AUSTRALIAN SENATE

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22 November 2010

Senator Gavin Marshall
Chair
Education, Employment and Workplace Relations Legislation Committee
The Senate
Parliament House
Canberra ACT 2600

Dear Senator Marshall

SOCIAL SECURITY AMENDMENT (INCOME SUPPORT FOR REGIONAL STUDENTS) BILL 2010

I thought it would be useful to provide the committee with a submission on this bill in view of the constitutional questions that have been raised about it. Claims have been made that it is not a bill that can be introduced in the Senate because of section 53 of the Constitution. This submission argues that claims that the bill should not have been introduced in the Senate are not in accordance with the views and practices of the Senate as they have been expressed through legislative and other action by the Senate from its inception.

Section 53 provides as follows:

> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.
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> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the government.
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> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any such omissions or amendments, with or without modifications.
>
> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

This section, which was regarded as a significant constitutional innovation, was the key to the constitutional settlement at the heart of the foundation of the Commonwealth of Australia because it balanced what was, in all other respects, a very powerful Senate, designed to protect the interests of the States, with the concept of responsible government expressed through the design of the House of Representatives. It did this by limiting the financial powers of the Senate in very specific ways, preventing the Senate from initiating appropriations or taxation measures (the first paragraph) and requiring that any proposed amendments by the Senate that would have the effect of increasing expenditure under an appropriation would need to take the form of requests for amendments (the third paragraph). Furthermore, any amendments to proposed laws appropriating money for the ordinary annual services of the government, a term with very specific meaning, or imposing taxation would also need to take the form of requests (the second paragraph).

Since 1901, the two Houses of the Commonwealth Parliament have been testing their relative powers in relation to financial legislation. There is a long history of the Senate defining its constitutional role under section 53 and of taking action in accordance with its interpretation of that role. Senate Clerks have been writing treatises on the financial powers of the Senate since 1908. [1]The practices of the Senate are recorded in chapter 13 of *Odgers' Australian Senate Practice* (12th edition, 2008). The House of Representatives has the same right to determine its position, and its practices are recorded in *House of Representatives Practice* (5th edition, 2005).

In a section of chapter 13 of *Odgers' Australian Senate Practice*, entitled "Terminology", in the context of a discussion of the utility of such terms as "money bills", "tax bills" and "budget measures", the following very useful distinctions are made:

> The conceptual confusion surrounding these categories of bills occurs because these terms are used as if they were interchangeable without any regard to the distinction between them. The terms are also 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.

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1 For a list of such works, see commentary on standing order 141 in Commentaries on the Standing Orders at: http://www.aph.gov.au/Senate/pubs/aso/so_141.htm#so_141f1 or *Annotated Standing Orders of the Australian Senate* (2009), ed. Rosemary Laing, p. 432.

> 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 and the Houses have equal powers in relation to them.
>
> The two useful categories of bills are distinguished by their defining characteristics. 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 purpose 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 provides that tax is imposed on a specified subject, either by setting a new tax or raising the level of an existing tax. A bill which does not contain such a clause is not a tax bill. (page 277)

In the mid-1990s, committees of both Houses undertook inquiries into the third paragraph of section 53 but a common position was not able to be reached and a scheme suggested by the Procedure Committee (in its *First report of 1996*) for dealing with issues arising under the third paragraph of section 53 was not implemented. An outcome of that process, however, was an order of the Senate requiring any amendments circulated in the form of requests to be accompanied by a statement explaining why the amendments were being circulated as requests, together with a statement from the Clerk of the Senate on whether the characterisation of the amendments as requests was in accordance with the practices of the Senate. This practice continues to this day.

The Houses have disagreed with one another on the interpretation of aspects of section 53 for 110 years but as section 53 refers to "proposed laws" rather than "laws", the framers of the Constitution left it to the Houses to settle the matter between them. It is not a matter that is justiciable. Indeed, the High Court has repeatedly indicated that this is the case. (See *Odgers' Australian Senate Practice*, page 279 for references.)

The issue here relates to the first paragraph of section 53 which states that "proposed laws appropriating revenue or monies, or imposing taxation, shall not originate in the Senate". The first paragraph is about the power of the Houses to initiate bills whereas the second and third paragraphs place limits on the Senate's power to amend bills. The Social Security Amendment (Income Support for Regional Students) Bill 2010 is not a bill that appropriates money. It does not contain any clause that could be characterised as an appropriation. This characterisation of the bill is entirely in accordance with the passage quoted above from *Odgers' Australian Senate Practice* which is an analysis and description of the practices of the Senate.

Income support for students is an entitlement under the *Social Security Act 1991* and is funded by a special or standing appropriation of indefinite amount in section 242 of the *Social Security (Administration) Act 1999*. The appropriation provision has the effect that any entitlements are automatically paid regardless of amount or duration. Where an appropriation is already of an indefinite amount, it is difficult to argue that any policy decision would increase demand on a fund which is both undetermined and indeterminable. Referring again to *Odgers*:

> The Parliament has passed 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. (page 291)

When the Parliament agrees to a standing or special appropriation, the relevant agencies have effectively been given a perpetual blank cheque for payments to be made. This means that a bill to change entitlements, such as providing wider access to income support, does not need to appropriate any money because the appropriation is already in place. Such bills are therefore not appropriation bills and may be introduced in the Senate by any Senator.

Bills of this nature have previously been introduced in, and passed by, the Senate. A recent example is the Urgent Relief for Single Age Pensioners Bill 2008, a private senator's bill which provided for an increase in the aged pension. The House declined to consider the bill but, as debate on a motion moved by the Government to the effect that such bills should be introduced in the House was gagged, there was no explanation or analysis of the issue. Another example is the National Health Amendment (Pharmaceutical Benefits) Bill 2007 which created an entitlement to pharmaceutical benefits in respect of prescriptions issued by optometrists, to be funded out of a standing appropriation in the principal Act. A Government bill introduced in the Senate, it was subsequently agreed to by the House without demur. These bills are the equivalent, in all constitutional respects, of Senator Nash's bill which is the subject of the committee's inquiry. The only difference in their treatment by the House of Representatives was that one was a Government bill and one a private senator's bill.

It might be observed that in these cases the Senate was doing by way of initiation something that it could not do by way of amendment (because of the third paragraph of section 53), and that this must surely not have been intended by the Founding Fathers. As chapter 13 of *Odgers' Australian Senate Practice* (12th edition) explains, the origins of the practice of the Senate making requests under the third paragraph in respect of bills which amend Acts containing standing or special appropriations may itself be a practice that was not envisaged by the Founding Fathers. (See the analysis at pages 290-92 of *Odgers* of factors which have complicated the interpretation of the phrase "increase any proposed charge or burden on the people" in the third paragraph of section 53.) It is apparent that arguments mounted against the Senate's initiation of such a bill under the first paragraph of section 53 have become confused by inferences drawn from the third paragraph and by practice which has been less than pure in its adherence to the principles in section 53. It is therefore suggested that the observation with which I began this paragraph is based on a false premise.

In summary, the introduction of the Social Security Amendment (Income Support for Regional Students) Bill 2010 in the Senate is entirely consistent with Senate practice and with the Senate's interpretation of the first paragraph of section 53.

Yours sincerely

(Rosemary Laing)