PARLIAMENT of AUSTRALIA
HOUSE of REPRESENTATIVES

OFFICE OF THE CLERK OF THE HOUSE
PO Box 6021, Parliament House, Canberra ACT 2600 | Phone: (02) 6277 4111 | Fax: (02) 6277 2006 | Email: clerk.reps@aph.gov.au

25 February 2013

Mr Stephen Boyd
Secretary
House Standing Committee on Economics
Parliament House
CANBERRA ACT 2600

Dear Mr Boyd

APPLICATION OF STANDING ORDER 179 TO A PRIVATE MEMBER'S BILL

Thank you for your letter of 19 February 2013 inviting me to provide some advice in relation to the Minerals Resource Rent Tax Amendment (Protecting Revenue) Bill 2013, which has been referred to the Economics Committee, and the provisions of standing order 179.

Background to financial initiative

Issues to do with the constitutional principle of the financial initiative of the Executive, of which so 179 is a component, have arisen on a number of occasions in the 43rd Parliament and there has been considerable reference to the principle in the House.

To assist members with the issues that have arisen, our office has produced a paper 'The Law Making Powers of the Houses – Three aspects of the Financial Initiative'. The latest version of this paper was presented to the House by the Speaker in June 2012. A copy of the paper is attached.

As noted in the paper, the term 'the financial initiative of the Executive' refers to the constitutional principle that only the government may initiate or move to increase appropriations or taxes. This constitutional principle is captured variously in the Constitution, standing orders and House practice. The detail of the application of the principle in its widest sense is discussed in some detail in the paper. In your letter you ask about standing order 179. I am confining my comments in this letter accordingly.

Standing order 179

Many aspects of the application of the financial initiative in relation to taxation matters are covered in standing order 179 which provides:

(a) Only a Minister may initiate a proposal to impose, increase, or decrease a tax or duty, or change the scope of any charge.
(b) Only a Minister may move an amendment to the proposal which increases or extends the scope of the charge proposed beyond the total already existing under any Act of Parliament.
(c) A Member who is not a Minister may move an amendment to the proposal which does not increase or extend the scope of the charge proposed beyond the total already existing under any Act of Parliament.

In particular, standing order 179(a) provides for the limitations that apply to private members introducing bills (initiating a proposal) on taxation matters. Private members cannot introduce a bill which would impose, increase, or decrease a tax or duty, or change the scope of any charge.

An example

In 2011, the Member for Mackellar (a private member) introduced the Abolition of Age Limit on Payment of the Superannuation Guarantee Charge Bill 2011. The bill had its second reading moved and was debated. The bill proposed to amend the *Superannuation Guarantee Administration Act 1992* to abolish the age limit of seventy years, as it then was, for the compulsory payment of the superannuation contribution.

A detailed examination of the bill raised concerns about the financial initiative in relation both to appropriation and taxation. I will not refer to the appropriation issues.

In relation to the taxation issues, the superannuation guarantee scheme worked in such a way that a charge arose under the *Superannuation Guarantee Charge Act 1992* if there was a shortfall by an employer in respect of the employer's obligations to employees. In this sense the bill was a contingency, rather than a direct impost because, if all employers met their legal obligations, no charge would arise. Nevertheless, the practical effect of the Bill was that the removal of the existing restriction on the age limit was likely to give rise to additional charges to employers because the class of employees covered would have been enlarged. Therefore the bill was regarded as contrary to standing order 179(a) as it was changing the scope of the superannuation guarantee charge by expanding the class of employees covered.

When the bill was called on for further consideration, Speaker Jenkins ruled that the bill could not proceed for reasons outlined above. A motion of dissent from his ruling was moved but defeated. Consequently there were no further proceedings on the bill.

The Minerals Resource Rent Tax Amendment (Protecting Revenue) Bill 2013 (MRRT(PR) Bill)

On 11 February 2013, the Member for Melbourne introduced the MRRT(PR) Bill and it had its first reading.

As I understand it from the Member for Melbourne's presentation speech and explanatory memorandum, the purpose of the bill is to protect the revenue generated from the Minerals Resource Rent Tax from being eroded by increases by state or territory governments to mining royalties.

The current law, the *Minerals Resource Rent Tax Act 2012* (MRRT Act), provides for allowances, including for a miner's Commonwealth, State and Territory mining royalty amounts, to offset the profit from mining projects before the MRRT liability is calculated. The claiming of royalties as credits or offsets in the current legislation is not limited by time.

As I understand the provisions of the Member for Melbourne's bill, the effect of the amendment to the operation of royalties under the MRRT Act, it seems, would be to fix the royalty allowance deductible from the mining profit at the amount of any royalties imposed

as at 30 June 2011. Increases in mining royalties that have been, and could be, imposed after 30 June 2011 would not be able to be treated as royalty credits as permitted by the MRRT Act in its present form. This would seem to have the effect of increasing the ultimate MRRT liability of those mining companies. I note that the Member for Melbourne in his presentation speech referred to estimates from the Parliamentary Budget Office that his bill could increase MRRT revenue by an additional $2.2 billion over the forward estimates and $3 billion by 2016-17. As a result it could be argued that the bill would change the scope of the MRRT charge and its intended or likely effect would be to increase the MRRT liability for miners. If this thinking is accepted it would seem that the proposal, under so 179(a), should only have been initiated by a Minister.

I would be happy to provide any further detail or expand on this advice should the committee wish.

I have provided a copy of this advice to the Member for Melbourne.

Yours sincerely

BERNARD WRIGHT
Clerk of the House

THE LAW MAKING POWERS OF THE HOUSES

THREE ASPECTS OF THE FINANCIAL INITIATIVE

Updated notes for Members

Clerk's Office
House of Representatives
June 2012

CONTENTS

During the present (43rd) Parliament there have been a number of references in the House to the application of the financial initiative of the executive.

The term 'the financial initiative of the executive' refers to the constitutional principle that only the government may initiate or move to increase appropriations or taxes.

Like all standing orders and practices, those concerning the financial initiative regulate proceedings and impose restrictions on all members.

The degree to which the standing orders and practices of the House dealing with the financial initiative reflect and supplement constitutional provisions, and the principles which underpin them, is notable.

The key provisions of the Constitution in relation to financial matters between the Houses are set out in sections 53-56. There have been disagreements between the Houses in respect of the third and fourth paragraphs of section 53 (Senate amendments and requests), but not until recently in respect of the first paragraph (the origination of bills).

These notes deal with three matters which have attracted attention in the current Parliament:

- the origination of bills;
- the introduction of bills by private members; and
- amendments to bills by private members.

Although the rules about the financial initiative are clear, it is acknowledged that their application to particular cases can sometimes be quite unclear.

It is helpful to an understanding of the standing orders and the practice of the House to consider the constitutional provisions and the principles behind them, and so, before dealing with those matters, these notes outline the historical background to the provisions of the Constitution concerning the powers of the Houses and the financial initiative.

1. INTRODUCTION

Constitutional background: Convention Debates

> '… if government is finance and finance is government these clauses must be … amongst the most important in the Bill.' …
>
> *Mr Edmund Barton in presenting a revised draft Constitution Bill at the first session of the Second Convention, Adelaide, 12 April 1897.*[1]

Mr Barton was referring to the clauses that would govern the powers of the Houses in a new federal parliament. The provisions eventually agreed on and the principles reflected in them govern the technical relationship between the House and the Senate.

It is understandable that the proposed provisions were subject to the most protracted consideration during the Conventions, and that it was difficult for delegates to reach agreement on them.[2]

First Convention, 1891

Extensive debate on the powers of the two Houses took place at the first Convention in Sydney in 1891. Basic alignments were between representatives of the less populous colonies on one side, and representatives of Victoria and New South Wales on the other as they considered the terms of a Constitution that would establish a new nation.

One of the great challenges was to reconcile the principles of responsible government, under which the executive drew its authority from the support of the majority in the lower House of Parliament, with the principles of a Federation in which all states would have equal representation. This issue had a theoretical dimension (in terms of the principles of responsible government and the principles of federalism), a practical dimension (in terms of the balance of power in a Federation of states of very unequal populations) and an ideological dimension (in terms of progressive or liberal and conservative thinking).[3]

---

1 Convention Debates, 12 April 1897, p 441.

2 *See especially* Prof J A LaNauze, *The Making of the Australian Constitution* (1972), MUP; *The Sentimental Nation: the making of the Australian Commonwealth*, Dr John Hirst (2000); B Galligan and J Warden, 'The Design of the Senate' in *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986); Anne Twomey, *Senate power in relation to money bills: an historical perspective*, Parliamentary Research Service Research Paper No. 5, June 1994. More recently Prof John Williams, in *The Australian Constitution: A Documentary History*, has done all interested in the constitution a great service by assembling and publishing many key documents, including successive drafts of the Constitution, and he has included informative explanatory essays. House of Representatives Standing Committee on Legal and Constitutional Affairs, *The third paragraph of section 53 of The Constitution*, PP 307 (1995) also provides a useful perspective. *And see* Dennis Pearce, *The Legislative Power of the Senate* in *Commentaries on the Australian Constitution*, Leslie Zines (ed) (1977). The references to the Convention Debates in these notes are taken from an unpublished paper *Against the Odds – lessons from the making of our Constitution* by Bernard Wright (2012).

3 *See*, for example, *Hansard*, 3 April 1891, p 708-11 (Deakin); *and see* Galligan and Warden, *op cit*, pp 94-8; Michael Coper, *Encounters with the Australian Constitution* (1986), p 79-80; La Nauze, *op cit*.

Leading delegates from the less populous colonies argued that the two Houses should have what they called 'co-ordinate' or 'co-equal' powers. The powers of the Houses in respect of financial matters was at the heart of this issue. A key question was whether the Senate should have the power to amend 'money' bills. One of the most important early debates took place on 16 and 17 March 1891.[4] An initial amendment by Sir John Downer (SA) to the second part of Sir Henry Parkes' resolution on the key features of a Federal system, which would have allowed the moving of a further amendment to give the Senate power to amend (in the limited sense of 'veto in detail') money bills, was agreed to. Sir John then moved his 'veto in detail' amendment. To this Mr Wrixon (Victoria) moved an amendment which would have given the Senate a power to reject but not amend money bills. It was clear that this was a major point of difference amongst the delegates, with the potential to imperil further progress.[5] There were references that delegates 'might as well pack their portmanteaux' and go home. Eventually the merits of allowing the matter to stand for further consideration by the Drafting Committee which was to be appointed were recognised and the amendments were withdrawn.[6]

The compromise agreed by the Drafting Committee was known as 'the compromise of 1891'. Consistent with the resolutions adopted, the less populous states would have equality of representation in the Senate with the greater states but the 'definite and unequivocal condition' was that the House of Representatives should have 'the predominating voice in finance and in the control of the Executive'.[7] The draft provided that:

> Laws appropriating any part of the public revenue, or imposing any tax or impost shall originate in the House of Representatives (s 54).
>
> and
>
> The Senate shall have equal power with the House of Representatives in respect of all proposed Laws, except Laws imposing taxation and Laws appropriating the necessary supplies for the ordinary annual services of the Government, which the Senate may affirm or reject, but may not amend. But the Senate may not amend any proposed Law in such a manner as to increase any proposed charge or burden on the people. (s 55 (1))[8]

Part of the compromise was the provision that the Senate could return a bill that it could not amend to the House with a 'request' for amendments – sub section 55(5) of the draft. This was a direct transfer of a provision that had been applied in South Australia since 1857.[9] It owed nothing to Westminster; it reflected local experience.[10]

---

4 *Hansard*, 16 March 1891, pp 375- 409; 17 March 1891, pp 409-463.

5 *See*, for example, speech of Sir Henry Parkes, *Hansard*, 16 March 1891, pp 380-1.

6 *Minutes of Proceedings*, 12 March 1891, p liv.

7 Quick, J and Garran, R, (1901) *The Annotated Constitution of the Australian Commonwealth, Part 1 (1901)*, p 131.

8 Document 15.2 in Williams, *op cit.*

9 Mark Leeming, '*Something that will appeal to the people at the hustings' Paragraph 3 of section 53 of the Constitution*, University of Sydney Law School Legal Studies Research Paper No 10/59 – includes details of the South Australian Compact, and notes that this had been explained by Mr Playford, a South Australian delegate, during debate on the initial resolutions – *Hansard*, 5 March 1891, p 56.

10 The draft contained phrases that were found in some of the colonies' own constitutional laws. *See* Prof John Williams and Ms Gabrielle Appleby 'A tale of two clerks: When are appropriations appropriate in the Senate?' (2009), *Public Law Review*, pp 194, 196-9; *see also* Anne Twomey, *op cit*, and Paul Schoff (1996) "'Charge or Burden on the People': the Origins and Meaning of the Third Paragraph of Section 53

On 31 March, Sir Samuel Griffith presented the committee's report and it was ordered to be printed.[11]

The report was debated at length between 1 and 9 April. The powers of the Senate were again canvassed. Mr Richard Baker, who was to become the first President of the Senate, was a great champion of its rights. Baker had studied federal systems and, according to Mr Alfred Deakin, as well as being in advance of others in 'federal knowledge and in the federal spirit', Baker was concerned about the power the British system of responsible government gave to the people and believed that a structure that reflected federal principles as seen in the United States or Switzerland[12] was more likely to enable the demands of radicals to be contained.[13] Baker moved amendments to reduce the restrictions on the powers of the Senate, but the amendments failed and the formulation that had been agreed by the Drafting Committee stood. The significance of this issue was recognised: at one point Sir Henry Parkes made it clear that the whole federal cause would be at risk if an amendment was made to the compromise.[14] It is not surprising that discussions outside the chamber were important in fostering the 'spirit of compromise' that was so essential for success.[15]

Second Convention, 1897-98

The second Convention, with its elected representatives, met in Adelaide on 22 March 1897. By agreement, Edmund Barton (New South Wales) became Leader of the Convention. As Sir Henry Parkes had done in 1891, Mr Barton's first official task was to propose a series of resolutions. These were very similar to those of 1891. They included a provision for:

> A Parliament, to consist of two Houses, namely, a States Assembly or Senate, and a National Assembly or House of Representatives: the States Assembly to consist of representatives of each colony,[16] ... the National Assembly to be elected by districts formed on a population basis, and to possess the sole power of originating [17] all Bills appropriating revenue or imposing taxation.[18]

---

of the Commonwealth Constitution", *Federal Law Review*, 24(1) at 43; *and* Galligan and Warden, *op cit*, pp 94-8.

11 The report includes the reports of the Finance and Judiciary Committees, and is appended to the official minutes. The documents are also available in Williams, *op cit*, pp 315-7, 341-9, 358-2. Professor Williams also provides helpful explanatory notes about the work of each committee.

12 The Swiss Federation of 1848 drew on the American model. Baker was well aware of the power and prestige of the US Senate, but thought that the US system had not worked well in all respects, and said that the 'great disassociation between the executive and the legislature' there had worked so badly that it should not be followed. He was attracted to the Swiss provisions under which members of the two houses elected the executive – *Hansard*, 18 March 1891, pp 464-6. Others, such as Deakin, were very concerned that what they saw as the democratic principle of responsible government should not be eroded by the use of the Swiss or US models.

13 Deakin, *op cit*, p 38. It should be acknowledged that Deakin was an opponent of Baker's in this.

14 *Hansard*, 3 April 1891, p 721.

15 La Nauze, *op cit*, p 44.

16 Unlike the resolution of 1891, it was not specified that each 'colony' would have the same number of places.

17 Here too the resolution differed from that of 1891, which had stipulated also that the House had the sole power of amending such bills.

18 *Minutes of Proceedings*, 23 March 1897, pp 9-10.

The resolutions were debated over seven days. Once again, a higher level debate allowed the most important issues to be discussed. Predictably, the issue of the relative powers of the two Houses was the subject of much debate. Sir Richard Baker[19] was the first to speak after Mr Barton. He questioned again the appropriateness of the principles of responsible government in a Federation. He referred again to the federal models of the US, where the Senate had great standing, to the more recent Swiss Federation in which each house elected the executive and to the German Federation in which the Bundesrath, the states house, also had great power. He argued that Canada, with its nominated second chamber, was not a true Federation, and championed the rights of the Senate in respect to the executive and in terms of the Senate's powers vis a vis the House's.[20] The Senate's powers in relation to money bills remained a key issue. Mr Barton spoke in reply on 31 March and the resolutions were agreed to – as in 1891, on the voices and without amendment. Committees were appointed again, and a Drafting Committee, effectively a sub-committee of the Constitutional Committee, was appointed.

The powers of the Senate in relation to money bills was a great issue for the Drafting Committee. When Mr Barton presented the new draft bill he said '... if government is finance and finance is government these clauses must be amongst the most important in the bill ...'.[21] The Committee had rejected the 'compromise of 1891'. The exclusive power of origination of the House was now to be limited to bills 'having for their main object the appropriation of any part of the public revenue, or the imposition of any tax or impost' (proposed section 52)[22] – the 1891 draft had imposed a greater restriction on the Senate, requiring that laws 'appropriating any part of the public revenue, or imposing any tax or impost' originate in the House. The committee's draft also provided that the Senate would:

> ... have equal power with the House of Representatives in respect of all proposed laws, except proposed laws appropriating the necessary supplies for the ordinary annual services of the government, which the States Assembly may affirm or reject, but may not amend …[23]

The Drafting Committee had thus reduced both the restrictions on the Senate in terms of the origination of bills and the Senate's right to amend bills – it would be able to amend bills imposing taxation.

Consideration of the committee's draft, which was described as the Commonwealth Bill, commenced on 13 April. An immediate indication of the centrality of the provisions about the powers of the Senate in respect of money bills was agreement to a motion by Sir John Forrest (Western Australia) to suspend standing orders to allow clauses 52-54, which dealt with those matters, to be considered before any other provisions. The debate on those clauses ran over two days, on 13 and 14 April, and was described by Quick and Garran as 'certainly the most momentous of the Convention's whole history'.[24] According to Professor La Nauze, at this stage it became clear that the Convention was a negotiating, rather than a legislative, body.

---

19 Sir Richard had become President of South Australia's Legislative Council in 1893 and had been knighted in 1895.

20 *Hansard*, 23 March 1897, pp 27-31.

21 *Hansard*, 12 April 1897, p 441.

22 Williams, *op cit*, Documents 25.1 and 25.2.

23 Proposed subsection 53(1).

24 Quick and Garran, *op cit*, p 172.

Mr George Reid (New South Wales) was determined to restore the 'compromise of 1891' saying that he would 'dare not submit that the Senate be able to amend taxation bills' to a referendum in New South Wales. The Convention was at a turning point, but rather than allow the matter to be voted on that evening (13 April), Mr Barton said he was unwell and suggested that the debate be adjourned. In words that have often been quoted, Mr Barton's condition was described by Quick and Garran as a 'providential catarrh'.[25] Apparently consultation and lobbying on these matters had been underway for some time, including on a trip to Broken Hill that had been arranged for participants.[26] Lobbying continued after the sitting adjourned on 13 April.[27] This echoed the course of events in Sydney in March 1891.

With 30 representatives the less populous states (South Australia, Tasmania and Western Australia) had a large majority. As Sir John Forrest (WA) asserted – 'We have the numbers': if their representatives voted as a group they would defeat New South Wales and Victoria. Presumably acknowledging the likely fate of the bill in New South Wales in particular (a colony 'reluctant about Federation and essential to its success')[28] if the committee's draft was not amended, Messrs Kingston and Glynn (South Australia) and Henry, Lewis and Brown (Tas) voted with representatives of the more populous colonies in support of Reid's amendment to add 'laws imposing taxation' to the statement of limitation on the Senate's powers of amendment. The amendment was carried by 25 votes to 23.[29] This had been a turning point – if the vote had gone the other way the consequences would have been serious.[30] Further amendment was made at the Sydney session when the many amendments suggested by the houses of the colonies' parliaments were considered (and where proceedings were complex and possibly confused)[31] and again in Melbourne at the final session. Included in the amendments was a broadening of the restriction on the Senate in respect of the origination of money bills; the words 'having for their main object the appropriation of any part of the public revenue' were replaced by 'appropriating revenue or moneys'.[32] According to Quick and Garran a condition of accepting the more broadly worded restriction on the Senate was the acceptance of the qualification on the restriction set out in the second sentence of the first paragraph of section 53.[33] The principle of the financial initiative of the executive was reflected in proposed section 54.

Provisions of the Constitution

Section 53 reflects the compromise eventually agreed to, with sections 54 and 55 protecting the rights of the Senate from misuse by the House of Representatives of the greater power it

---

25 Quick and Garran, *op cit*, p 173.

26 Deakin, *op cit*, p 84.

27 La Nauze, *op cit*, pp 144-5. Wise *op cit* p 235.

28 Hirst, *op cit*, p 176.

29 *Minutes of Proceedings*, 14 April 1897, p 63; La Nauze *op cit*, pp 139-47.

30 *See*, for example, Hirst ,*op cit*, p 172.

31 *Minutes of Proceedings*, 13, 14 and 15 September 1897, pp 31-35; Schoff, *op cit*, p 69.

32 The publication of successive drafts of the Constitution in Williams, *op cit*, is very helpful in showing the evolution of successive drafts of these provisions.

33 Quick and Garran, *op cit*, p 666. The authors also link that qualification to the wording of section 56 – p 680. The rejection of the word 'for' was seen as significant and would, it was said, distinguish the House of Representatives from its counterparts in Washington and Ottawa – p 666. *And see* La Nauze, *op cit*, pp 139-49.

enjoys in financial matters by virtue of the restrictions on the Senate's powers set out in section 53.

Section 56 reflects the principle of responsible government by requiring that 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.

The terms of sections 53-56 are at Attachment 1.

The standing orders[34] and practice of the House reflect these constitutional provisions and the principles that have been understood to underpin them.

A significant number of cases of conflict between the Houses have occurred in respect of the third paragraph of section 53 (Senate amendments) and in respect of the fourth paragraph (Senate requests). These matters are dealt with thoroughly in *House of Representatives Practice* and *Odgers' Australian Senate Practice*, and are not dealt with in these notes. Our observation is that where there is agreement at a political level to negotiate an acceptable outcome on a measure it tends to happen. The Senate has also been vigilant in protecting its rights in terms of the restriction set out in the second paragraph of the section.[35]

There has not been a history of conflict between the Houses in respect of the first paragraph of section 53. The meaning to be given to the words 'imposing taxation' has been at issue and was, for example, debated in the Senate in connection with the Taxation (Deficit Reduction) Bill 1993, but there was no disagreement between the Houses.

The receipt of two bills in recent years has focussed attention on the application of these significant constitutional provisions.

A dispute between the Houses arose in 2008 in connection with the first paragraph of section 53 and its application to bills intended to increase expenditure under standing appropriations. Under House practice such bills are considered appropriation bills. When the Urgent Relief for Single Aged Pensioners Bill was received from the Senate the Speaker drew attention to the issues involved in terms of House practice, and the House declined to consider the bill. The reasoning behind the Government's position was explained to the House, but debate was curtailed. The Social Security Amendment (Income Support for Regional Students) Bill, received on 21 February 2011, which gave rise to the same technical issue, was treated similarly. On that occasion there was considerable debate and a thorough ventilation of the competing considerations.[36]

---

34 For example, standing orders 147, 165 and 178-182.

35 *Odgers' Australian Senate Practice*, 12th edn, pp 284-7.

36 *Hansard*, 21 February 2011, pp 645-661.

The notes describe House practice and standing orders and explain the understanding of the constitutional provisions and principles that has been followed in the House. These rules, practices and interpretations impose restrictions on all members.[37] It is understandable that they may sometimes cause members concern, and it may continue to be the case that while the basic rules and practices are clear their application to particular situations will not always be obvious.

It is acknowledged that while the principle of the financial initiative might be criticised, the 1988 Constitutional Commission recognised the public policy purpose of the section 56 provisions, reporting:

> We are not persuaded that there is any need to alter the Constitution to abrogate the fundamental and long-standing principle that no appropriation bill may be passed unless it has been recommended by the executive government. To remove section 56 from the Constitution would mean that any member of the House could initiate bills for appropriation of federal moneys. But a government having the confidence of the House would still be able to prevent any appropriation bill which did not have its support from being passed. [38]

---

[37] Although the relevant standing orders were changed significantly in 1963, practice has been consistent – Glenn Worthington, *How far do section 53 and section 56 secure the financial initiative of the executive?* Parliamentary Studies Centre Paper (2011) (unpublished).

[38] Constitutional Commission, *Final Report* (1988), Vol 1, p 243.

2. THE ORIGINATION OF BILLS

Constitutional provisions

The first paragraph of section 53 of the Constitution provides in part:

> Proposed laws appropriating revenue or moneys shall not originate in the Senate.

Although a number of disputes have arisen between the Houses in connection with the third paragraph of section 53 – the Senate may not amend any proposed law so as to increase any proposed charge or burden on the people – and the fourth paragraph – Senate requests, and in particular whether the Senate may press or repeat requests – there has been very little inter-House controversy in connection with the first paragraph.[39]

A related constitutional provision relevant to origination is contained in section 56:

> 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*.

This broadly worded provision was intended to give effect to the principle of the financial initiative of the Crown, which forms an essential aspect of the system of responsible government recognised under the Australian Constitution. The principle means that the executive government is responsible for the initiation of financial proposals.

In plain language it is the government – upon whose advice the Governor-General acts in this regard and not private members or even individual Ministers – which submits to the Parliament proposals in relation to both taxation and expenditure, and it is then for the Parliament to decide whether to give its approval to those proposals.

The public policy purpose of such provisions had been recognised in *Australian Senate Practice*:

> This financial initiative rule is regarded as a safeguard against unrestrained and politically competitive financial proposals by members who have not the responsibility of government.[40]

A helpful discussion of the constitutional limitations and their practical effect is set out in Pearce.[41]

The consideration of the wording that was to become the first paragraph of section 53 during the Convention debates is of interest – *see above*.

---

39 The application of the section 53 provisions in respect of taxation bills – the meaning of the words 'imposing taxation' was subject to consideration in connection with the Taxation (Deficit Reduction) Bill 1993, but there was no disagreement between the Houses. *House of Representatives Practice*, pp 425-6, *Odgers*, pp 281-3 and Twomey, *op cit*, pp 22-4.

40 JR Odgers, *Australian Senate Practice*, 6th edn, (1991), p 568.

41 Pearce, *op cit*, pp 122-4.

Basis of claim of validity – Regional Students Bill

On 21 February 2011 the House received the Social Security Amendment (Income Support for Regional Students) Bill from the Senate. In a letter dated 16 November 2010 to Senator Evans, Leader of the Government in the Senate, the President of the Senate, Senator Hogg, summarised the thinking behind the claim that the introduction of the bill in the Senate had been valid. He quoted the terms of the first paragraph of section 53 and then wrote:

> The bill in question does not appropriate money. It does not need to do so because any funds required to support the measures in the bill have already been appropriated by the Parliament in the form of a special appropriation of indefinite amount in section 242 of the *Social Security (Administration) Act 1999.*

A copy of the President's letter is at Attachment 3.

For more details on the Senate perspective, see the submission dated 22 November 2010 from the Clerk of the Senate, Dr Laing, to the Senate Education, Employment and Workplace Relations Legislation Committee, to which the Regional Students Bill had been referred.

A copy of the submission is at Attachment 4.

For background information see *Odgers' Australian Senate Practice*, chapter 13. In relation to the third paragraph of section 53 particularly, see the Senate's *Papers on Parliament No 19*, May 1993. A Senate Procedure Committee report of 1996 concerning the third paragraph of section 53 is also of interest.[42]

Recent Senate bills

The Urgent Relief for Single Aged Pensioner Bill 2008 (the Pension Increase Bill) provided for an increase in aged pensions. It was introduced by a private senator, passed by the Senate and transmitted to the House. The appropriation for the payment of aged pension is provided by section 242 of the Social Security (Administration) Act 1999. This provision is a standing or open-ended appropriation (in contrast to the specified sums appropriated for the operations of departments and agencies in annual appropriation Acts). An increase in the sums payable to eligible persons, or an enlargement of the categories of persons eligible to receive benefits, increases the sums payable under the authority of the standing appropriation. The Pension Increase Bill was thus relevant for the Regional Students case – but the House declined to consider the bill.

The Regional Students Bill was introduced by Senator Nash, a private senator, on 28 October 2010. The bill sought to change the entitlement to youth allowance payments by extending the category of eligible recipients. It did this by inserting a new category of 'Inner Regional Australia' into paragraph 1067A(10E)(a) of the Social Security Act 1991. The explanatory memorandum provided by Senator Nash stated that the financial impact was

---

42 Senate Procedure Committee, *Section 53 of the Constitution/Incorporation into the standing orders of continuing and sessional orders*, November 1996.

approximately $90 million per annum. According to the government the cost to 2013-14 would have been in the order of $272 million.[43]

The authorisation for relevant payments of youth allowance, like the Pension Increase Bill, was provided by a standing appropriation in section 242 of the Social Security (Administration) Act 1999. Thus if there is a proposal that the Parliament change the eligibility requirements so as to extend eligibility to a larger class of persons, or so as to increase the entitlement for those already eligible, then it is considered that there is a need for the additional appropriation to be recommended, regardless of the existence of a standing appropriation section. In accordance with the principle of the financial initiative and the provisions of section 56 this is effected by means of a Governor-General's message recommending an appropriation. Agreement by the Parliament to the bill authorises the additional expenditure from the Consolidated Revenue Fund (CRF) – *and see* below for High Court comments in *Pape*.

A government sponsored bill, the National Health Amendment (Pharmaceutical Benefits) Bill 2007 (the PBS Bill) had been cited as a precedent for the Pension Increase Bill. It provided for optometrists to be authorised to issue prescriptions for scheme benefit purposes. The explanatory memorandum stated "The 2007-08 Budget provides funding of $10.7 million over four years which includes funding for additional costs to the PBS and the RPBS, and to Medicare Australia for prescriber approvals, system changes and claims processing". The portfolio budget statements for the year make it clear, however, that the estimates referred to in the explanatory memorandum were for department/agency operating costs and not for the payment of benefits. The vital point is that funds for such purposes are appropriated separately by the Parliament in specified sums in annual Appropriation Acts; activities to be funded by annual appropriations will only be funded if an Appropriation (or Supply) Bill is passed by the Parliament. Presumably it was not considered or intended that the PBS bill would increase the sums payable under the authority of the standing appropriation which provides funding for PBS benefits.[44]

As a government bill the PBS bill would have been drafted by the Office of Parliamentary Counsel (OPC). Had OPC believed that the provisions would cause increased expenditure under a standing appropriation OPC would have been acting contrary to its established procedures, which are based on AGS advice as mentioned in Drafting Direction 4.9 of OPC's published Drafting Directions, if it advised that the bill could be introduced in the Senate. Presumably OPC would also have advised that a message from the Governor-General in accordance with section 56 of the Constitution recommending an appropriation for the purposes of the bill was required. Thus the PBS bill was not a helpful precedent for the Pension Increase Bill.

---

43 Advice from Attorney-General to Senator Chris Evans, 15 November 2010.

44 Contained in section 137 of the *National Health Act 1953*.

Other bills introduced in the Senate

In chapter 13, dealing with financial legislation, *Odgers* states that legislation which requires appropriations or the imposition of taxation for its operation may be introduced in the Senate with an indication that the necessary appropriation or imposition of taxation is to be inserted in the House. *Odgers* cites a statement by President Givens in 1921,[45] and lists nine bills, two of the bills were concerned with taxation and seven with expenditure.

Five of the seven bills cited that were concerned with expenditure were introduced in the Senate by Ministers. Three of the bills had clauses to make the necessary appropriations inserted or added as amendments moved by Ministers in the House, and in each case this followed the receipt of a message in the House from the Governor-General recommending the necessary appropriation.[46] In the case of the Scholarships Bill 1967 a clause in the bill as introduced in the Senate provided that benefits were to be paid out of moneys appropriated by the Parliament for the purpose. The fifth government-sponsored bill, the Compensation (Commonwealth Government Employees) Amendment Bill 1976 provided for benefits but funding for payments was provided through the annual appropriation process.

The remaining two bills cited were introduced by private senators and concerned expenditure from special funds to be created. In each case they related to provisions in associated bills that provided for levies on certain activities (liquor advertising and plastic bags). Each contained a provision for the expenditure of funds providing that 'such moneys as are appropriated by the Parliament' were to be credited to the fund in question – that is they did not rely on standing appropriations.

From a House perspective, none of these bills gave rise to a complaint in terms of section 53. As is made clear in *Odgers*, the necessary appropriation or imposition was made or proposed to be made by separate legislative action.

It should also be noted that a private senator's bill, the Health Insurance Amendment (Revival of Table Items) Bill 2009 was transmitted to the House and made an order of the day in the House. The second reading was not moved and no further action was taken by the House. The practical impact of that bill if enacted would have been that, in the event of disallowance of a medical service item, additional moneys would have been payable. This bill is thus also distinguishable in terms of its impact on expenditure: it did not have as its object changes which were intended and expected to increase sums payable from the CRF under a standing appropriation.[47]

Two other bills have also been mentioned – the Health and Ageing Legislation Amendment Bill 2003 and the Social Security Legislation Amendment (Concession Cards) Bill 2000.[48] As Ms Appleby and Professor Williams note, expenditure authorised by a standing

---

45 *Odgers' Australian Senate Practice*, 12th edn, p 273. *And see* Appleby and Williams, *op cit*, pp 209-10. The Pension Increase Bill and the Regional Students Bill are listed in the on-line supplement to *Odgers* and reference is made to amendments circulated by the Government in the Senate which would have inserted an appropriation clause in a government bill.

46 Note that section 56 refers to a message 'to the House in which the proposal originated' – presumably the new provision was regarded as 'the proposal'.

47 *And see* opinion from Blake Dawson on this bill tabled in the Senate on 18 November 2009. The opinion deals helpfully with the competing claims about the restrictions on the introduction of bills in the Senate.

48 Appleby and Williams, *op cit*, p 208.

appropriation was not intended to be increased by either bill. As bills introduced by Ministers each would have been drafted by the Office of Parliamentary Counsel. Had OPC considered that the bills would have caused expenditure from a standing appropriation to be increased it would have been acting contrary to its established procedures if it advised that they could be introduced in the Senate.[49]

House standing orders and practice

It is within the determination of the Senate as to which bills are introduced in the Senate. The House's interest can only be in its own actions on receipt of messages transmitting Senate bills.

The standing orders[50] and practice of the House divide 'proposed laws appropriating revenue or moneys' into two categories. The first consists of Appropriation and Supply Bills, such as annual appropriation bills. A defining feature of such bills is that in enacting them the Parliament specifies finite sums that can be drawn from the CRF. Bills in the second category – other appropriation bills – are bills which either contain words which appropriate the CRF to meet expenditure under the bill, or which, while not themselves containing words of appropriation, would have the effect of increasing, extending the objects or purposes of or altering the destination of amounts to be paid out of the CRF under existing words of appropriation.[51] These appropriations are referred to as standing appropriations – in practice such appropriations are not limited in either sum or duration.

In so far as the initiation of 'proposed laws appropriating revenue or moneys' is concerned in standing order 180:[52]

- paragraph (a) states that all proposals for the appropriation of revenue or moneys require a message to the House from the Governor-General recommending the purpose of the appropriation in accordance with section 56 of the Constitution;

- paragraph (b) requires that for an Appropriation or Supply Bill (such as the annual appropriations) a Governor-General's message must be announced before the bill can be presented; and

- paragraph (c) allows other bills appropriating revenues or money to be proceeded with before a Governor-General's message is reported.

The standing orders and House practice reflect the fact that in our system it is not possible for a private Member to obtain a Governor-General's recommendation under section 56 of the

---

49 Office of Parliamentary Counsel, Drafting Direction 4.9.

50 Principally standing order 180, but also standing order 147.

51 *House of Representatives Practice*, 5th edn, pp 409-10. In House terminology such bills are described as special appropriation bills. It is this categorisation that has been recognised by the High Court – see below.

52 Quoted in full below.

Constitution.[53] House practice is that to be in conformity with constitutional provisions 'proposed laws appropriating revenue or moneys', whether they are Appropriation or Supply Bills as per standing order 180(b) or other appropriation bills as per standing order 180(c), must originate in the House, and be presented by a Minister and that they require a message from the Governor-General in accordance with section 56.[54]

It is clear that the standing orders make no provision for the receipt or consideration of a bill from the Senate which would appropriate revenue or moneys, nor have the standing orders of the House ever made such provision.

In 1994 the interpretation and application of the third paragraph of section 53 was considered by the Senate Standing Committee on Procedure and by the House Standing Committee on Legal and Constitutional Affairs. The House committee supported the view that a bill which increases expenditure under a standing appropriation should not originate in the Senate.[55]

For the purposes of standing order 180 the characterisation of bills is critical. If a bill is characterised as an Appropriation or Supply Bill a Minister may not present it unless a Governor-General's message under section 56 has been announced. If under House practice a bill received from the Senate is characterised as an 'other' bill appropriating revenue or moneys only a Minister can introduce it, but it can be presented before the message is announced. If a bill received from the Senate is characterised as a bill which will appropriate revenue or moneys the provisions of paragraph (a) would apply and there is no further provision under which it can be considered.[56]

Academic comments

The specific position set out in the note for members tabled by the Speaker in respect of the Regional Students Bill has been supported by Professor Geoffrey Lindell AM.[57] In an article published in 2009, Ms Gabrielle Appleby and Professor John Williams concluded in general terms:

> Section 53 states any appropriation, that is, the authorisation of the expenditure of public funding on a particular purpose, must be introduced in the House of Representatives with the recommendation of the Governor-General. Reference is not made to laws including an appropriation clause, but laws appropriating revenue. Its purpose and context require it to be read as to include any law which would increase appropriation – whether expressly by the inclusion of an appropriation clause or incidentally by increasing expenditure under a standing appropriation.[58]

---

53 Because the Governor-General acts on the advice of ministers, *and see* the Constitution, sections 61-63.

54 Section 56 refers to a bill not being passed unless the purpose of the appropriation has been recommended by message from the Governor-General. The standing orders, made under section 50, impose a stricter requirement.

55 House of Representatives Standing Committee on Legal and Constitutional Affairs, *op cit*, p 82.

56 The oddity of the situation such as then present would be heightened because section 56 refers to a message from the Governor-General 'to the House in which the proposal originated', and standing order 180 requires a message to the House.

57 A leading authority in constitutional law, Adjunct Professor, University of Adelaide and Australian National University, Professorial Fellow, University of Melbourne, consultant to the Department of the House of Representatives (message to department).

58 Williams and Appleby, *op cit*, pp 212-3.

High Court comments

It is accepted that in using the term 'proposed laws' the founders of the Constitution intended that the provisions of section 53 and section 56 would be among the matters for the Parliament to interpret and apply, and not matters for the High Court.[59] The High Court accepted this distinction very soon after Federation[60] and has followed this approach ever since that time by continuing to recognise that the provisions of sections 53 and 54 are not justiciable.[61]

In the Pape case in 2009, the High Court upheld the validity of the Tax Bonus for Working Australians Act (No. 2) 2009. That Act, which provided for one-off payments to taxpayers, did not itself contain a section making an appropriation. Instead, it relied on the standing appropriation contained in section 16 of the Taxation (Administration) Act 1953.[62]

A majority of the Court, while recognising that section 53 was a matter for the Parliament and not the Court, quoted with approval the statement in *House of Representatives Practice* that included in the category of 'special appropriation bill' bills which while not themselves containing words of appropriation have the effect of increasing, extending the objects or purposes or altering the destination of the amount that may be paid out of the CRF under existing words of appropriation. Their Honours concluded that:

> The Bill for the Bonus Act, as will appear, was of that character. Accordingly, ... there is an appropriation of the Consolidated Revenue Fund within the meaning of the Constitution in respect of payments ... required by section 7 of the Bonus Act.

and later:

> The definition of "taxation law" was "picked up" by the Bonus Act, with the consequence that the Bill for the Bonus Act was a special appropriation bill as identified by the Practice.[63]

Following this line of reasoning the submission, that taken by itself the Bonus Act contained no appropriation, was rejected.[64]

We note the High Court's approach and submit further that the very fact that section 53 is held by the High Court to be non-justiciable places a special responsibility on the Parliament to take care to ensure that it does not take advantage of that circumstance to enact legislation that would be inconsistent with a constitutional provision or fundamental constitutional principle.

---

59 Quick and Garran, *op cit*, p 664.

60 *Osborne v Commonwealth* (1911) 12 CLR 321.

61 *See*, for example, *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, at p 482.

62 In accordance with normal practice a message from the Governor-General under section 56 of the Constitution recommending an appropriation for the purposes of the bill had been received by the House.

63 *Pape v Commissioner of Taxation* (2009) HCA 23, at 135, 164-171, per French, CJ, Gummow, Crennan and Bell, JJ.

64 *Pape v Commissioner of Taxation* (2009) HCA 23, at 206, Gummow, Crennan and Bell, JJ.

Long-standing Government position

The approach taken by successive governments was summarised by the Attorney-General, Mr McClelland, in a letter of 16 February 2011 to Speaker Jenkins. This letter analysed the provisions of the Regional Students Bill and the way the relevant provision of the Social Security Act operates. The letter quoting opinions by former Attorney-General Barwick, commented on the differences between the Houses in relation to section 53 matters, on the issue of the financial initiative of the executive, on the provisions of section 56 of the Constitution and on provisions of the House standing orders.

The essence of the advice was that the Regional Students Bill would appropriate revenue or money for the purpose of meeting the cost of the extension of youth allowance, that such a bill would require a message from the Governor-General in accordance with section 56 and that, as a proposed law for the appropriation of revenue or moneys within the meaning of section 53, the bill could not properly have been introduced in the Senate.[65]

A copy of Mr McClelland's letter is at Attachment 5.

Focussing on the substantive issue

The terms of the first paragraph of section 53 prevent 'proposed laws appropriating revenue or moneys' from originating in the Senate. Long-established practice is that bills which, while not themselves containing overt words of appropriation, would have the effect of increasing or extending the objects or purposes of a law by causing an amount to be paid out under an existing appropriation are 'proposed laws appropriating revenue or moneys'. It is the **effect** of the relevant provisions in such bills that matters: will they **increase** expenditure under a standing appropriation? It would seem that to hold that whether or not the constitutional provision applied depended simply on whether words explicitly making an additional appropriation were included in a bill would be to make the constitutional restriction merely a matter of form rather than substance.[66] A reasonable test would surely be to ask 'what will the provisions of the bill do if the bill is enacted?' If the answer is that they will cause sums to be drawn from the CRF that could not otherwise be drawn from it then the bill would properly, it is submitted, be characterised as a 'proposed law appropriating revenue or moneys'.

Consequences of interpretation

Acceptance of the view that a bill which is intended or which would be expected to have the effect of increasing payments under a standing appropriation but which does not itself contain explicit words of appropriation is not a bill appropriating revenue or moneys would have significant consequences. It would mean that a standing appropriation, perhaps enacted

---

65 *And see* HR Deb (21.2.2011) pp 45-7.

66 This point has been recognised by Ms Appleby and Professor Williams, *op cit*, p 211. In its November 1996 report the Senate Procedure Committee recommended that government amending bills which increase expenditure should contain a clause appropriating the additional money and be classified as appropriation bills and be first introduced in the House.

decades earlier, could be held to authorise payments of greatly increased benefits or payments to greatly enlarged classes of recipients on a continuing basis.

Governments can speak for themselves, but members and senators might be concerned that in such circumstances the responsibility of the executive for the financial initiative reflected in section 56 would be circumvented in a way that undermines the capacity of the executive to discharge its responsibilities in managing the overall budgetary position of the Commonwealth. A message for the purposes of section 56 provided in the context of a set of conditions submitted to the Parliament at the time an original provision was considered apparently would continue to be relied upon on an ongoing basis – and it would often have been provided on the advice of a different ministry. It is difficult to accept that the founders of the Constitution would have intended such a situation.

An argument to be noted is that, unless it is accepted that a bill is only an appropriation if it contains explicit words of appropriation, the rights of the Senate would be infringed because objection could be raised against the origination of virtually any bill in the Senate. It is correct that a great number of bills would, if enacted, indeed eventually be found to have some impact on expenditure – for example by adding to the duties or responsibilities of office holders or organisations, or by creating additional rights or opportunities. Any concerns that such possibilities would be cited to argue that many more bills should not be introduced in the Senate should be relieved when it is remembered that as far as can be ascertained from House records, while hundreds of bills have been received from the Senate since 1901, there may have been only two cases (those of 2008 and 2011) in which the Speaker has drawn attention to issues concerning the first paragraph of section 53, and in which the House has then agreed to motions that they should not be considered.[67] As well as indicating that a responsible and common-sense approach has been taken by the House, this record could be seen as respectful of the thinking reflected in the fifth paragraph of section 53: 'Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.'

The Governor-General and assent: risk of Governor-General being drawn into conflict

It is possible that consideration and agreement by the House to a bill received from the Senate and regarded by the Government as not being consistent with constitutional requirements could see the Governor-General drawn into a political and constitutional dispute. This would occur if the bill, having passed both Houses, were duly transmitted to the Governor-General for assent and the Government advised the Governor-General not to give assent. This is a possibility about which Professors Lindell and Twomey, separately, have written.[68] References were made to the assent stage when the issues associated with the Regional Students Bill were debated in the House.[69]

---

67 It is also relevant that although standing appropriations provide for a very high proportion of Commonwealth expenditure, many bills have no connection with standing appropriations.

68 Professor Geoffrey Lindell (2009), 'Assent or refusal to assent to legislation – on whose advice?', *Constitutional Law and Policy Review*, August 2009, pp 126-138; Professor Anne Twomey (2006), 'The Refusal or Deferral of Royal Assent', *Public Law Review* 580.

69 HR Deb (21.2.11) pp 602-4. In fact, it is not a matter for a government whether a bill is sent for assent, rather one of the parliamentary processes in relation to legislation being duly followed.

Receipt of bill from Senate

The ordinary course after a Senate message transmitting a bill is received is that the bill is read a first time without a question being put and the second reading set down 'for the next sitting', or moved immediately if copies of the bill are available. If, however, a Senate bill were to be considered by the Speaker to be a bill 'appropriating revenue or moneys', the provisions of standing order 180 would apply. These provisions do not contemplate that such a bill would be received from the Senate, or that a private member (a member other than a minister or a parliamentary secretary) would be able to sponsor the bill through its various stages.

Moens and Trove take the view that it would be the duty of the Speaker to uphold a point of order challenging the consideration of a bill appropriating revenue or imposing taxation if it were received from the Senate,[70] but the statements made by Speaker Jenkins in 2008 and 2011 were consistent with the approach sometimes taken in connection with the third and fourth paragraphs of section 53.

In the cases of the Pension Increase Bill and the Regional Students Bill, the Speaker made short statements to draw to the attention of members the issues involved in terms of House practice and tabled detailed notes. In each case the Leader of the House then moved motions in effect endorsing the position set out by the Speaker and proposing that the House decline to consider the bill. In the case of the Pension Increase Bill, while the Leader of the House set out reasons why the bill was considered to infringe constitutional provisions, the closure was moved, and agreed to, and so the matter was not debated.[71] In the case of the Regional Students Bill, extensive debate took place, and differing views were put by members.[72] Mr Bandt moved an amendment to the effect that the bill should proceed when a method to finance the measures contained in it had been agreed on. In the event the amendment was lost and the motion of the Leader of the House agreed to.

---

70 Gabriel Moens and John Trove, *Lumb and Moens – The Constitution of the Commonwealth of Australia, Annotated*, 6th edn, (2001) p.189.

71 HR Deb (23.9.2008) pp 8236-42 and 8273-8.

72 HR Deb (21.2.2010) pp 598-619 and 645-663.

3. THE INTRODUCTION AND AMENDMENT OF BILLS BY PRIVATE MEMBERS

Implicit fundamental constitutional principle

The standing orders and practice of the House which govern the introduction of bills by private members, and the scope of amendments to bills by private members, reflect the principle of the financial initiative.

House of Representatives Practice refers generally to the financial initiative in the following terms:

> What is called the 'financial initiative of the Executive' – that is, the constitutional and parliamentary principle that only the Government may initiate or move to increase appropriations or taxes – plays an important part in procedures for the initiation and processing of legislation.[73]

House of Representatives Practice notes that the principle of the financial initiative, which is drawn from the constitutional and parliamentary law of the United Kingdom is spelled out in *Erskine May Parliamentary Practice*.[74] The requirements of the financial initiative are in turn part of the system of responsible government established by the Constitution.[75]

Specifically in relation to the taxation aspect of the financial initiative *House of Representatives Practice* notes:

> The Executive Government demands money, the House grants it, but the House does not vote money unless required by the Government, and does not impose taxes unless needed for the public service as declared by Ministers.[76] [emphasis added]

This particular aspect of the financial initiative is not captured explicitly in any aspect of the Constitution in so far as private members are concerned. Section 53 of the Constitution imposes restrictions on the Senate's power to originate or amend laws imposing taxation, but makes no reference to private members of the House.

May refers to the financial initiative of the Crown as it applies to the United Kingdom Parliament. Put simply, *May* states 'A charge of either kind (ie a charge upon the public funds (an appropriation) or a charge upon the people (a tax)) cannot be taken into consideration unless it is sought by the Crown or recommended by the Crown'.[77] *May* refers to this principle as 'The long-established and strictly observed rule of procedure, which expresses a principle of the highest constitutional importance'.[78]

---

73 *House of Representatives Practice, op cit*, p 407.
74 Erskine May, 2011, *Parliamentary Practice*, 24th edn.
75 Quick, J and Garran, R, 1901, *The Annotated Constitution of the Australian Commonwealth, Part 1 (1901)*, p 709.
76 *House of Representatives Practice, op cit*, p 408.
77 Erskine May, *op cit*, p 713.
78 *Ibid*, p 716.

May goes on to refer to the enforcement of the rules relating to financial procedure, noting they 'are strictly observed by the House of Commons'.[79] As *May* notes:

> In discharging its duties to disallow any proceedings which would infringe the rules of financial procedure, the Chair relies in the last resort upon its power to decline to propose the necessary questions.[80]

The introduction of bills by private members

House of Representatives Practice records the consistently applied practice that a private member may not initiate a bill imposing taxation, varying a tax or requiring the appropriation of moneys because of the constitutional and parliamentary principle of the financial initiative of the Executive[81].

The financial initiative in regard to appropriation is expressed in section 56 of the Constitution, and is extended in standing order 180 as follows:

> (a) All proposals for the appropriation of revenue or moneys require a message to the House from the Governor-General recommending the purpose of the appropriation in accordance with section 56 of the Constitution.
>
> (b) For an Appropriation or Supply Bill, the message must be announced before the bill is introduced.
>
> (c) For other bills appropriating revenue or moneys, a Minister may introduce the bill and the bill may be proceeded with before the message is announced and standing order 147 (message recommending appropriation) applies.
>
> (d) A further message must be received before any amendment can be moved which would increase, or extend the objects and purposes or alter the destination of, a recommended appropriation.

It is not possible for a private Member to obtain the Governor-General's recommendation for an appropriation. Furthermore, of those bills requiring a Governor-General's message, only those brought in by a Minister may be introduced and proceeded with before the message is announced. Therefore, only a Minister may bring in a bill which appropriates public moneys.[82]

Sometimes matters of categorisation are very clear – for example a proposal that a new benefit be created, an existing benefit increased or the class of persons eligible to receive a benefit enlarged. The categorisation of such bills as special appropriation bills is critical[83], and it has the effect that under the standing orders they may not be introduced by private members. In some other cases the impact on expenditure may be more indirect – the Abolition of Age Limits on Payment of the Superannuation Guarantee Charge Bill 2011 was in this category – *see below*.

---

79 *Ibid*, p 718.
80 *Ibid*, p 718.
81 *House of Representatives Practice*, *op cit*, pp 567-8.
82 *Ibid*, p 568.
83 *And see Pape* case cited above.

In relation to appropriations, under House practice the critical test for a proposal is the impact on expenditure authorised under a standing appropriation or whether the proposal in itself would require a new appropriation. In some cases, for example where a private member wished to introduce a bill which would give new duties or responsibilities to an officeholder or an organisation, or allow new grounds or rights of appeal in relation to a matter, although enactment of the bill would have some eventual impact on the nature of the responsible agency's expenditure, if there was no impact on a standing appropriation, House practice would not prevent the member from introducing the bill. However, a bill which sought to establish a new Office or Authority to perform a new function may give rise to appropriation issues.

It is noted that the normal processes of appropriation for departments and agencies is by means of annual Appropriation Acts. Therefore, even if the Parliament passes a private member's bill which gives a department additional responsibilities, although funding appropriated for the department may be expended on the additional responsibilities as a result, the Parliament has, through the Appropriation Act, authorised a specific sum to be spent, and that sum cannot be exceeded without further parliamentary approval. The source of funding involved is critical (standing (existing or new appropriation) *v*. annual dollar limited appropriations).

The financial initiative in regard to taxation, which restricts private Members from initiating taxation bills, is expressed in, and given effect by, standing order 179:

> (a) Only a Minister may initiate a proposal to impose, increase, or decrease a tax or duty, or change the scope of any charge.
>
> (b) Only a Minister may move an amendment to the proposal which increases or extends the scope of the charge proposed beyond the total already existing under any Acts of Parliament.
>
> (c) A Member who is not a Minister may move an amendment to the proposal which does not increase or extend the scope of the charge proposed beyond the total already existing under any Acts of Parliament.

The proposed Abolition of Age Limit on Payment of the Superannuation Guarantee Charge Bill 2011 illustrated the proposition that, while the principles of the financial initiative and the standing orders and practice which reflect them are clear, the application of the rules to particular cases is often not completely straightforward. This Bill proposed to amend the Superannuation Guarantee (Administration) Act 1992 to abolish the age limit of 70 years, as it then was, for the compulsory payment of the superannuation contribution.

The bill gave rise to concerns about issues in respect of both appropriation and taxation. In relation to appropriation, a provision in the principal Act (section 71) appropriated funds from the CRF to make payments in the event that an employer does not meet the statutory obligation to pay the necessary superannuation contribution. If that happened, the Australian Taxation Office would issue the employer with a debt notice equivalent to the amount of the superannuation guarantee payment, plus an administration charge. Technically, and although it was not intended, if passed, the bill could have given rise to payments under the standing appropriation; and it was considered that because of that a Governor-General's message for the purposes of section 56 was necessary in respect of the bill.

In regards to taxation, the superannuation guarantee scheme worked in such a way that a charge arose under the *Superannuation Guarantee Charge Act 1992* if there was a shortfall by an employer in respect of the employer's obligations to employees. In this sense the bill was a contingency, rather than a direct impost because, if all employers met their legal obligations, no charge would arise. Nevertheless, the practical effect of the Bill was that the removal of the existing restriction on the age limit was likely to give rise to additional charges to employers because the class of employees covered would have been enlarged. Therefore the bill was contrary to standing order 179(a). In the event, Speaker Jenkins ruled that the bill could not proceed, and a motion of dissent from his ruling was defeated.[84]

It is often possible for private members to put matters which would otherwise involve an appropriation or the imposition of a charge before the House either in the form of a bill which sets out a position without infringing the constitutional provisions and House practice,[85] or in the form of a resolution setting out a policy position as the opinion of the House.[86]

Amendments to bills by Private Members

In relation to amendments concerning expenditure House practice is reflected in standing order 180 (d):

> A further message must be received before any amendment can be moved which would increase, or extend the objects and purposes or alter the destination of, a recommended appropriation.

As noted above, in our system it is not possible for a private member to obtain a Governor-General's message. A member prevented by the standing orders from moving an amendment may still wish to propose it, even though it will be ruled out of order.[87] Alternatively, the member may choose to express the matter in general terms in a second reading amendment, or to read into the Hansard record the text of the amendment he or she would have liked to move.

As in the case of the introduction of bills by private members, the test applied is to ask what the intended and expected effect of the amendment is. An amendment considered or intended to increase expenditure under a standing appropriation would be out of order. Amendments which could ultimately have some financial impact, such as by giving additional responsibilities to government entities, rights of appeal or similar generally would not give rise to any objection generally.

The scope of amendments open to a private member may be illustrated: a government bill is introduced to reduce from $10 to $5 a benefit, funded by a standing appropriation in an existing Act. A private member could move an amendment to omit the provision making the reduction, or to provide that the benefit be $7.50. This is because the existing law authorises

---

84 *Hansard*, 2 June 2011, p 5699.

85 For example Private Member's Bills introduced by Mr Abbott (Assisting the Victims of Overseas Terrorism Bill 2010), by Mr Hockey (Parliamentary Budget Office Bill 2011) and by Mr Dutton (Health Insurance (Dental Services) Bill 2012).

86 For example motions moved by Ms Marino concerning regional students and by Mr Crook concerning the distribution of GST revenue across the States and Territories.

87 *House of Representatives Practice*, *op cit*, pp 413-4.

payment of benefits of $10 so neither amendment would cause expenditure under the standing appropriation to be increased beyond that already authorised by the Parliament.

In relation to taxation House practice, again reflecting the principle of the financial initiative, is that only a Minister or Parliamentary Secretary may move an amendment to increase or extend the scope of the charge proposed beyond the total already existing under an existing Act.[88]

Standing order 179 provides:

> (a) Only a Minister may initiate a proposal to impose, increase, or decrease a tax or duty, or change the scope of any charge.
>
> (b) Only a Minister may move an amendment to the proposal which increases or extends the scope of the charge proposed beyond the total already existing under any Act of Parliament.
>
> (c) A Member who is not a Minister may move an amendment to the proposal which does not increase or extend the scope of the charge proposed beyond the total already existing under any Act of Parliament.

In relation to taxation an amendment to reduce the tax imposed by a bill is in order and thus, in moving an amendment to a government bill a private Member may do what he or she cannot do by introducing a private Member's bill – that is, propose the alleviation of a tax. Conversely, an amendment to a customs tariff proposal which sought to impose a duty on a date sooner than that stated in the legislative proposal, thereby having the effect of producing an additional sum (charge) from customs duties, has been ruled out of order.[89]

The consideration of the Minerals Resource Rent Tax package of bills illustrated the scope of amendments open to private Members of the House in relation to taxation proposals, and also raised the question of the limit on the scope of motions to suspend standing orders.[90] On 25 November 2011 (am) Speaker Jenkins ruled that a motion to suspend standing order 179 to permit a private member to move an amendment which would have extended the scope of the tax was out of order. The basis of the ruling was that the standing orders could not properly be suspended to permit an action which was contrary to a constitutional provision or to a principle reflected in the Constitution. Amendments moved by another private Member, Mr Crook, were in order, as the effect of the amendments would have been to reduce or defer liability, an action which would not offend against the restrictions.

---

88 *House of Representatives Practice, op cit*, p 413.

89 *Ibid*, p 427.

90 Minerals Resource Rent Tax Bill 2011 and ten associated bills, VP 81, 21-22 November 2011, pp 1082-1114.

4. CONCLUSION

The provisions of the constitution which provide for the expression of the financial initiative balance the requirements of a federal system with the principles of responsible government. The Constitution quite deliberately limits the powers of the Senate in financial matters and recognises the principle of the financial initiative of the Executive.

The standing orders and practices of the House carefully reflect the provisions of the Constitution and the principles behind them.

In so far as the financial initiative is concerned, the standing orders and practice regulate the receipt and consideration of bills received from the Senate, the introduction of bills by private members, and the rights of private members to move amendments to bills.

The issues involved in these matters have been described as technical in nature, but they are matters of high importance in terms of their long-term implications. They are significant for each House of the Parliament because of its respective rights and responsibilities. They are also significant for individual members, for executive government because of its responsibilities for financial matters, and potentially for the Governor-General. It is therefore very important that members who wish to express a view or present information or opinions on the issues involved in such matters have access to information to do so.

CLERK'S OFFICE
House of Representatives
June 2012

Extract from *The Australian Constitution*

Chapter 1, Part V
Powers of the Parliament

53 Powers of the Houses in respect of legislation

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.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

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 of 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.

54 Appropriation Bills

The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

55 Tax Bill

Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

56 Recommendation of money votes

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.

Extract from
The Annotated Constitution of the Australian Commonwealth
by J. Quick and R. Garran (1901)

The present form of the nominative part of the section should be carefully scanned and studied. As submitted to the Convention by the Constitutional Committee, the section commenced "proposed laws having for their main object the appropriation of any part of the public money or revenue," &c. An attempt by the representatives of the larger colonies to strike out those words and insert "proposed laws appropriating," was defeated by 26 votes to 24. (Conv. Deb., Adel., p. 479.) At the Sydney sitting of the Convention the Legislative Council and Legislative Assembly of New South Wales proposed to omit the words "having for their main object," with a view to insert "for." The Legislative Assembly of Victoria proposed to omit the words, "having for their main object the appropriation of," with a view to insert the word "appropriating," and the Legislative Assembly of Tasmania proposed to omit the word "main." Mr. G. H. Reid proposed an amendment for the omission of the words "having for their main object," with a view to the insertion of the word "appropriating." This was carried, on the understanding that the following addendum, recommended by the Legislative Assembly of Tasmania, should be added to the section: "But a proposed law which provides for the imposition and appropriation of fines or other pecuniary penalties, or for the demand and payment and appropriation of fees for licenses, or for services, and does not otherwise impose any tax or appropriate any part of the public revenue, may originate either in the House of Representatives or in the Senate." The section referring to the origination of Money Bills, as it now stands, omitting the word "for," which appears in the Constitutions of the United States and of Canada, gives the House of Representatives a larger grant of exclusive originating power than that possessed by the American House of Representatives or by the Canadian House of Commons. At the same time, several important and useful exceptions to the rigid rule of exclusive financial origination are clearly expressed in the latter part of the paragraph.

EXTENT OF APPROPRIATING POWER.—The power of the Federal Parliament to appropriate and authorize the expenditure of revenue or money, is not, by this section, restricted to any particular or general purpose. No doubt the appropriating and spending power is intended to be confined to the purposes in respect of which the Parliament can make laws. Such a limitation, however, is not expressed; if it exists at all it is implied. If such be the case could the High Court restrain the appropriation and expenditure of Federal money for a purpose not within the powers of the Parliament? Some light may be thrown on the point by the cases of United States *v.* Realty Co., and United States *v.* Gay (163 U.S. 427). In these cases it was held, per Peckham, J., that it was within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honourable obligations, and upon principles of right and justice; and that having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decisions can rarely, if ever, be the subject of review by the judicial branch of the Government.

§ 242. "Or Imposing Taxation."

Proposed laws imposing taxation are essentially different from proposed laws appropriating revenue. By one law money is raised and by the other law money already raised is made available for expenditure.

"The action taken by the House of Commons, upon the demand of aid and supply for the public service, made by the speech from the throne, is the appointment, pursuant to standing order No. 54, of those committees of the whole House, which are known as the Committee of supply and the Committee of ways and means. . . . The Committee of ways and means provides the public income raised by the imposition of annual taxation." (May's Parl. Prac. 10th ed. pp. 554-555.)

"Proposed laws . . imposing taxation" are intended to legalize charges or burdens on the people; as for instance bills imposing customs and excise duties; bills imposing stamp duties; bills imposing succession duties; bills imposing taxes on property. Now, the provision, "proposed laws . . imposing taxation shall not originate in the Senate," limits the authority of one of the Federal Chambers and confers a monopoly of originating power on the other; therefore it will be strictly construed.

§ 243. "Shall Not Originate in the Senate."

The provision, that appropriation and tax bills shall not originate in the Senate, necessarily confers the monopoly of financial origination on the House of Representatives. This part of the section crystallizes into a statutory form what has been the practice under the British Constitution for over two hundred and twenty years. On 3rd June, 1678, the House of Commons resolved—That all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords. (May's Parl. Prac. 10th ed. 542.) By usage based on the foregoing resolution, the House of Lords has been excluded from the power of initiating bills dealing with public expenditure and revenue, and also from initiating public bills which would create a charge upon the people by the imposition of local and other rates, or which deal with the administration or employment of those charges. Bills which thus infringe the privileges of the Commons, when received from the Lords, are either laid aside or postponed for six months. (May's Parl. Prac. 10th ed. 542.) This exclusive power of initiating money Bills is one of the most valued privileges of the House of Commons, and one of its vital sources of constitutional strength and supremacy.

§ 244. "But a Proposed Law Shall Not be Taken."

This part of the section embraces a compromise, with reference to the originating power, which was recommended by the Legislative Assembly of Tasmania. The Tasmanian amendment, drafted by the Hon. Inglis Clark, Attorney-General of that colony (now Mr. Justice Clark), was founded on the practice recognized by the House of Commons, and thus explained by May:—

"The claim to exclusive legislation over charges imposed upon the people was formerly extended by the Commons to the imposition of fees and pecuniary penalties, and to provisions which touched the mode of suing for fees and penalties, and to their application when recovered; and they denied to the Lords the power of dealing with these matters. The rigid enforcement of this claim proved inconvenient; and in 1849, the Commons adopted a standing order, based on a resolution passed in 1831, which gave the Lords power to deal, by bill or amendment, with pecuniary penalties, forfeitures, or fees, when the object of their legislation was to secure the execution of an Act; provided that the fees were not payable into the exchequer, or in aid of the public revenue; and when the bill shall be a private bill for a local or personal act. And the Commons also agreed to another standing order, whereby they surrendered their privileges so far as they affected private and provisional order bills sent down from the House of Lords, which refer to tolls and charges for services performed, not being in the nature of a tax, or which refer to rates assessed and levied by local authorities for local purposes. The practical result of these standing orders is a waiver by the Commons of their privileges with respect to pecuniary penalties in public and in private bills. Fees imposed in a public bill can only be dealt with by the Lords provided they are not paid into the exchequer; whilst it is competent for the Lords by a private bill to impose fees and tolls for rendered services, and to authorize the levy of rates to be assessed and levied by local authorities for local purposes." (May's Parl. Prac. 10th ed., p. 547.)

"I am quite prepared to go in the direction indicated by the amendment of Mr. Inglis Clark, which not only makes things a good deal more definite, but is a step beyond the Bill of 1891, by way of making the legislative machinery work more smoothly, and securing to the Senate that degree of individuality in matters of this kind, of which it would be a scandal to deprive them through some matter of construction." (Mr. E. Barton, Conv. Deb., Syd., 1897, p. 474.)

§ 245. "Fines or other Pecuniary Penalties."

This represents the first of the group of minor financial matters which are excepted from the prohibition against the senatorial initiation of appropriations and taxes. By this proviso the Senate may originate Bills containing, *inter alia*, clauses authorizing the

imposition or appropriation of fines or other pecuniary penalties, when the object of those fines or penalties is to secure the execution of the proposed law. Such fines and penalties are exempted from the prohibition, and the proposal to so exempt them was not objected to by any member of the Convention.

§ 246. "Fees for Licences."

Bills containing provision for the demand or payment or appropriation of fees for licences, under the proposed law, may originate in the Senate. Under this exemption from the prohibition, a Bill dealing with such a subject as fisheries beyond territorial waters, and imposing or appropriating fees for licences to fish in such waters, could be introduced in the Senate. A Bill dealing with mining in Federal territories (in which the Federal Parliament will have exclusive jurisdiction to make all laws) and authorizing the issue of licences to mine upon payment of fees, could be introduced into the Senate. A Bill relating to navigation, requiring the owners of ferry boats to take out licences and pay fees, could be brought into the Senate. In the Convention objection was taken to this exemption from the prohibition, as tending to whittle away the originating financial power intended for the House of Representatives. (Mr. J. H. Carruthers, Conv. Deb., Syd., 1897, p. 478.)

§ 247. "Fees for Services."

Bills containing provision for the demand or payment or appropriation of fees for services rendered under a proposed law, could originate in the Senate. In practice some difficulty may at first be experienced in determining the limits of this exemption. Some members of the Convention, who objected to it, were inclined to magnify its importance. It was said it was wide enough to cover Bills introduced for the purpose of regulating the rates of postage, charges for telegrams, harbour dues, light dues, pilotage, wharfage rates, &c., all of which were fees for services rendered.

§ 248. "The Senate may not Amend."

The second paragraph of sec. 53 takes from the Senate absolutely the power to amend tax bills and annual appropriation bills, whilst the third paragraph restricts its power to amend other appropriation bills. The financial disabilities of the Senate may be thus classified and reviewed *seriatim* :—

(1.) The Senate cannot amend proposed laws imposing taxation :

(2.) The Senate cannot amend the ordinary annual appropriation bill :

(3.) The Senate cannot amend any bill so as to increase proposed charges or burdens on the people.

Proposed Laws Imposing Taxation.—We have had occasion, in our notes on the first paragraph of this section, to discuss the requirement that a proposed law imposing taxation shall not originate in the Senate. It is manifest that a "proposed law" is a bill, in course of passing through Parliament. The next point to consider is the meaning of the expression, "imposing taxation." May a bill providing for the raising of taxation contain auxiliary provision for the enforcement and collection of the tax? Mr. Barton expressed the view that, as a tax could not be collected without subsidiary provisions, a bill imposing taxation could embody, not merely the bare imposition of the charge, but all the machinery clauses, referring to matter, manner, measure, and enforcement, essential to make the law effectual and completely operative. This opinion is supported by the following passage in Cooley's Principles of Constitutional Law, p. 64 :—"The power to tax includes the power to make use of all customary and usual means to enforce payment. But legislation must prescribe these means and give full directions for their employment, and it is essential to the validity of the proceedings that a statute in all essential particulars shall be followed." The authorities cited in support of this proposition are Stead *v.* Course, 4 Cranch, 403 ; Williams *v.* Peyton, 4 Wheat. 77 ; Parker *v.* Overman, 18 How. 137.

"It shall not be lawful for the House of Representatives to pass any vote, resolution, or law for the appropriation of any part of the public revenue, or of the produce of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-General in the session in which the vote, resolution, or law is proposed."

This provision was taken from the Constitution Acts of the several colonies; see, for instance, Constitution of New South Wales, sec. 54.

The draft Constitution as settled at the Adelaide session restricted the exclusive originating power of the House of Representatives to Bills whose "main object" was to appropriate money or impose taxation. It was then seen that bills for the appropriation of revenue or moneys, but whose "main object" was not such appropriation, might be introduced into the Senate, and would require a message; and consequently the clause as drafted at Adelaide provided that it should not be lawful for "the Senate or the House of Representatives" to pass a vote, &c., for appropriation without a message. It was pointed out that this would involve a message to both Houses in the case of every appropriation Bill; and the clause was therefore altered to read as follows:—

"It shall not be lawful for the Senate or the House of Representatives to pass any vote, resolution, or proposed law for the appropriation of any part of the public revenue or moneys to any purpose which has not been first recommended to the House in which the proposal for appropriation originated by message of the Governor-General in the session in which the vote, resolution, or law is proposed." (Conv. Deb., Adel., pp. 616, 1200.)

That was the second stage in the evolution of the message section. At the Sydney session the clause relating to the origination of Money Bills was altered by the omission of the "main object" limitation, and the substitution of the provision that a Bill should not be deemed an Appropriation or Tax Bill merely because it provided for fines or fees. This took away from the Senate the power to initiate that large class of Appropriation Bills contemplated by the Adelaide clause; but the Chairman, Sir Richard Baker, thought that the decision to allow the Senate to initiate Bills imposing and appropriating fines and fees would still necessitate messages to the Senate; and, therefore, suggestions made by several of the Houses of Legislature, to require a message to the House of Representatives only, were not put from the chair. (Conv. Deb., Syd., 1897, pp. 540-1.)

At the Melbourne session, the words "for the Senate or the House of Representatives" were omitted by the Drafting Committee before the first report, and the clause then read as follows:—

"It shall not be lawful to pass any vote, resolution, or proposed law for the appropriation of any part of the public revenue or moneys to any purpose which has not been first recommended to the House in which the proposal for appropriation originated by message of the Governor-General in the session in which the vote, resolution, or law is proposed."

This was the shape in which the clause was debated in Melbourne, after the second report. The first point discussed was the meaning of the words "it shall not be lawful." They apparently amounted to a prohibition, any breach of which would render the law, even if passed, invalid, thereby enabling the courts to enquire into the question whether an Appropriation Bill had been recommended by message or not. (See Todd, Parl. Gov. in Col. 2nd ed. p. 637.) Mr. Reid pointed out the undesirableness of this; and to prevent any difficulty arising from the circumstance of a preliminary vote being taken on an Appropriation Bill before the necessary message was brought down to the House, he also suggested the omission of the word "first," so that the clause should read "which has not been recommended to the House." With this alteration it would only be necessary that the message should reach the House before the Bill was passed by the House. The Drafting Committee subsequently gave effect to these suggestions by omitting the words "it shall not be lawful," and the word "first," and re-casting the clause into its present form. Mr. Isaacs moved to substitute "House of Representatives" for "House in which the proposal originated," on the ground that the Senate, under

ATTACHMENT 3

PRESIDENT OF THE SENATE

PARLIAMENT HOUSE
CANBERRA

16 November 2010

Senator the Hon Chris Evans
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Evans

I refer to your letter of today's date in relation to the Social Security Amendment (Income Support for Regional Students) Bill 2010 and attaching advice on the bill from the Attorney-General.

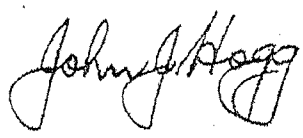
You have sought my assistance in "drawing this matter to the attention of Senators so that steps may be taken to ensure the Bill does not proceed". While I am happy to table your correspondence and the Attorney-General's advice (and this reply) for the information of senators, it is quite inappropriate for you to ask me to take steps to ensure that a bill does not proceed on any basis, let alone on the basis that the House of Representatives has a different view of its constitutionality.

Under the practices of the Senate, as described in chapter 13 of *Odgers' Australian Senate Practice*, the bill introduced by Senator Nash is quite in accordance with the Senate's view of section 53 of the Constitution. As you know, the first paragraph of section 53 provides that "proposed laws appropriating revenue or monies, or imposing taxation, shall not originate in the Senate". The bill in question does not appropriate money. It does not need to do so because any funds required to support the measures in the bill have already been appropriated by the Parliament in the form of a special appropriation of indefinite amount in section 242 of the *Social Security (Administration) Act 1999*. It is therefore a bill which may be introduced in the Senate.

Although the House of Representatives may have a different view about section 53 of the Constitution, and I remind you that the Houses have been differing on the interpretation of this section since 1901, it is not the role of the President of the Senate to anticipate objections that the House may have to a bill introduced in the Senate. It is the role of the President of the Senate to uphold the rights of the Senate and senators.

I do not intend to take any steps to ensure that the bill does not proceed. Rather, I intend to allow proceedings to occur in the usual way and the Senate to come to a decision on this matter. Should the Senate pass the bill, it will then be transmitted to the House in accordance with the standing orders and the House will have the opportunity then to express its views.

Yours sincerely



(John Hogg)

ATTACHMENT 4

AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

rc.let.17537

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.
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the government.
>
> 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.

---

[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.

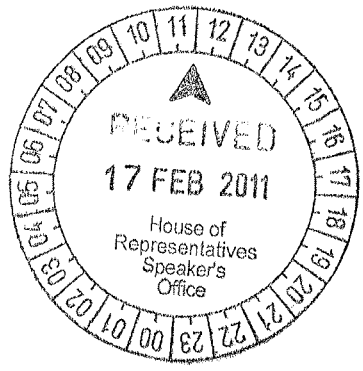
It might be observed that in these cases the Senate was doing by way of initiation something that it could not do by way of amendment (because of the third paragraph of section 53), and that this must surely not have been intended by the Founding Fathers. As chapter 13 of *Odgers' Australian Senate Practice* (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)

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP



10/27447

The Hon Harry Jenkins MP
Speaker of the House of Representatives
House of Representatives
Parliament House
Canberra ACT 2600

Dear Mr Speaker

Social Security Amendment (Income Support for Regional Students) Bill 2010

I am writing to you about the Social Security Amendment (Income Support for Regional Students) Bill 2010 **(the Bill)** introduced in the Senate on 28 October 2010 by Senator Nash. The Bill passed the Senate on 10 February 2011.

The Bill seeks to change the entitlement for youth allowance payments. I wish to draw your attention to constitutional problems with the Bill.

Under Australia's constitutional arrangements the Government of the day is responsible for the management of public revenue and the budget. The Government therefore initiates all financial initiatives in the Parliament. This is reflected most clearly in sections 53 and 56 of the Constitution, which deal with proposed laws for the appropriation of revenue or moneys. Section 53 states that such laws shall not originate in the Senate. Section 56 states that such laws shall not be passed unless the purpose of the appropriation has been recommended by message of the Governor-General to the House in which they were originated. The Governor-General's message can only be given on the advice of the Government of the day. The House of Representatives Standing Orders reflect the Government's constitutional responsibilities.

In short, a proposed law that would appropriate revenue or moneys cannot originate in the Senate or as a private members bill.

I have set out in some greater detail below the historical, legal and constitutional analysis that underpins the position I have just outlined.

The Bill

The Bill proposes to amend the *Social Security Act 1991* (**SS Act**). The SS Act currently deals with persons regarded as 'independent' for the purposes of certain aspects of the social security law. In summary, section 1067A of the SS Act applies to determine whether a person is independent, and it is relevant in part to this determination whether the person's family home is 'in a location categorised under the Remoteness Structure as Outer Regional Australia, Remote Australia or Very Remote Australia'. The Bill proposes to insert the words 'Inner Regional Australia', so that persons whose family home is within such a region may more easily be 'independent'.

In summary, the assessment whether a person is 'independent' affects whether he or she is eligible for youth allowance, as well as the manner in which entitlement is calculated. A person may be able to access youth allowance at a younger age, for example, if he or she is independent. Different rates may also apply if a person is independent. Entitlement may be reduced for a person who is *not* independent as a result of the application of the parental income means test and the family actual means test.

Payments of youth allowance are, in formal terms, made under the standing appropriation in the *Social Security (Administration) Act 1999* (**SS Administration Act**), which relevantly provides in section 242 that payments 'are to be made out of the Consolidated Revenue Fund, which is appropriated accordingly'.

The Bill would increase the amount of youth allowance payments made from the Consolidated Revenue Fund under the standing appropriation in the SS Administration Act. The Explanatory Memorandum to the Bill suggests the financial impact would be approximately $90 million per annum; that is, if the Bill were enacted, an additional amount of approximately $90 million would be appropriated from the Consolidated Revenue Fund on an annual basis. I am advised the estimated increase in appropriation to 2013-14 would be $272 million.

Constitutional provisions

The first paragraph of section 53 of the Constitution is as follows:

53 Powers of the Houses in respect of legislation

> 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.
>
> ...

Section 56 of the Constitution is as follows:

> **56 Recommendation of money votes**
>
> 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.

There is no material distinction for present purposes between the expressions 'proposed laws appropriating revenue or moneys' and 'proposed law for the appropriation of revenue or moneys'.

Constitutional history

Essentially the two provisions reflect the important principle of our constitutional heritage that the business of Government in the Anglo-Australian context is conducted by the Crown (more commonly referred to in the Australian context as the Executive). But that business which necessarily requires a continual supply of money is conducted with the approval of and under the supervision of the Parliament (see McHugh J's judgment in *Combet v Commonwealth* (2005) 224 CLR 494 (*Combet's case)* at para [44]).

The constitutional history of this principle was discussed by McHugh J in *Combet's case* at para [44]. That history was described as one of rivalry between the Crown and the House of Commons. His Honour described how, by the 17th century, the House of Commons had not only insisted on its right to control the levying of taxation, "it also insisted on knowing the purposes for which the Crown intended to use the supply of money and on scrutinising the expenditures of the Crown".

Reflecting upon this history, in the context of section 53, his Honour described a "fundamental rule of constitutional law of the Anglo-Australian peoples" as being "that the Crown cannot expend money without the authorisation of Parliament". His Honour further noted that when the Australian Constitution was drafted "there was also a widely accepted convention that control over money bills essentially belonged to the popularly elected lower house of Parliament from which the government was formed". It is beyond contention that in Australia this is the House of Representatives.

The history of section 56 of the Constitution is also directly relevant. That history was noted by Attorney-General Barwick in his opinion on the operation of section 56 of the Constitution dated 20 February 1962. Mr Barwick, as he then was, referred to the following extract from "The British Budgetary System", by Sir Herbert Brittain, published in 1959:

> Underlying the Parliamentary procedure on Supply is a rule of the House of Commons which is of fundamental importance. It is enshrined in a Standing Order which, in its earliest form, was passed in 1706 and which now (as Standing Order No. 78) provides as follows: 'This House will receive no petition for any sum relating to public service or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund or out of money to be provided by Parliament, unless recommended from the Crown.

Based on that historical analysis the learned author concluded:

> *Only the Crown, therefore, can initiate proposals for expenditure* and in the House the Crown's right and responsibility in this respect are *exercised by Ministers in the Government of the day. No private member, on either side of the House, can exercise such initiative* or move for an increase in any grant above the sum proposed by the Government. [emphasis added]

A review of this historical context makes it clear that the underlying purpose of section 56 of the Constitution is to ensure that the Government of the day retains control over legislative initiatives for public expenditure. In his opinion Attorney-General Barwick stated that "the very purpose of section 56 of the Constitution is to deny to private members any right to initiate measures for the expenditure of the public revenue". He emphasised the rationale of his conclusion by reference Quick and Garran's *Annotated Constitution of the Commonwealth* (1901) at 681, which in turn quoted Hearn's *Government of England* (second edition, 1886) at pp 376-7, which sets out:

> It is ... a fundamental rule of the House of Commons that the House will not entertain any petition or any notice for a grant of money, or which involves the expenditure of money, unless it be communicated by the Crown. We are so accustomed to the general practice, and the deviations from it have been so inconsiderable, that its importance is scarcely appreciated. Those, however, who have had the experience of the results which followed from its absence, of the scramble among the members of the Legislature to obtain a share of the public money for their respective constituencies, of the 'log-rolling', and of the predominance of local interests to the entire neglect of the public interest, have not hesitated to declare that 'good government is not attainable while the unrestricted powers of voting pubic money and of managing the local expenditure of the community are lodged in the hands of the Assembly.

Consistent with this view, the *Final Report of the Constitutional Commission*[1] saw section 56 as reflecting the well established principle of Westminster parliamentary government that:

> ... financial initiatives are the preserve of the Crown. The Executive Government is charged with management of the public revenues and other public moneys and it alone may request parliamentary authorisation of expenditures. This request is formally communicated to the House by message from the Governor-General.

This "fundamental principle" has been confirmed by the High Court of Australia in *Combet's case*.

In their majority judgment, Gummow, Hayne, Callinan and Heydon JJ noted that "it is the Executive Government which begins the process of appropriation. This the Executive Government does by specifying the purpose of the appropriation by message to the House of Representatives" (at para [143]).

Similarly, in that case, Kirby J referred to a discussion of the issue in *Lane's Commentary on the Australian Constitution* (second edition, 1997, p 644), and concluded that "the initiative for proposed appropriations belongs to the Executive Government, in accordance with section 56 of the Constitution" (at para [227]).

---

[1] Volume I (1988), at pp 243-247.

Standing orders

House of Representative Standing Order 180 reflects the historical context that I have outlined. It provides::

> (a) All proposals for the appropriation of revenue or moneys require a message to the House from the Governor-General recommending the purpose of the appropriation in accordance with section 56 of the Constitution.
>
> (b) For an Appropriation or Supply Bill, the message must be announced before the bill is introduced.
>
> (c) For other bills appropriating revenue or moneys, a Minister may introduce the bill and the bill may be proceeded with before the message is announced and standing order 147 (message recommending appropriation) applies.
>
> (d) A further message must be received before any amendment can be moved which would increase, or extend the objects and purposes or alter the destination of, a recommended appropriation.

The expression 'Appropriation Bills' is defined in standing order 2 as 'bills which appropriate money to fund annual government expenditure (other bills may appropriate money for special purposes)'; the expression 'Supply Bills' is defined as those that 'appropriate money to fund government expenditure on an interim basis until Appropriation Bills have passed (now rarely necessary)'.

While the Bill in this case would not be an Appropriation or Supply Bill as just defined, it would be an 'other' bill appropriating revenue or money. Standing order 147 covers such bills appropriating revenue or moneys and provides that, immediately after the second reading of a bill, 'the Speaker shall announce any message from the Governor-General in accordance with section 56 of the Constitution recommending an appropriation in connection with the bill'. The House of Representatives Standing Orders thus link the requirement for a message under section 56 for a bill appropriating moneys and the introduction of any such bill by a Government Minister. There is an assumption that only Ministers may introduce such bills. This is, of course, entirely consistent with the conventional constitutional understanding that the Governor-General's power to recommend money bills under section 56 is exercisable only on the advice of the Government of the day.

Laws appropriating revenue or moneys

The primary reason why the Senate's view has not always corresponded with that of the House of Representatives on these matters is because the Houses differ in their opinion as to what constitutes a law appropriating revenue or money.

The weight of authority in respect to this issue is that the requirements under sections 53 and 56 are not confined to laws containing a clause explicitly appropriating the Consolidated Revenue Fund. Laws that cause money to be expended under a standing appropriation are also covered. Thus, a law that alters the purposes for which money may be expended under a standing appropriation (for example, by increasing the categories of person entitled to a

benefit, or changing the formula by which that benefit was calculated to increase the amounts that could be paid out) is covered.

This was the view adopted by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its 1995 Report on *The Third Paragraph of Section 53 of the Constitution*. In the context of considering the first paragraph of section 53, the Committee concluded that "a bill which increases expenditure under a standing appropriation should not be originated in the Senate" (Recommendation 4 at p 82 of the Report).

More recently, in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at para [167] Gummow, Crennan and Bell JJ, after noting that the Court needed to be careful not to adjudicate on the operation of section 53, nevertheless cited the statement in the *House of Representatives Practice* (fifth edition, 2005) at p 409 that an appropriation bill includes one which:

> while not in [itself] containing words of appropriation, would have the effect of increasing, extending the objects or purposes of, or altering the destination of, the amount that may be paid out of the Consolidated Revenue Fund under existing words of appropriation in a principal Act to be amended, or another Act.

In the opinion dated 20 February 1962, to which I have referred, and in a separate opinion dated 26 November 1962, Attorney General Barwick set out this view in relation to section 56, by reasoning equally applicable to section 53. He stated in the 26 November 1962 opinion:

> Benefits under the Social Services Act are ... payable out of the National Welfare Fund. Section 5 of the National Welfare Fund Act provides that there is payable out of the Consolidated Revenue Fund, which is appropriated accordingly, for the purposes of the National Welfare Fund, in each financial year, an amount equal to the amount of moneys paid out of the National Welfare Fund in that financial year. Having regard to this provision, I have expressed the view in the House of Representatives that section 56 of the Constitution makes a Governor-General's message necessary to the passage of a Bill to increase benefits under the Social Services Act **or to liberalize the conditions under which such benefits are payable**. [emphasis added]
>
> ... the inconvenience resulting from my view must be considered in relation to the important constitutional principles involved, affecting on the one hand the position of the Government as the constitutional organ responsible at the one time for the planning of the expenditure of the Commonwealth and the raising of the revenue necessary to meet that expenditure and on the other hand the special responsibilities of the House of Representatives as the organ of the Parliament responsible for the initiation of financial proposals.

It is clear that the purpose and natural consequence of the Bill in this case would be to liberalize the conditions under which youth allowance benefits are payable, and thereby to increase the amount of youth allowance payments paid from the Consolidated Revenue Fund under the standing appropriation in the SS Administration Act. In this case there is no doubt the Bill would have this effect.

As I have noted, the Senate's view of section 53, and the restraints that it imposes on the Senate's powers in relation to appropriation bills, has not always corresponded to that of the House. Indeed, *Odgers' Australian Senate Practice* (12th edition, 2008) (*Odgers*) appears to suggest (at p 290) that a bill which amended an Act in such a way as to increase expenditure

under an appropriation prescribed by that Act would not be a proposed law appropriating revenue and moneys for the purposes of section 53.

For the reasons given above, I do not think that view is correct. Moreover, the Senate appears to have accepted that it cannot by virtue of the third paragraph of section 53 of the Constitution amend a proposed law so as to increase expenditure under an existing appropriation. Accordingly, acceptance of the view outlined in *Odgers* would result in the Senate being able to initiate laws that it cannot amend.

In practice, the main difference between the approaches of the House and the Senate to appropriation laws seems to have centred on the degree to which it must be apparent that a bill will increase expenditure under an appropriation before that bill may be treated as a proposed appropriation. *Odgers* suggests (at p 296), in the context of the third paragraph of section 53, that a bill should not be regarded as an appropriation unless it would "clearly, necessarily and directly cause an increase in expenditure" under an existing appropriation. The better view, I think, is that it is sufficient if such an increase in expenditure is reasonably likely. Whatever view is taken as a matter of principle, as indicated it seems clear that the necessary consequence of the Bill in the present matter is to increase expenditure under an existing appropriation.

Summary and conclusion

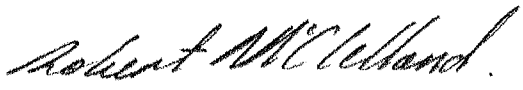
It follows that the Bill is a proposed law for the appropriation of revenue or moneys within the meaning of section 53 of the Constitution and, as a result, could not properly have been introduced in the Senate and could not properly be passed by the Senate.

On the same basis, the Bill is a proposed law for the appropriation of revenue or money within the meaning of section 56 and, as such, requires a message from the Governor-General to pass through the House of Representatives. No such message has been obtained.

You may wish to table this letter so that the House is aware of the Government's view.

I have copied this letter to the Prime Minister, the Leader of the House and the Minister for Tertiary Education.

Yours sincerely



Robert McClelland

16 FEB 2011