordinary annual services and other services is a matter for interpretation and was delineated by an agreement between the Senate and the government in 1965.)

"Tax Bills"

The term "tax bills" should properly be confined to bills which impose taxation and which, under section 53 of the Constitution, may not originate in the Senate and may not be amended by the Senate.

Under section 55 of the Constitution, laws imposing taxation must deal only with one subject of taxation, and must deal only with the imposition of taxation. Provisions dealing with the

assessment and collection of taxation are contained in separate bills, and such bills should not be referred to as "tax bills". A proper term for them would be "tax assessment and collection bills".

"Budget Measures"

The term "budget measures" is used to refer to all bills which put into effect the financial measures proposed in the Treasurer's budget speech. The term covers not only the main annual appropriation bills and any bills containing increases in taxation proposed in the speech, but bills making minor adjustments to appropriations, taxes or government outlays.

Thus the only distinguishing characteristic of "budget measures" is that they have been proposed in the budget speech. It is not, therefore, a useful category of bills: it does not indicate the importance of the bills, and bills appropriating money, imposing taxation or carrying out other financial measures, including bills of great importance, may not be budget measures simply because they were not referred to in the budget speech.

The Confusion of Concepts

The conceptual confusion surrounding these categories of bills occurs because of two factors.

First, the above terms are used as if they were interchangeable without any regard to the distinction between them.

Secondly, the above terms are used to include all bills which refer to financial matters or which have some financial implications. This category virtually includes all bills presented, because every piece of proposed legislation has some financial implications.

Appropriation bills and tax bills are the only useful categories of bills because they are the only categories which are given special treatment by the Constitution. All other bills are treated alike, although the other classifications referred to above may occasionally be employed legitimately to characterise particular bills.

It is an easy matter to distinguish between the two useful categories of bills. Money bills, which should properly be called appropriation bills, are those bills which contain clauses which state that money, of specified or indefinite amount, is appropriated for the purposes of the bills. A bill which does not have such a clause is not an appropriation bill. A tax bill is a bill which contains

a clause which states that tax is imposed at a specified rate upon a specified subject. Any bill which does not contain such a clause is not a tax bill.

Powers of the Senate

Discussion of the various categories of financial measures usually takes place in the context of the powers of the Senate.

Section 53 imposes only three limits upon the powers of the Senate, as follows:

- (a) the Senate may not amend any bill imposing taxation;
- (b) the Senate may not amend any bill appropriating money for the ordinary annual services of the government; and
- (c) the Senate may not amend any bill so as to increase any proposed charge or burden on the people.

Section 53 provides that where the Senate may not amend a bill it may request the House of Representatives to make the amendment, and, in its last paragraph, that the Senate may reject any bill.

Limitations (a) and (b) are clear because they relate to definite categories of bills.

Limitation (c), however, requires interpretation. The phrase "any proposed charge or burden on the people" has traditionally been taken to refer to appropriation bills or to bills which amend, directly or indirectly, appropriation provisions in statutes, and the limitation has been taken to mean that the Senate may not amend such a bill in any way which would directly increase expenditure under the appropriation involved.

Where the Senate cannot amend a bill, it may request the House of Representatives to make amendments. The distinction between amendments and requests is purely procedural. In practical terms the distinction is of no consequence, because when the Senate makes requests the bill is returned to the House of Representatives as with amendments, and does not pass until the two Houses have agreed in relation to the requests.

"Vital Measures"

Another concept which is sometimes used in discussion is that of "measures vital to government" or "measures vital to the survival of a government".

The bills which may be regarded as falling into this category are:

- (a) the annual and additional appropriation bills and the supply bills (without which government would not be able to continue to fund its various services); and
- (b) tax bills which impose income tax (without which there would be insufficient revenue to appropriate in the appropriation and supply bills).

If any of these bills were not passed by the Parliament the government would not be able to continue to function. The failure to pass other bills, however, would not in normal circumstances prevent the continuing operations of government.

Harry Evans

November 1990