THE PARLIAMENT OF
THE COMMONWEALTH OF AUSTRALIA

THE THIRD PARAGRAPH OF SECTION 53 OF THE CONSTITUTION

House of Representatives Standing Committee on
Legal and Constitutional Affairs

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Foreword

The Committee is pleased to present the report of its inquiry on the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution.

The provisions of the third paragraph are highly complex. In order to promote discussion on their interpretation and application, the Committee tabled an exposure draft of its report on 6 March 1995. Several submissions have been received on the exposure draft and these have been taken into account in this final report.

While incorporating views on the exposure draft into its final report, the Committee has remained focused on associating the broad policy of section 53 with the purpose of the third paragraph of section 53. This broad policy relates to the relationship between the Houses in dealing with financial matters, with an emphasis on the effect on the people.

The Committee has held informal discussions on issues arising from the exposure draft with the Senate Legal and Constitutional References Committee (which has the same reference). This provided a useful forum for Members and Senators to consider matters relevant to the inquiry. The Committee has also benefited from informal discussions with several constitutional lawyers on matters raised in the exposure draft. In this respect we are particularly grateful to Dennis Rose and Peter Lahy for their generous assistance. The Committee would also like to take this opportunity to record its thanks to all those who assisted the inquiry. One of the highlights of the inquiry was a seminar which brought together leading constitutional experts. This seminar was an important step in identifying and crystallising views on some of the more difficult topics. Thanks go to Mr Lyn Barlin, Professor Tony Blackshield, Professor Michael Coper (the Committee's consultant), Mr Harry Evans, Mr Ian Harris, Mr Dennis Rose QC, Professor Cheryl Saunders, Dr James Thomson and Mr Bernard Wright. I would also like to record my thanks to the secretariat, particularly Judy Middlebrook, Kelly Williams and Michael Wright.

The Committee considers that the task of the Parliament is to arrive at the most sensible and practical view of the third paragraph of section 53. The view must be consistent with the broad policy of the section (that policy being to preserve the financial initiative of the House of Representatives but otherwise to give the two Houses equal powers). It should be harmonious with the drafting history of the paragraph and the subsequent course of parliamentary precedent, and the view should be reasonably sustainable within the actual wording of section 53.

While keeping these ultimate objectives in view, it is not possible in logic to accord the various criteria equal weight in relation to each issue. The Committee has focussed on upholding the broad policy of section 53 and maintaining current parliamentary practices. Where necessary, notice has been taken of the High Court's interpretation of issues relating to section 53(3).

The Committee has altered the structure of the report from the exposure draft and amended some of its findings and recommendations. In particular the chapter on the application of the third paragraph of section 53 to taxation has been amended to give more emphasis to the High Court's interpretation of imposing taxation for the purposes of section 55 of the Constitution.

The Committee has altered its recommendations in relation to the appropriate benchmark for determining whether there has been an increase in the proposed charge or burden within the meaning of the third paragraph of section 53. In the exposure draft the Committee recommended that the level for determining whether there has been an increase, is the charge proposed in the bill and not the existing charge. While this approach is based on the natural meaning of the third paragraph, the Committee now considers that the benchmark should be the existing charge. This is the current practice, accepted by the Clerks of both Houses, and the Committee considers it unwise to disrupt this understanding.

The Committee recognises that its recommendations may not avoid all the potential problems associated with the application and interpretation of the third paragraph of section 53. But this report (which follows a detailed study of this area of constitutional law) may narrow the areas of disagreement between the Houses. The Committee hopes that its work will be of assistance to Members of Parliament, Senators and parliamentary officers when issues concerning the interpretation and application of the third paragraph of section 53 next arise. The report may also be of interest to lawyers and law students because it supplements a thin coverage of material on this section of the Constitution.

Daryl Melham
Chair

November 1995

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Sections 53 — 55 of the Constitution

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

55. 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 custom shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Terms of reference

On 24 March 1994 the House of Representatives referred the following matter to the Committee for inquiry and report:

> the question of the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution.

Summary and recommendations

The inquiry

1. On 24 March 1994 the House of Representatives referred the question of the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution to the Committee for inquiry and report. The third paragraph states that:

> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate Legal and Constitutional References Committee has a similar reference and the Senate agreed to permit its committee to confer with the House Committee. The Committees participated in two informal joint meetings.

2. The reference resulted from a history of controversy between the two Houses on the correct interpretation and application of section 53. The particular stimulus to the reference was a dispute between the Houses concerning whether Senate alterations to the Taxation Laws Amendment Bill (No. 4) 1993 should be made in the form of requests or amendments.

3. An important practical consequence of the distinction between whether the Senate can amend a bill or whether it must request amendments to a bill, is that it can determine which House will have to take responsibility for the loss of a bill. In the case of a request, the Senate does not alter the form of the bill and the right of decision as to the form of the Bill rests with the House of Representatives while the fate of the bill lies with the Senate. In contrast, with an amendment the Senate actually alters the form of the bill and the House of Representatives bears the onus of determining the fate of the bill as it must decide whether to accept the amended bill or lose the bill.

Scope and structure of the report

4. The report begins with background material on the inquiry and considers the policy and principles underlying section 53. It then places the third paragraph of section 53 in its historical context. This is followed by a discussion of the justiciability of section 53 and some comments on the Committee's approach. The Committee

then considers whether the third paragraph of section 53 applies to appropriation and expenditure bills. Next the report considers whether the third paragraph applies to tax and tax-related burdens, finds that it does so and goes on to examine what sort of tax bills are involved. The Committee also considers the meaning of the expression 'proposed charge or burden', and the relevance of that expression to bills that contain appropriation clauses and bills that do not contain such clauses. The Committee then details the tests that can be applied to determine whether an amendment will increase the proposed charge or burden. Various miscellaneous issues are then addressed. The report concludes by discussing possible outcomes concerning the interpretation and application of the third paragraph of section 53, including the topic of a compact between the Houses.

5. The Committee considers that the task of the Parliament is to arrive at the most sensible and practical view of the third paragraph of section 53 that is: consistent with the broad policy of the section (that policy being to preserve the financial initiative of the Government but otherwise to give the two Houses equal powers); harmonious with the drafting history of the paragraph and the subsequent course of parliamentary precedent; and reasonably sustainable within the actual wording of section 53.

The policy and principles underlying section 53 (chapter 2)

6. Section 53 of the Constitution was part of a political compromise negotiated at the Constitutional Conventions of the 1890s. The so-called 1891 compromise was, in turn, built upon previous compromises between the legislatures in the Australian colonies and between the House of Commons and the House of Lords. Such a compromise was necessary due to the conflicting principles of responsible government and federalism. These conflicting requirements led to a political compromise whereby the Senate would not have the power to introduce or amend 'money bills', but could request the House of Representatives to amend those bills. Complementary sections prevented the House of Representatives from abusing this advantage.

7. The Committee examines the broad policy of section 53, that is, is to preserve the financial initiative of the House of Representatives, but otherwise to give the two Houses equal powers. The third paragraph may be more directly related to the peoples' rights (rather than the rights of the respective chambers). The Committee also examines the principles reflected in section 53 and attempts to provide a holistic interpretation of section 53.

Historical perspective (chapter 3)

8. The Committee considers the third paragraph of section 53 in its historical perspective by dividing the history of the paragraph into two stages: the development of the Constitution through the 1890s until the final draft of the Constitution bill and the post-1901 parliamentary history of the third paragraph. The first stage identifies two motives of the framers of the Constitution for promoting the financial initiative of the House of Representatives. First, it would have defied the principles of good government to give the Houses equal powers in relation to money bills and secondly, the House representing the people should have some powers that are not available to the House representing the States.

9. A study of the post-1901 parliamentary history shows a recent increase in the number of disputes concerning the third paragraph and illustrates that the main area of contention concerns the test that should be applied to determine whether there has been an increase in expenditure.

Justiciability (chapter 4)

10. The Committee discusses the traditional view that section 53 is not justiciable and cites authorities in support of that view. The Committee also examines the factors that may support an alternative view, that is, that section 53 may be justiciable. Those factors include the declining persuasive value of relevant precedents, the interrelationship between sections 53, 54 and 55, increasing judicial activism and submissions and judgments in recent High Court cases. The Committee's conclusion in the exposure draft that section 53 was not justiciable has since been affirmed by the High Court.

The Committee's approach (chapter 5)

11. The diversity of opinion on the third paragraph of section 53 is partly explicable by the use of different approaches in interpreting the paragraph. Differing approaches include interpreting the paragraph with reference to the drafting history, the policy behind section 53, the plain meaning of the words of the paragraph, parliamentary practice and the practicality or workability of particular interpretations.

12. The Committee suggests that it is impossible to reconcile all of the competing views. The different approaches to interpretation need to be considered in order to provide a coherent view of the third paragraph of section 53. However, in arriving at

a considered view of the paragraph, it is apparent that there will need to be a compromise of one or more of the relevant approaches.

Appropriation and expenditure (chapter 6)

13. In *Annotated Constitution of the Australian Commonwealth*, Quick and Garran expressed the view that the third paragraph applied to appropriation bills. However, in his 1950 opinion, Garran appeared to change his mind and argued that the third paragraph did not apply to appropriation bills. Parliamentary practice treats the third paragraph as applying to appropriation bills. The Committee considers a number of arguments that have been raised in support of the proposition that the third paragraph does not apply to appropriation and expenditure bills but is not persuaded by such arguments.

14. In the exposure draft the Committee concluded that the Houses should continue to adhere to the existing parliamentary practice that the third paragraph of section 53 applies to appropriation and expenditure bills. The Committee stands by that conclusion.

Recommendation 1

The Committee recommends that the third paragraph of section 53 should be regarded as applicable to proposed laws relating to appropriation and expenditure (other than proposed laws appropriating revenue or moneys for the ordinary annual services of Government, which the Senate is prevented from amending by the second paragraph of section 53). [p. 69]

Expenditure under standing appropriations (chapter 7)

15. The current parliamentary practice is to regard the third paragraph as applicable to a bill which contains a standing appropriation, if a Senate amendment to the bill would increase expenditure under the appropriation. The Committee considers that this practice should continue.

Recommendation 2

The Committee recommends that the third paragraph should continue to apply to a bill containing a standing appropriation, where a Senate alteration to the bill would increase expenditure under the appropriation. [p. 75]

16. It is current practice to treat the third paragraph of section 53 as applicable to expenditure bills if a Senate alteration would increase expenditure from a standing appropriation. An expenditure bill increases expenditure from a standing appropriation in an existing Act. In this context, a proposed charge or burden includes a reference to a standing appropriation as proposed to be affected by a bill. It appears generally accepted that this practice should not be overturned.

17. A non-expenditure bill is a bill that amends an Act but not so as to affect expenditure from a standing appropriation. The Committee considered whether the third paragraph should apply to a proposed Senate alteration to a non-expenditure bill if the alteration would have the effect of increasing expenditure out of a standing appropriation. Notwithstanding the absence of a proposed charge or burden in the bill itself, the application of the third paragraph to non-expenditure bills is in keeping with the broad policy of section 53. Alternatively, the proposed Senate alteration may contravene the first paragraph of section 53 because such an amendment may be the origination of a proposed law appropriating revenue or money within the meaning of that paragraph. Regardless of which paragraph of section 53 prohibits the Senate amending non-expenditure bills to increase expenditure under a standing appropriation, it is an example of a reasonable practice open to the Houses which is not precluded by the words of section 53.

Recommendation 3

The Committee recommends that, where a bill does not contain an appropriation, the Senate should not amend the bill to increase expenditure out of a standing appropriation, whether or not the bill itself affects expenditure under the appropriation. [p. 81]

18. Mr Evans was critical of this recommendation. He argued that the prohibition should be limited to proposed Senate alterations which increase expenditure in bills which contain appropriations or bills which amend Acts containing appropriations. The

Committee's view is that the third paragraph of section 53 applies to proposed Senate alterations which increase expenditure under an appropriation, where the appropriation is contained in the bill itself, in an Act being amended by the bill, or elsewhere.

19. If a bill that itself affects expenditure under a standing appropriation is classed as a bill which appropriates revenue or money within the meaning of the first paragraph of section 53, it would appear that such a bill should be originated only in the House of Representatives. However, such bills have been introduced in the Senate and the Senate has amended such bills to further increase expenditure under a standing appropriation. The Committee considers that it is inconsistent with the broad policy of the third paragraph if such bills are originated in the Senate.

Recommendation 4

The Committee recommends that a bill which increases expenditure under a standing appropriation should not be originated in the Senate. [p. 82]

Does the third paragraph apply to tax and tax-related burdens? (chapter 8)

20. The Committee traces the history of the third paragraph of section 53 in relation to taxation. While the history could be traced to the earliest struggles between the House of Commons and House of Lords, the chapter picks the history up at the federal conventions of the 1890s. A statement by Sir Henry Parkes during the Convention debates that all taxes are burdens on the people is considered. The indirect reference to taxes in relation to section 53 in Quick and Garran's treatise, *Annotated Constitution of the Australian Commonwealth*, is noted. The 1950 opinion of Sir Robert Garran that the third paragraph applies to 'tax bills that do not impose taxation' is also outlined, as is the 1990 opinion of the then Attorney-General, the Hon Michael Duffy, which supports Sir Robert Garran's opinion. Mr Duffy concluded that the third paragraph applied to amendments to bills dealing with taxation (though not 'imposing' it) where the amendments would increase the rate of taxation that is imposed by another Act.

Recommendation 5

The Committee recommends that the third paragraph of section 53 should be regarded as applicable to tax and tax-related measures. [p. 93]

21. The first paragraph of section 53 provides that a proposed law shall not be taken to appropriate revenue or money, or impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines, or other pecuniary penalties, or for the demand, payment or appropriation of fees for licences or fees for services. The issue that arises is whether these laws are subject to the third paragraph of section 53.

22. The broad view is that such imposts are charges or burdens on the people and subject to the third paragraph. Proponents of the broad view suggest that a narrower interpretation fails to accord 'charge' its normal meaning. It is also argued that had the draftsmen intended those imposts be excluded from the operation of the third paragraph, they would have made the provision explicit.

23. The narrow view is that such laws are not subject to the third paragraph of section 53 because fines and fees for licences or services are not charges or burdens of the kind envisaged in that paragraph. Fines are punitive in nature and the imposition of such penalties is appropriate in certain circumstances. Furthermore, fees are levied as a direct consequence of rights accorded or services rendered and, in that way, fees for licences or services are not charges or burdens on the people. The Committee subscribes to the narrow view on this issue.

Recommendation 6

The Committee recommends that fines, penalties, licence fees and fees for services should not be regarded as charges or burdens on the people for the purposes of the third paragraph of section 53. [p. 97]

Tax bills which are subject to the third paragraph of section 53 (chapter 9)

24. Bills which impose taxation may not be originated in the Senate, nor may the Senate amend them (first two paragraphs of section 53). The Committee considers bills which do not impose taxation but which might be subject to the third paragraph

of section 53 if a Senate amendment were to increase a proposed charge or burden on the people.

25. It appears clear that a bill which increases the rate or expands the base of taxation (and is expressed to impose the resulting, additional tax) is a proposed law imposing taxation for the purposes of section 53 of the Constitution. The central issue, therefore, is whether a bill that increases the rate or amends the tax base (where that tax is expressed to be imposed in another Act) is a proposed law imposing taxation, for the purposes of section 53.

26. It is necessary to determine a meaning for 'imposing taxation' to decide which tax bills might attract the prohibition in the third paragraph. The meaning of 'imposing taxation' in section 55 of the Constitution is considered. This is followed by an examination of whether the section 55 meaning should be applied to section 53. The Committee concludes that the High Court's interpretation of 'imposing taxation' should be applied to section 53 because sections 53 to 55 are part of a unified constitutional scheme which requires a consistent meaning to be given to the phrase.

27. It follows that bills which expand the tax base or increase the rate of taxation (where the tax is expressed to be imposed in another Act) do not impose taxation and are not therefore beyond the Senate's powers of amendment by virtue of the second paragraph of section 53. They are subject to the third paragraph of the section when a Senate amendment would increase a proposed charge or burden on the people because the third paragraph extends to 'any proposed law'.

28. Because tax base and rate bills do not impose taxation (unless the imposition is also in the bill) there is no express constitutional bar to their being originated in the Senate. However, such a practice offends the implied principle underlying section 53 of the financial initiative of the House. The Committee considers that as a matter of sound parliamentary practice, consistent with supporting the financial initiative of the House of Representatives, these bills should be originated in the House.

Recommendation 7

The Committee recommends that bills which affect the tax base or tax rates should be originated in the House of Representatives. [p. 112]

29. The Committee is aware that there may be times when the exigencies of parliamentary timetabling will encourage a government to originate these tax bills in the Senate. It is unlikely that any government will deny itself flexibility in relation to where it originates bills, where the Constitution does not expressly deny origination in a particular House.

30. Where a government decides to originate a non-imposing tax bill in the Senate, the question of whether the Senate can amend the bill arises. Another way of putting this question is 'does the third paragraph of section 53 apply to bills which originate in the Senate?' It has been pointed out that if the answer is 'yes', all sorts of anomalies would flow. In particular it has been argued that it would be illogical for the Senate to be denied the opportunity to amend a bill which originated in the Senate. One reason put forward for this view is that the Senate could achieve by withdrawing the bill and originating an alternative bill containing the desired amendment, the same outcome as if it had amended the bill. On this view, it would be illogical for the Senate to be unable to achieve by amendment that which it could achieve by other means.

31. The Committee rejects this view. The third paragraph of section 53 applies to '**any** proposed law' in which a Senate amendment would 'increase **any** proposed charge or burden on the people'. The language is deliberately broad and inclusive. While it might appear an awkward procedure to withdraw a bill and replace it with another in order to pass an amended bill, this option is not as unattractive as ignoring the third paragraph of section 53. This latter 'option' is quite unacceptable.

Recommendation 8

The Committee recommends that the third paragraph of section 53 apply to all Senate amendments which would increase a charge or burden on the people, including amendments which would increase a tax rate or expand a tax base regardless of whether the bill originated in the Senate or the House of Representatives. [p. 116]

32. The option of 'requests' where amendments are prohibited and the bill has been originated in the Senate is considered next. The fourth paragraph cannot apply to bills which have not been in the House of Representatives because there would be nothing to which the request could be attached. At the same time, the Senate's options in respect of non-imposing tax bills should not be less than those in respect

of bills which impose tax. The latter may be the subject of requests. The Committee considers that a similar mechanism to that provided in the fourth paragraph of section 53 could be devised following negotiation and a compact between the Houses. A message could be sent from the Senate to the House of Representatives containing a request for an amendment. The request could lie dormant until the bill to which it related was introduced to the House of Representatives. Alternatively, the request could be sent with the bill.

Recommendation 9

The Committee recommends that the Houses negotiate a procedure which would allow the Senate to make requests for amendments to bills, where bills are originated in the Senate and where the third paragraph of section 53 prohibits a Senate amendment. The procedure should be based on the provisions of the fourth paragraph of section 53 and be the subject of a compact between the Houses. [p. 120]

'Proposed charge or burden' (chapter 10)

33. The Committee discusses whether a 'proposed' charge or burden should be interpreted literally to include increases in a charge or burden proposed in the bill (even though this might in fact, decrease an existing charge or burden). The Committee considers the appropriate benchmark for determining whether there has been an increase in the proposed charge or burden. Some regard the benchmark as the existing level of the charge or burden, others the level of the charge or burden proposed by the bill.

34. In the exposure draft, the Committee decided these issues according to the natural meaning of the third paragraph. It concluded that the term 'proposed charge or burden' should be interpreted to include any increase in the charge or burden proposed in the bill (even though this might be a decrease in an existing charge or burden). While these conclusions arose from the natural meaning of the third paragraph, they were contrary to current practice. The Committee has amended the conclusion in the exposure draft.

Recommendation 10

The Committee recommends that, for the purposes of determining whether an alteration to a bill moved in the Senate increases a proposed charge or burden, the alteration should continue to be compared to the existing level of the charge or burden and not the level of the charge or burden proposed by the bill. [p. 128]

35. On a literal interpretation of the third paragraph, the Senate could amend a bill that does not contain a proposed charge or burden to increase the existing rate or incidence/base of taxation in another Act (so long as a tax was not imposed by the amendment). The Committee considers that such a practice should not be permitted. The Committee acknowledges that, in relation to the following recommendation, it could be argued that the Committee is ignoring the word 'proposed' in the phrase 'proposed charge or burden'. However, the recommendation is consistent with preserving the financial initiative of the House of Representatives and sits naturally alongside, and is concomitant with, recommendation 3.

Recommendation 11

The Committee recommends that, where a bill does not itself propose a charge or burden, the Senate should not amend the bill to increase the rate or incidence of taxation. [p. 133]

Determining whether an amendment will increase the proposed charge or burden (chapter 11)

36. In this chapter, the Committee considers the test that should be applied to determine whether a Senate amendment increases the charge or burden.

37. The test to be applied in determining whether the Senate amendment increases the proposed charge or burden is an area of contention between the Houses. The Clerk of the House of Representatives favours a test where the third paragraph applies if the 'probable, expected or intended effect' of the amendment will increase the charge or burden. The Clerk of the Senate applies a test where the third paragraph applies if the effect of the amendment will 'necessarily, clearly and directly' increase expenditure under an appropriation. Evidently, the area of controversy

concerns those bills that will not 'necessarily, clearly and directly' result in increased expenditure.

38. A test of 'availability' has been proposed as an alternative to the tests discussed above. This test involves considering whether the alteration would increase the amount available for expenditure, regardless of whether any of the extra amount is likely to be spent. A variation of that test - the 'legally possible' test - was suggested as a possible means of resolving the dispute. This test can be applied in relation to appropriations, taxes and other charges, and it involves considering whether an alteration makes an increase legally possible in the expenditure available under an appropriation or the total tax or charge payable. The Committee favours this formulation. It considers that the House of Representatives should not object to a proposed Senate amendment if the alteration will result in only a minor or incidental increase in expenditure. The Committee notes that this appears to be the current practice in relation to minor increases in expenditure.

Recommendation 12

The Committee recommends that a request should be required where an alteration to a bill is moved in the Senate which will make an increase, in the expenditure available under an appropriation or the total tax or charge payable, legally possible. [p. 144]

39. The Committee considers that where the Senate proposes to amend a bill originated in the House of Representatives, it may be useful if the responsible Senate Minister made a statement to the Senate as to whether the amendment would increase expenditure under a standing appropriation. The Committee believes that such a statement may assist Senators in deciding whether a particular amendment should be moved as a request or an amendment.

Further issues (chapter 12)

40. The House of Representatives has never conceded the Senate's right to press a request. The Clerk of the Senate argues that the Senate has successfully pressed requests on many occasions and suggests that if the framers of the Constitution had intended that the Senate be prevented from pressing its requests, a prohibition would have been included in the Constitution. The Committee agrees with the view of Sir Isaac Isaacs that once the Senate has made a request in relation to a particular

issue, its power of suggestion is exhausted as far as that stage is concerned (where 'stage' refers to the recognised stages in the passage of a bill through the chamber). Any subsequent request at the same stage must relate to a different substantive issue. A second request on the same issue can be made provided that the request is made at a different stage. The possibility that the pressing of requests may invoke the process outlined in section 57 of the Constitution should also be noted in this context.

41. The issue of when requests are appropriate is next considered. It could be argued that requests need not be limited to the situations provided for in the fourth paragraph of section 53. Extra-constitutional requests could be made to alleviate deadlocks, perhaps by means of a compact between the Houses. If the Senate agreed to request the House to amend bills when serious controversy as to whether a Senate alteration should be a request or an amendment arose (even when the Senate believes it could amend the bill itself), the problems surrounding the application of the third paragraph may be remedied. On the other hand, It might be argued that if the Senate can amend a bill, it should not be able to opt instead to request an amendment in order to retain its ability to veto the bill altogether. It appears open to the House to refuse to consider the request and return the bill to the Senate. There may also be implications in relation to section 57 of the Constitution if the Senate makes a request when it could amend. If the Senate makes a request when it could amend the proposed law, that may be considered a failure to pass the proposed law and a failure to pass may invoke the double dissolution procedure in certain circumstances.

42. The Committee notes it appears to be implicit that the term 'charge or burden' in the third paragraph refers to financial charges or burdens. The context of 'burden' in section 53 accords with this view. The first two paragraphs of section 53 deal specifically with financial matters and it appears logical that the third paragraph would also deal with that type of matter rather than administrative matters. Support for the view may also be found in the recent decision of *Western Australia* v. *The Commonwealth* (1995) 69 ALJR 309. A Senate amendment to the Native Title Bill 1993 provided for the establishment of a joint parliamentary committee on Native Title. The establishment of this committee resulted in various administrative costs and other expenses. The High Court concluded that the submission, that this amendment contravened the third paragraph of section 53, was without merit. The Committee notes this dicta, even though the Court itself agrees that section 53 is not justiciable.

Outcomes (chapter 13)

43. Most witnesses and participants in the seminar appeared to think that a compact between the Houses was desirable, although there were varying levels of optimism concerning the likelihood of both Houses agreeing to such a compact.

Recommendation 13

The Committee recommends that there should be a compact between the Houses in relation to the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution. [p. 161]

44. The Committee consulted the Senate Legal and Constitutional References Committee and it does not appear, at this stage, that the Committees will be able to work together to reach a consensus of views which might be the basis of a compact. The Senate Committee has had a very heavy work program and has not had an opportunity to address the section 53 reference in detail. Consequently, this Committee has decided to proceed with some amendments to the exposure draft and table its final report. The Senate Committee is expected to table its report in 1996.

45. It is hoped that the House of Representatives Committee report will assist Members of both Houses of Parliament as well as parliamentary officers from both Houses, in determining the issues associated with the interpretation and application of the third paragraph of section 53 of the Constitution.

Differences between the final report and the exposure draft

46. The most obvious difference between this report and the exposure draft is the altered structure of the report. Changes to the content have arisen from a consideration of the views of those who provided submissions on the exposure draft and from further informal discussions and deliberations on the issues. For the most part the Committee has not changed its conclusions or recommendations in significant ways but there are some changes.

47. Chapter 9 (which replaces Chapter 6 in the exposure draft, dealing with increases in the rate or incidence of taxation) has been changed considerably. The changes reflect the Committee's decision to apply the High Court's interpretation of 'imposing taxation' in section 55, to section 53. This change provides more certainty

than was provided by the exposure draft. The exposure draft had adopted the position of acting as though imposing taxation meant the same in sections 55 and 53, without deciding absolutely on the matter.

48. The changes to chapter 9 have required some consequential amendments. The Committee adheres to its view that non-imposing tax bills should not be originated in the Senate but the basis of this view has altered. These bills should be originated in the House of Representatives, not because this is required by the first paragraph of the Constitution, but because it is required by the broad purpose of section 53, which is to uphold the financial initiative of the House of Representatives.

49. Nevertheless, it is possible that governments might chose to originate some tax-related bills in the Senate because of timetabling requirements, raising questions of the applicability of the third paragraph of section 53. The Committee regards the third paragraph as preventing all Senate amendments which would increase a charge or burden on the people, even where the bill originated in the Senate.

50. The application of the third paragraph of the section 53 to bills which originate in the Senate, raises the issue of the application of the fourth paragraph (returning a bill to the House of Representatives with a request for an amendment). This could not be implemented if a bill originates in the Senate. The Committee considers that the Houses should develop a practice whereby requests could be sent to the House of Representatives to be considered when the bill arrives in that House from the Senate. The practice could be modelled on the provisions in the fourth paragraph of section 53 and be the subject of a compact between the Houses.

51. For the convenience of readers, a table comparing the recommendations in the final report with those in the exposure draft appears in Appendix H.

The Third Paragraph of Section 53 of the Constitution

"The Senate may not amend any proposed laws so as to increase any proposed charge or burden on the people."

To determine whether a Senate amendment would increase a proposed charge or burden the benchmark is the existing level of the charge or burden, not the level proposed by the bill (Rec. 10).

Applies whenever a Senate amendment would increase the rate or incidence of taxation even when the bill does not propose a charge or burden (Rec. 11).

Applies if an increase (expenditure under standing appropriation or tax or charge) would be legally possible (Rec. 12).

Appropriation and Expenditure Bills

Applies to appropriation and expenditure bills, other than the appropriation bills for the ordinary annual services of Government which the Senate may not amend because of the first paragraph of s.53 (Rec. 1).

Applies to bills which contain a standing appropriation where an amendment to the bill would increase expenditure under the appropriation (Rec. 2).

Applies where a bill does not contain an appropriation and a Senate amendment would increase expenditure out of a standing appropriation, whether or not the bill itself affects expenditure under the appropriation (Rec. 3).

Bills which increase expenditure under standing appropriations should not be originated in the Senate (Rec. 4).

Tax Related Bills

Applies to tax and tax related measures (Rec. 5) but does not apply to fines, penalties, licence fees and fees for service which are not charges or burdens for the purposes of the third paragraph (Rec. 6).

Bills that deal with the tax base or tax rates should be originated in the House of Representatives (Rec. 7).

Applies to all Senate amendments which would increase a tax rate or expand a tax base regardless of whether the bill originated in the Senate or the House of Representatives (Rec. 8).

Chapter 1 Introduction

The Legal and Constitutional Affairs Committees of both Houses were given references to inquire into the third paragraph of section 53. The references arose because of the increasing number of disputes relating to the paragraph, the most recent (at the time the matter was referred) relating to a proposed Senate amendment to the Taxation Laws Amendment Bill (No. 4) 1993.

The approach of the Committee has been to promote discussion and consultation in order to formulate a practical interpretation of the third paragraph. The Committee published and circulated an exposure draft and invited comments on the draft. It now publishes its final report on the interpretation and application of the third paragraph of section 53. The report discusses, among other things, the historical context of the third paragraph of section 53, whether section 53 is justiciable, appropriation and expenditure issues, taxation issues and the idea of a 'compact' between the Houses.

1.1 Terms of reference

1.1.1 The third paragraph of section 53 of the Constitution states that:

> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

This paragraph has to be considered in the context of section 53 as a whole.[1]

1.1.2 On 24 March 1994 the House of Representatives resolved to refer the following matter to the Committee for inquiry and report:

> the question of the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution.[2]

A similar reference was given by the Senate to its committee on Legal and Constitutional Affairs (as it then was), although the reference was limited to bills dealing with taxation.[3]

1.1.3 The House of Representatives sent a message to the Senate acquainting that chamber of its resolution and asking the Senate to consider broadening the terms of reference to its Standing Committee on Legal and Constitutional Affairs in line with those of the House Committee.[4] The message also asked that the Senate agree to

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1 Section 53 of the Constitution is set out at ix.

2 House of Representatives, *Hansard* 24 March 1994, p. 2149.

3 Senate, *Hansard* 24 March 1994, p. 2176.

4 ibid.

an order to permit its committee to confer with the House Committee with a view to reports on the matter being presented to both Houses.[5]

1.1.4 The Senate Committee's terms of reference were later amended to be the same as the terms of reference of the House Committee.[6] In relation to the second part of the message from the House of Representatives, the Senate advised that standing order 25(1) provided authority for the committees of the two Houses to confer on the matter.[7] The Senate later directed its Standing Committee on Legal and Constitutional Affairs to confer with its House counterpart on this matter.[8]

1.2 The Committee's inquiry

1.2.1 The inquiry was advertised in the *Financial Review* on 22 April 1994 and in all capital city newspapers and the *Weekend Australian* on 23 April 1994. The inquiry was also advertised in the May 1994 edition of *Australian Lawyer.* The advertised deadline for submissions was 3 June 1994 although this was extended.

1.2.2 An informal meeting between members of both the House of Representatives and Senate committees was held on 9 June 1994. Discussion took place concerning possible cooperation between the committees on the inquiry.

1.2.3 On 30 June 1994 a resolution was passed which authorised the House of Representatives Standing Committee on Legal and Constitutional Affairs to meet concurrently with the Senate Standing Committee on Legal and Constitutional Affairs for the purposes of the inquiry. The resolution also stated that the meetings be jointly chaired by the Chairs of both Committees and that the Senate privilege procedures be followed for the purposes of hearing evidence at joint meetings.[9] No formal meeting was held with the Senate Committee, partly because of the workload of that

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5 ibid.

6 Senate, *Hansard* 4 May 1994, p. 230.

7 ibid. Note that standing order 25(1) previously read:
'At the commencement of each Parliament, Legislative and General Purpose Standing Committees shall be appointed, and each committee shall have power to confer, and, in accordance with a resolution of the Senate, to sit as a joint committee with a similar committee of the House of Representatives.'
However, with the new arrangements in the Senate, a reprint of the standing orders was issued in October 1994 and there does not appear to be a comparable standing order.

8 Order agreed to 12 May 1994. Text repeated in successive Notice Papers. See, for example, Order of the Senate No. 5, *Senate Notice Paper No. 123*, 16 November 1994.

9 *Extracts from Votes and Proceedings*, No. 83, 30 June 1994.

Committee, but an additional informal meeting was held to discuss the exposure draft and a possible compact between the two Houses.

1.2.4 The House Committee received 37 submissions on the matter. The names of those who made submissions are listed in Appendix A. The Committee published an issues paper on the interpretation and application of the third paragraph of section 53 on 1 September 1994. The issues paper presented the relevant arguments in relation to each issue, but the Committee did not reach any conclusions in that paper.

1.2.5 The Committee held a number of public hearings. The hearings were held in Canberra on 11 October 1994, 12 October 1994, 19 October 1994 and in Perth on 26 October 1994. Those people who gave evidence before the Committee at public hearings are listed in Appendix B.

1.2.6 The Committee also held a seminar in Canberra on 28 October 1994. The participants in that seminar are also listed in Appendix B.

1.2.7 The Committee tabled an exposure draft of its report on 6 March 1995. Comments on the exposure draft were sought. The Committee received nine submissions on the exposure draft. It has amended parts of the exposure draft in light of those comments.

1.2.8 The initial submissions received by the Committee prior to publication of the exposure draft are called '*Submissions*'. Those submissions received after publication of the exposure draft have been called *Submissions on the exposure draft.*

1.3 Impetus for the inquiry

1.3.1 There are diverse views concerning the application of the provision of section 53. For example, the Clerks of the respective Houses of Parliament take different views on the application of the provisions and there have been a number of instances since Federation where the third paragraph of section 53 has been an issue. A large number of disputes appear to have arisen since 1981. In these cases the Senate has made an amendment which the House considered should have taken the form of a request for an amendment.

1.3.2 A dispute concerning the Taxation Laws Amendment Bill (No. 4) 1993, was the catalyst for the current inquiry. In relation to that bill, the Senate proposed

> ... amendments to the income tax provisions that provide deductions for expenditure incurred by life insurance companies and registered organisations in obtaining premiums which are excluded from assessable income.[10]

The Senate also proposed an amendment that would require taxpayers to pay instalments earlier than before, or to pay larger amounts. This amendment would either reduce the interest a taxpayer earned on invested money used to meet the new instalment obligations, or would increase the interest payable on borrowed moneys used for that purpose.[11] The Attorney-General's Department advised that it could reasonably be argued that this amendment could fall within the third paragraph of section 53.[12]

1.3.3 The Clerk of the Senate submitted that the argument appeared to be that an increase in a proposed charge or burden is anything which is regarded as burdensome to the public in a broad sense and that this type of argument goes much too far.[13]

1.3.4 On 24 March 1994 at the end of the motion adopting the report on the Taxation Laws Amendment Bill (No. 4) 1993, the Senate added:

> ... and the Senate declares that its agreement, on the motion of the government, to make requests to the House of Representatives for amendments of the bill does not indicate that the Senate considers that requests are appropriate or that the Senate has formed a conclusive view on the application of section 53 or 55 to the bill.[14]

The motion also added that the application and interpretation of the third paragraph of section 53 of the Constitution be referred to the Senate Legal and Constitutional Affairs Committee.[15]

1.3.5 Recognition of the problems associated with the third paragraph of section 53 by Members and Senators is evident from the referral of the matter to the Standing Committees for Legal and Constitutional Affairs in both Houses. That

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10 Senator Watson, *Debates*, 23 March 1994, p. 2036.

11 Letter of 10 August 1994 from the Hon Michael Lavarch to the Hon George Gear, tabled in the Senate by Senator Cook, *Debates* 10 October 1994, p. 1308.

12 Mr D. Rose, *Submissions*, p. S284.

13 Mr H. Evans, *Submissions*, p. S63.

14 Senate, *Debates*, 24 March 1994, p.2176.

15 ibid. However, at that time the Senate's reference was limited to bills dealing with taxation.

referral and the disagreements that have occurred in relation to the paragraph suggest that there is a need for detailed study of the application and interpretation of the paragraph. If agreement cannot be reached on the legal issues it might be possible to formulate a procedure for dealing with disputes as they arise.

1.3.6 The Taxation Laws Amendment Bill (No.3) 1994 is a recent example of a dispute concerning the application of the third paragraph of section 53. The Senate made amendments dealing with the definition of qualifying reductions in the *Income Tax Assessment Act 1936* (additional amendment No. 2) and with provisional tax on estimated income (additional amendment No. 3). The Attorney-General's Department took the view that the first amendment was subject to the third paragraph of section 53 and the Office of Parliamentary Counsel, referring to principles derived from previous advice from the Attorney-General's Department, considered that the second amendment was also subject to the third paragraph.[16]

1.3.7 The Speaker made a statement to the House of Representatives that there was doubt as to whether it was open to the Senate to propose the alterations (in additional amendments No. 2 and 3) as amendments. The Speaker also stated that additional amendment No. 7, which amended income tax regulations in respect of PAYE arrangements, may also be considered to increase a charge or burden on the people.[17] The House, having regard to the fact that the public interest demanded the early enactment of the legislation, refrained from insisting that the Senate alterations be cast in the form of requests and passed the amendments.[18]

1.3.8 The third paragraph of section 53 was again at issue during consideration of the Taxation Laws Amendment Bill (No.4) 1994. The Speaker made a statement that there was doubt as to whether it was open to the Senate to propose as amendments two of the alterations to which it had agreed. The Speaker noted that two of the proposals were originally drafted as requests by the Office of Parliamentary Counsel. The Speaker concluded that he presumed that if the members dealt with the proposals as amendments, they would not want that action to be taken as acceptance by the House that they should have been proposed in that way.[19]

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16 For reasons why those amendments were viewed as subject to the third paragraph, refer to Mr D. Rose, *Submissions*, p. S358.

17 House of Representatives, *Debates*, 17 November 1994, p. 3753.

18 ibid.

19 House of Representatives, *Debates*, 8 December 1994, p. 4437.

1.3.9 These bills, while providing current examples of the application of the third paragraph of section 53, also illustrate the practical difficulties associated in considering the constitutional implications of the third paragraph when there are constraints on the sitting periods of both Houses, other pressing business and often strict timetables for the passage and enactment of legislation.

1.4 Why is it important to determine whether the third paragraph of section 53 applies to a particular bill?

1.4.1 Whether the third paragraph applies to a bill is important because it determines whether the Senate can amend the proposed law itself or whether it must request the House of Representatives to make the amendments. The ability to amend a bill is viewed as more significant than the ability to request an amendment.[20]

1.4.2 It has been suggested that an important practical consequence of the distinction is that it can determine which House will have to take responsibility for the loss of a bill.[21] In a joint opinion in 1943, Sir Robert Garran and others stated that the essence of the difference between a request and an amendment is that in the case of a request, the Senate does not alter the form of the bill and the right of decision as to the form of the Bill rests with the House of Representatives while the fate of the bill lies with the Senate.[22]

1.4.3 When the Senate requests an amendment, it does not agree to the third *reading of the bill. The bill is returned to the House with the request for the* amendment. If the requested amendment is made, the bill then goes back to the Senate for the third reading. The bill can only be prepared for Royal Assent after the Senate agrees to the third reading of the bill, as amended by the House at the request of the Senate.[23] Where a Senate request is not complied with, the Senate is faced with the choice of dropping the request or vetoing the whole bill.[24] The Senate may be reluctant to reject a whole bill simply because it objected to one item.[25]

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20 Mr L. Barlin, *Submissions*, p. S193.

21 Odgers, op. cit., p.563.

22 See Mr L. Barlin, *Submissions*, p. S192.

23 Ms H. Penfold, *Submissions*, p. S123.

24 Note that if the Senate rejects or fails to pass a bill, that may have implications in relation to section 57 of the Constitution (that is, it may provide the pre-conditions for a double dissolution). See paragraph 8.4.19.

25 Odgers, op. cit., p.563.

1.4.4 In the case of an amendment, the Senate actually alters the form of the Bill and the House of Representatives bears the onus of determining the fate of a bill as it must decide whether to accept the amended bill or lose the bill. Procedurally, when the Senate agrees to a bill that originated in the House of Representatives with an amendment, it agrees to the amendment and to the third reading of the bill before returning it to the House.[26] The fate of the amendment is unresolved. If the House agrees to the amendment, the parliamentary process is complete and the bill can be prepared for Royal Assent.[27]

1.4.5 When the Government controls the Upper House, the power of the Senate to make amendments is unlikely to be critical.[28] However, in the current political climate, the power of the Senate to make amendments is often controversial.

1.5 Scope of the report

1.5.1 The key objectives of the Committee's inquiry have been to promote discussion between the Houses and to provide a report which may form the basis of a compact to be settled between the two chambers. With these objectives in mind, the Committee decided to table an exposure draft. This allowed the Parliament, and in particular the Senate Legal and Constitutional References Committee, to consider the Committee's draft report. Tabling an exposure draft also permitted the Committee to take further contributions into account before finalising its report.

1.5.2 The report begins by considering the compromise underlying sections 53-55 of the Constitution. The broader principles reflected in section 53 — which are related to the roles of the respective chambers — are then examined. Finally, in this chapter the Committee attempts to provide an interpretation of those aspects of section 53 which are generally accepted.

1.5.3 Chapter 3 of the report places the third paragraph of section 53 in its historical context. In this regard, a comment by Sir Samuel Griffith during the Convention debates is useful to bear in mind. He stated that:

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26 Ms H. Penfold, *Submissions*, p. S122.

27 ibid., p.S122.

28 See comment to this effect in Mr M. Leeming, 'Something That Will Appeal to the People at the Hustings: Paragraph 3 of Section 53 of the Constitution', (1995) 6 PLR 131 at 132.

> ...[t]here must necessarily be clauses in a constitution which are ambiguous. Who can say what will be the development in the course of some thirty or fifty years of some of the clauses we are now passing? Who can tell what will be the precise manner in which these provisions will work out? Who can tell what will be the practical operation of them?[29]

In referring to the development and the practical operation of the provisions, the comment suggests that the clauses of a constitution may not necessarily be consistent and, when interpreting section 53 of the Constitution, particular weight may be accorded to any parliamentary practices that have evolved. The Committee gave careful consideration to this possibility in deciding whether 'imposing taxation' meant the same in section 53 as it does in section 55.

1.5.4 After considering the third paragraph in its historical context, the Committee goes on to discuss the issue of justiciability. The non-justiciability of section 53 was affirmed by the High Court after the tabling of the exposure draft. The Committee has, however, decided to retain this chapter in the final report. As section 53 is not justiciable, the Houses have more flexibility than if it were likely to be scrutinised by the High Court.

1.5.5 In chapter 5 the Committee identifies the criteria it has used in analysing the evidence. These criteria include the plain meaning of the words of the third paragraph of section 53, the policy underlying section 53 and the purpose of the third paragraph itself, the drafting history of the section, parliamentary practice, the opinions of respected lawyers and the workability of various interpretations. Using those criteria for guidelines, the Committee considers that it should endeavour to formulate a practical interpretation of the third paragraph of section 53 rather than attempt to discover some pre-existing interpretation of the section. In its approach the Committee has endorsed some practices which, while they stand outside a literal interpretation of section 53, are not precluded by the words of the section itself. The Committee considers that such practices reflect the broad policy of section 53 (that is, to preserve the financial initiative of the House of Representatives but otherwise give the Houses equal powers).

1.5.6 While the third paragraph of section 53 deals with types of amendments rather than types of bills, it is necessary to seek some guidance on where the section might be applied by considering the types of bills likely to be involved. The Committee

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29 *Official Record of the Debates of the Australasian Federal Convention* ('Convention Debates'), 3 April 1891 at 714.

divided issues related particularly to expenditure from issues related particularly to taxation. Chapter 6 deals with whether the third paragraph applies to appropriations and expenditure bills. The Committee then considers whether the third paragraph of section 53 applies to tax and tax-related burdens. Both of these questions are answered in the affirmative.

1.5.7 *Then, in chapter 9, the Committee determines how bills that increase the* rate of tax or expand the tax base should be treated. The report then moves on to a discussion of the meaning of the expression 'proposed charge or burden' — an issue that is relevant to both taxation and expenditure. The issue is examined in relation to bills that contain appropriation clauses and bills that do not contain such clauses.

1.5.8 The report details the tests that can be applied to determine whether an amendment will increase the proposed charge or burden. Those tests include the 'necessary, clear and direct' test, the 'probable, expected, intended effect' test and the 'availability' and 'legal possibility' tests. The report concludes by discussing the possibility of a compact between the Houses concerning the interpretation and application of the third paragraph of section 53.

1.5.9 The Committee considers that the major issues associated with the inquiry are:

- whether the third paragraph of section 53 applies to tax and tax-related measures including the interpretation of 'imposing taxation' in the first two paragraphs of section 53;
- whether the third paragraph applies to proposed laws relating to expenditure and appropriation;
- the interpretation of the expression 'proposed charge or burden';
- the test which should be applied to determine whether an amendment will increase the proposed charge or burden; and
- the possibility of a compact between the Houses.

1.5.10 A multitude of issues were raised during the Committee's inquiry into the third paragraph of section 53. The report focuses on those issues debated during the

public hearings. Other issues that are not dealt with so extensively in the report are referred to in chapter 12.

1.5.11 The report does not purport to provide a comparative account of how 'money bills' proceed through the parliaments of the States or of other federations. The focus is on identifying and resolving the issues the Commonwealth Parliament faces when interpreting the third paragraph of section 53 of the Constitution.

2 The policy and principles underlying section 53

Section 53 of the Constitution represents part of a compromise born of the conflicting principles of responsible government and federalism. The compromise prevents the Senate from introducing or amending 'money bills' but allows it to 'request' amendments to such bills.

Interpretation of the third paragraph of section 53 of the Constitution is linked to the role of the Senate. Whether one takes a broad view or a narrow view, of the restriction on the powers of the Senate embodied in the third paragraph of section 53, may be influenced by one's perception of the role of the Senate in the Constitutional framework.

Despite the fact that the interpretation and application of section 53 as a whole varies, there are some interpretations of the section that are non-contentious. The 1965 compact is considered together with an introduction to the terminology relevant to the section.

2.1 Conflicting principles and the policy of section 53

2.1.1 Sections 53-55 of the Constitution were a political compromise negotiated at the Constitutional Conventions of the 1890s. Such a compromise was necessary due to the conflicting principles of the Westminster system of responsible government and American notions of federalism. The Westminster system of responsible government placed greater responsibility for financial matters with the House of Commons as opposed to the House of Lords because the latter was not an elected body.[30] However, as the Australian system of government was also to be a federation, it would have an elected upper house to represent the interests of the States. The conflicting requirements of responsible government and federation led to a political compromise whereby, in summary, the Senate would not have the power to originate[31] or amend money bills, but could request amendments of such bills.

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30 Twomey A., *Senate power in relation to money bills: an historical perspective*, Parliamentary Research Service, Research Paper Number 5 1994, p. 1.

31 In the report there are many references made to the House where bills are 'originated'. The Committee favours using 'originated' as opposed to 'introduced'. This is because 'introduced' can be used to refer to the situation where a bill is originated in one chamber and then first introduced in the other chamber. Use of the term 'originated' avoids confusion. However, where various witnesses have used 'introduced', references to that evidence in the exposure draft use that term even though the origination of the bill is the subject of discussion.

2.2 The policy of section 53

2.2.1 The broad policy of section 53 is to preserve the financial initiative of the House of Representatives, but otherwise to give the two Houses equal powers. The fifth paragraph of section 53 expresses this policy; it provides that the Houses shall have equal powers except for the prohibitions imposed on the Senate by section 53.

2.2.2 The prohibitions imposed on the Senate by section 53 indicate that the financial initiative rests with the House of Representatives. The Senate is prohibited from originating appropriations and laws which impose taxation. It is also prohibited from amending appropriations for the ordinary annual services of the Government, laws which impose taxation and any other proposed law so as to increase the proposed charge or burden on the people. These prohibitions on the Senate vest the power of origination and amendment with the House of Representatives in certain financial matters. The Clerk of the Senate, Mr Harry Evans, agrees that section 53 is designed to protect the financial initiative of the House of Representatives.[32] Some of the submissions on the exposure draft commented on the draft's treatment of the broad policy of section 53.

2.2.3 In commenting on the broad policy of section 53, Dr Thomson emphasised the importance of considering the policy of section 53 as a whole. He noted that the first half of this policy may suggest that section 53 relates to the powers and prerogatives of the House of Representatives. However, read as a whole, the policy suggests that section 53 relates to the relationship between the Senate and the House of Representatives over money.[33]

2.2.4 Dr Thomson queried whether the objective or purpose of the third paragraph of section 53 is different from the broad policy of section 53. He suggested that the purpose of the third paragraph could be more directly related to the people's rights (than to the rights of the respective chambers). He noted that the third paragraph is the only place in section 53 which refers to 'the people'.[34]

2.2.5 Following on from this, Dr Thomson asked whether the broad policy of section 53 serves to protect peoples' rights more indirectly, that is, through the House of Representatives asserting its rights and protecting the people because it is the

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32 *Submissions*, p. S65.

33 *Submissions on the exposure draft*, p. S25.

34 ibid.

peoples' House. Dr Thomson concluded that the third paragraph of section 53 may be more concerned with the people rather than the financial initiative of the House of Representatives or the relationship between the two chambers.[35]

2.2.6 The Committee agrees that the focus of the third paragraph of section 53 is on the people and that this can be distinguished from the general policy of the whole of section 53. (The possible meaning of 'the people' is further discussed in chapter 12). Nevertheless in considering the application and interpretation of the third paragraph, this distinction is but one of the many threads comprising the fabric of the broad policy of section 53. It is not possible to give the third paragraph any application as a stand alone section because of its integral relationship with the rest of the section. But in applying the paragraph its focus on the people is an essential factor.

2.2.7 The broad policy of section 53 and the purpose of the third paragraph provide a basis for many of the Committee's recommendations.

2.3 Financial initiative of the executive and the House of Representatives

2.3.1 Mr Evans suggested that the exposure draft confused the distinction between the financial initiative of the House of Representatives and the financial initiative of the executive. While these notions are distinct, they are also interrelated. *House of Representatives Practice* states that:

> The financial procedures of the House give effect to the basic parliamentary and constitutional principle of the financial initiative of the Crown which ... is that only the Government of the day, through the House of Representatives, may initiate appropriations or taxes, or move amendments to increase or extend the objects and purposes or alter the destination of any appropriation or move to increase or extend the incidence of a tax or charge.[36]

The financial initiative of the executive in regard to appropriations is expressed in section 56 of the Constitution and the financial initiative in relation to taxation is expressed in standing order 293.

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35 ibid.

36 Browning A. (ed.), *House of Representatives Practice*, Second edition, AGPS, Canberra, 1989, p. 407.

2.3.2 It was submitted that the financial initiative of the Crown lies behind the limitations on the powers of the Senate imposed by section 53 and the result is that no public charge may be incurred except on the initiative of the Executive Government.[37] *House of Representatives Practice* notes that 'the principle of the financial initiative of the Crown vests in the Government the right to initiate or move to increase appropriations and taxes.'[38] As the Government is formed in the lower house, the financial initiative of the Executive and that of the House of Representatives are intertwined. This matter is further considered in section 12.8 below, where amongst other things, the situation of a minority government is addressed.

2.4 The broader principles reflected in section 53

2.4.1 It has been suggested that the role of the Senate, particularly in relation to the House of Representatives and in relation to federation and the States, is central to the Committee's reference.[39] Dr Thomson submitted that the issue can be examined through the lens of the 'Territorial Senators' Case'.[40] That case considered the constitutionality of electing Senators from the territories. The *Senate (Representation of Territories) Act 1973* increased the number of Senators from 60 to 64, by adding two senators each from the Northern Territory and the Australian Capital Territory. The validity of the increase was based on section 122 of the Constitution which provides that the Parliament may allow the representation of a territory in either House to the extent and on the terms which it thinks fit. Western Australia, New South Wales and Queensland challenged this Act, relying on section 7 of the Constitution which provides that the Senate shall be composed of senators from each State. The Act was one in a package of bills where section 57 of the Constitution was in issue.

2.4.2 The majority on the issue (McTiernan, Mason and Jacobs JJ) held that the creation of territorial senators (with full voting rights) was justified by the clear words of section 122 and that the *Senate (Representation of Territories) Act 1973* was valid. Murphy J agreed and argued that it would be contrary to the democratic theme of the Constitution if Parliament was not able to allow representation by membership in either House to territories at the time and on the terms which the Parliament

37 See Mr L. Barlin, *Submissions*, p. S191.

38 ibid., p. 47.

39 Dr J. Thomson, *Transcript*, p. 98.

40 *Western Australia* v. *The Commonwealth* (1975) 134 CLR 201. See also *Queensland* v. *Commonwealth* (1977) 139 CLR 585.

considers appropriate.[41] The minority view was that in order to reconcile section 122 with preserving the Senate as a 'States' House', it would have to be read down to *authorise representation with no voting rights.*[42]

2.4.3 There is a number of possible broad policy principles, some of which are conflicting, that may underpin the third paragraph of section 53 of the Constitution. Dr Thomson suggested that the majority and minority judgments in the 'Territorial Senators' Case' can be interpreted as reflecting those contrasting principles. He submitted that the minority emphasised and gave primacy to the Senate as representing states and their interests. He made reference to the equal number of Senators from the original states and to the role of the state parliaments in filling casual Senate vacancies.[43]

2.4.4 Dr Thomson went on to suggest that the majority gave primacy to section 122 of the Constitution and emphasised the democratic nature of the system of representative government embodied in the Constitution. Dr Thomson submitted that a majority of the judges in that case suggested that the role of the Senate as a states' house may have been the drafters' intention, but the Senate has not operated that way in practice. Rather it operates chiefly as a house of review and as a house of the national parliament.[44]

2.4.5 Whether one takes a broad view or a narrow view, of the restriction on the powers of the Senate embodied in the third paragraph of section 53, may be influenced by one's perception of the role of the Senate in the Constitutional framework. Emphasis on the importance of the role of the Senate, whether as a States' House or a House of Review, may lend support to a relatively narrow view of the restriction. That would allow the Senate wider powers to check the powers of the House of Representatives.[45]

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41 At 234 per McTiernan J, 270 per Mason J, 275 per Jacobs J and 286 per Murphy J.

42 At 232 per Barwick CJ, 249 per Gibbs J and 257 per Stephens J.

43 Dr J. Thomson, *Transcript*, p. 98.
Note that in 1977 section 15 of the Constitution was amended to require state parliaments to appoint a person to a casual Senate vacancy who is of the same political persuasion as the previous incumbent. However, Dr Thomson noted that since the amendment there have been several controversies concerning proposed appointees and whether they were of 'the same political persuasion'. See *Submissions on the exposure draft*, p. S28 and Blackshield A., 'Constitution's additions left ambiguous areas' (18 May 1987) *Financial Review* p.5.

44 See Dr J. Thomson, *Transcript*, pp. 98-99.

45 See ibid., p. 100.

2.4.6 Emphasis on the role of the House of Representatives as the people's House where the Government is formed may lend support to a broader view of the restrictions on the Senate.[46] These generalities about the relative importance of the respective roles of the two Houses lie behind a consideration of the third paragraph of section 53. However, conclusions concerning the interpretation of the third paragraph require more detailed consideration.

2.5 Relevant terminology

2.5.1 The first paragraph of section 53 of the Constitution prohibits proposed laws appropriating revenue or moneys, or imposing taxation, from being originated in the Senate. An appropriation of revenue or money is an authorisation of government expenditure made by legislation. There are two types of appropriations - standing and fixed appropriations. Standing appropriations are open-ended and do not specify a monetary limit on expenditure. An example of a standing appropriation is in the *Social Security Act 1991*. As there is a standing appropriation in that Act, any benefits or allowances payable under that Act are automatically funded from the Consolidated Revenue Fund. A fixed appropriation, as the name suggests, specifies the amount of expenditure authorised. Examples of fixed appropriations are the annual Appropriation bills passed in every budget. Terms relevant to appropriation and expenditure are further defined and discussed in chapters 6 and 7.

2.5.2 There does not appear to be a non-contentious interpretation of the expression 'imposing taxation' in section 53. High Court authorities support the proposition that a bill which enlarges a tax base (where the tax is imposed in another Act) is **not** a law imposing taxation within the meaning of section 55 of the Constitution. The two issues which then arise are:

(a) Is there a distinction under section 55 of the Constitution between a bill which enlarges a tax base (where the tax is imposed by another Act) and a bill which increases the tax rate (where the tax is imposed by another Act)? and

(b) If there is no distinction and both types of bill are viewed as either imposing taxation or not imposing taxation within the meaning of section 55, can that same reasoning be applied to section 53?

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46 See ibid., p. 101.

These issues are further discussed in chapter 9.

2.5.3 The effect of the second paragraph is that proposed laws imposing taxation or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government may not be amended in the Senate. The main Appropriation Bill (Appropriation Bill [No.1]) for the year provides for the ordinary annual services of the Government, and a second appropriation bill contains provision for expenditure not appropriately included in the main bill.[47] The second appropriation bill can be amended in the Senate.

2.5.4 In 1965 a compact between the Government and the Senate provided that a number of items of expenditure were not appropriations for the ordinary annual services of the Government. Those items were the construction of public works and buildings, the acquisition of sites and buildings, items of plant and equipment which are clearly definable as capital expenditure, grants to the States under section 96 of the Constitution and new policies not previously authorised by special legislation.[48] In 1982 a further compact between the Government and the Senate provided that appropriations for the parliament were not ordinary annual services of government.

2.5.5 As previously stated, the third paragraph prevents the Senate amending any proposed law to increase the proposed charge or burden on the people. While the section focuses on types of amendments rather than types of bills (unlike the first two paragraphs of the section) it remains necessary to identify the classes of bills to which the third paragraph applies. The Committee discusses whether the third paragraph applies to appropriation measures in chapter 6, to expenditure under standing appropriations in chapter 7, and whether the paragraph applies to tax-related burdens in chapter 8.

2.5.6 Tax-related burdens may include increases in the rate or incidence of taxation (sometimes referred to as the tax base) and variations in deductions. A bill that increases the rate of taxation is a bill which has the effect of increasing the amount of an existing tax that a taxpayer must pay. Bills that increase the incidence of taxation include bills that enlarge the tax base by changing the levels at which the tax applies, by removing exemptions or by reducing deductions. A bill enlarges the tax base by, among other things, expanding the class of taxpayers subject to the tax

47 Browning, op. cit., p.420.

48 House of Representatives *Debates*, 13 May 1965, pp. 484-5 cited in Browning, ibid., p. 421.

or changing the circumstances under which the taxation is payable (for example, reducing the time in which tax is payable). Terms relevant to taxation are further defined and discussed in chapters 8 and 9.

2.5.7 The fourth paragraph of section 53 provides that where proposed laws cannot be amended in the Senate, they may be returned to the House of Representatives with a request for the House to make the desired amendment. The final paragraph of section 53 states that the Senate and the House of Representatives shall have equal power in relation to all proposed laws, except as provided in the preceding paragraphs of section 53.

2.5.8 It is interesting to note that the first two paragraphs of section 53 deal with specific categories of proposed laws, namely those which appropriate revenue or money and those which impose taxation. The third paragraph does not delineate the categories to which it applies, but makes a general statement. This variation in structure from the earlier paragraphs makes it difficult to construct a coherent interpretation of section 53. It has been noted that the non-specific language of the words of the third paragraph sits uneasily alongside the precision of the surrounding paragraphs.[49]

49 Mr M. Leeming, 'Something That Will Appeal to the People at the Hustings': Paragraph 3 of Section 53 of the Constitution, (1995) 6 PLR 131.

Chapter 3 Historical perspective

This chapter reviews the history of the third paragraph of section 53 prior to and since federation. The overview of the paragraph from the 1891 draft of the Constitution Bill until the final draft attempts to discern the intentions of the drafters. The text changed little between the first and last drafts of the Constitution. The words of the third paragraph are analysed in the context of the Convention Debates.

The post-federation history of the third paragraph reveals a multiplicity of disputes arising from the application of the third paragraph to particular Senate amendments. In recent years disputes between the Houses have concerned the extent to which particular Senate alterations will result in a 'necessary, clear and direct' increase in expenditure.

3.1 Introduction

3.1.1 The exposure draft's treatment of the history of the (current) third paragraph of section 53 elicited some comments which should be addressed in this final report. Some submissions criticised the exposure draft's focus on the role of Sir Henry Parkes in the evolution of the third paragraph of section 53.[50] One submission and an article on the exposure draft traced sources for the text and philosophy of the paragraph to the period before the 1891 Convention. They found sources for the paragraph in the constitutions and practices of the Australian colonies and the relationship between the House of Lords and the House of Commons in dealing with money bills.[51]

3.1.2 To the critics of Sir Henry Parkes' role, the Committee can merely reiterate the facts that the paragraph first appeared in the 1891 draft in virtually the same form as it is today. Sir Henry Parkes was the President of the 1891 Convention. He was an active President and particularly active in regard to the relative powers of the

50 See Mr H Evans, *Exposure Draft Submissions*, pp. S12—13 and Mr P Schoff, ibid., p. S35, fn 3.

51 Mr P. Schoff, op. cit. and Mr M. Leeming, *'Something that Will Appeal to the People at the Hustings': Paragraph 3 of Section 53 of the Constitution*, (1995) 6PLR 131.

Houses in relation to money bills.[52] It is perhaps understandable that those who would deny Sir Henry's influence on this section of the Constitution would disagree with his insistence on the representative and democratic nature of the coming federation and the analogies he drew between the peoples' house and the House of Commons.

3.1.3 On the other hand, it was never intended to imply in the exposure draft that Sir Henry invented either the text or the philosophy behind the words. The pre-1890 history of the paragraph which has been expertly reconstructed by both Mr Leeming and Mr Schoff is of great interest in the context of constitutional history. It would be superfluous to repeat their scholarship here and peripheral to the focus of this report to revisit this history. It is the post-1891 history that is most relevant to the interpretation and application of the third paragraph.

3.1.4 A note of caution should be repeated here. The story of how the paragraph got into the Constitution may help throw light on the expected roles of the two Houses. However, when compared with ninety-four years of practice and many learned opinions from Attorneys-General and others, constitutional history is but a small guide to how the paragraph should be interpreted and applied in the 1990s and beyond. Limits on the persuasive nature of the history of the paragraph were noted in the exposure draft.

3.1.5 It is useful to divide the history of the third paragraph into two stages: the development of the Constitution through the 1890's until the final draft of the Constitution Bill and post-1901. An examination of the first stage may shed some light on the intentions of the drafters which, in turn, will suggest what the content of the paragraph was thought to convey at the time it was drafted. The purpose of considering the pre-federation history of section 53[53] is to illuminate one of the paths

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52 Sir Henry made five major speeches in Committee on the amendment of money bills. When Mr McMillan, suggested allowing the Senate to amend money bills rather than merely suggest amendments, Sir Henry threatened to submit a more stringent amendment:'I only rise to say that if an amendment of the character which is suggested is moved, I shall feel it my duty to submit another amendment restricting the senate from amending or touching in any way bills appropriating revenue, or imposing new burdens upon the people.' [Convention Debates, op. cit., 3 April 1891, p. 721.]

53 In the early drafts of the Constitution Bill the contents of the current second and third paragraphs of section 53 were in section 55 (1). For the purpose of this analysis the contents will be referred to as those which became the third paragraph of section 53.

to interpreting the paragraph.[54] It cannot provide the ultimate or only definition of its interpretation and (proper) application.

3.1.6 A study of the post-1901 history of the paragraph will complement the analysis of the first stage of its history. The interpretation and application of the paragraph since 1901 may not be in strict accordance with the intentions of the drafters (insofar as these can be known), but that interpretation has the strength of precedent and history on its side. A proper analysis of the interpretation and application of the third paragraph of section 53 must take account of the meaning of the words themselves and the ways in which they have been interpreted and applied during the passage of legislation in the past 93 years.

3.1.7 Evidence before the Committee suggests that as history and practice have been found wanting in providing a satisfactory interpretation of the third paragraph, something else is needed.

> .. we should be looking to 'create' an interpretation for the third paragraph ... rather than to extract or discover that interpretation from what has gone before. That interpretation should be sensible and defensible in the general context of constitutional and parliamentary history and practice, and it should pay proper respect to the Constitution, but it need not be absolutely consistent with every element of the relevant history and practice — indeed, the impossibility of finding an interpretation of the latter kind is one of the things that has led to the current situation.[55]

3.1.8 The Committee considers that history and precedent are good guides even though they may be rejected as absolute masters. The Committee further explains its approach, and the place of factors such as history and precedent, in Chapter 4.

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54 The approach to the interpretation of the Constitution via the Convention Debates has not been favoured by Australian courts. See for example the comments of Sir Ninian Stephen in the foreword to Convention Debates, op. cit., Sydney 1986, p. viii. However, they are now referred to for limited purposes eg. to identify the contemporary meaning of the language used and the subject to which that language was directed: see *Svikart* v. *Stewart* (1994) 69 ALJR 35 at 37 per Mason CJ, Deane, Dawson and McHugh JJ, 43 per Toohey J., 48 per Gaudron J. See also *Cole v Whitfield* (1988) 165 CLR 360 at 385, 388 and *New South Wales* v. *The Commonwealth* (the *Incorporation Case*) (1990) 169 CLR 482 at 501.

55 Ms H. Penfold, *Submissions*, p. S352.

3.2 The federal idea and the development of the Constitution

3.2.1 The concept of a federation of the Australian colonies dates from at least the 1840s. The desire to initiate a federation of the colonies gained momentum during the 1880s. The Constitution was developed from resolutions considered at the 1891 Australasian Federal Convention, from drafts prepared by various delegates and from the debate at the Convention.

3.2.2 These elements were developed by a drafting committee into a Constitution Bill which was considered at the 1897—98 Convention. The Bill was put to the people of the colonies in a series of referendums.[56]

3.2.3 The resolutions considered at the first Australasian Federal Convention held in Sydney between 2 March and 9 April 1891 were drafted by Sir Henry Parkes.[57] At the meetings of the Convention, Sir Henry, who was President of the Convention, was vocal in his support for the financial initiative of the House of Representatives — the people's house. Parkes proposed that the House of Representatives should 'possess the sole power of originating and amending all bills appropriating revenue or imposing taxation'.[58]

3.2.4 On 16 March 1891 discussion turned to the aims and objects of the Convention — in particular, whether the resolutions being considered should be debated in detail, or whether they were meant to be merely indications to guide the drafters of the constitution bill. Sir Henry said

> My object was simply to put before the Convention an embodiment of what may be called the cardinal principles, such, for example, as a legislature of two houses, and not of one; such for example, as the electoral basis of the house of representatives; such, for example, as the

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56 Proposals for a form of co-operative union were raised from time to time for most of the period of colonial Australia but were taken more seriously during the 1880s. Sir Henry Parkes in January 1881 considered that the time was not yet ripe for an Australian Federal Parliament but he thought the public mind should be prepared for such an eventuality. [Quick J. and Garran R., *The Annotated Constitution of the Australian Commonwealth,* The Australian Book Company, Sydney 1901, p. 108.] The movement was helped, no doubt, by the 'nationalistic' fervour of journals such as *The Bulletin.* The idea of an Australian union is attributed by Quick and Garran to Earl Grey, the then Secretary of State for the Colonies, in a despatch of 31 July 1847. [ibid., p. 81.] Quick and Garran record the considerable amount of activity aimed at federation in the years before the Australasian Federal Convention. ibid., pp. 81—129.

57 Convention Debates, op. cit., 13 March 1891, p. 345.

58 Cited in J. La Nauze, *The Making of the Australian Constitution,* Melbourne 1972, p. 43.

> power of dealing with all bills imposing burdens on the people, or appropriating their money. These seemed to me to be the essential parts, forming in reality the very soul of any scheme to which we can agree.[59]

3.2.5 It is clear that Sir Henry considered that the power to deal with such bills to be one of the cornerstones of the proposed federation.

3.3 Insights from the 1891 Convention

3.3.1 Debate on the resolutions at the 1891 Convention were part of the background philosophy of the draft Constitution Bill, which was compiled by a drafting committee at the end of the main debates. The Parkes resolutions were not the only influence on the drafting committee and Parkes himself was not one of the drafters. Parkes did not attend the later conventions.[60] But the philosophy of Parkes is present in the clauses which eventually became the third paragraph of section 53.[61]

3.3.2 The origins of the limitations on the upper house in relation to money bills lie in the importance of the people's house in the British Parliament. Restrictions on the House of Lords arose from the composition of that House. The historical origin of this view is the resolution of the House of Commons of 3 July 1678:

> 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.[62]

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59 Convention Debates, op. cit., 16 March 1891, p. 362.

60 Sir Henry died in 1896.

61 For example, one of the more significant bases of the Constitution Bill was the draft bill prepared by Inglis Clark. The Clark version relating to 'Money Votes' shows the origins of much of what later became section 53, but it does not contain the language of the current third paragraph: '**52** Every Bill for appropriating any part of the Public Revenue, or for imposing any tax or impost, shall originate in the House of Representatives, but may be amended or rejected by the Senate: Provided, that no amendment shall be made to any such Bill by the Senate which would have the effect of increasing any proposed expenditure, or tax, or impost.' (Inglis Clark, *Draft Bill*, 1891, reproduced in D. Eastman, *Foundation Documents,* Canberra 1994.)

62 Cited in *Northern Suburbs General Cemetery Reserve Trust* v. *The Commonwealth* (1992—93) 176 CLR 555 at 578.

The words of the current section 53 which reflect these views, modified to reflect the fact that the upper house in the Australian federation was to be elected but not on a population basis, survived more or less intact through all the official drafts of the Constitution Bill.[63]

3.3.3 It is worth examining some of Parkes' comments in the light of the eventual distinction between the powers of the two Houses which owed much to his strong views on practical politics and representative government. Parkes thought it was inconsistent with the maintenance of sound principles of government for the two houses to have co-equal powers in dealing with money bills. Given that one house would have to have the greater power to deal with money bills, it should be the lower house because the Senate was not intended to represent the people:

> ... I do not see how two bodies can have equal power in dealing with matters, which, viewed however they may be viewed, are admitted to be the most vital questions of good civil government. There must be somebody to decide, and the great constitutional struggle in England, as I observed the other day, has been to see who shall decide, and they have decided that the people of England as represented in Parliament shall decide. With regard to the equally representative character of these two houses, I am at a loss to conceive how any hon. gentleman can calmly reason and come to the conclusion that their representative character will be equal. One will not represent the people at all, except indirectly; it will represent in fact the states...[64]

3.3.4 Parkes went on to comment on the slow progress of South Australia compared with the other old colonies and noted:

> I, for one, and those who think with me, are prepared to give to South Australia just the same representation in the senate as we ourselves have. We are quite prepared to give her equal power in the general legislation of the country; but we say, 'Some one authority must decide as to how the people are to be taxed, and as to how the product of the taxes is to be appropriated in the interest of the people.'[65]

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63 The early drafts read 'The Senate may not amend any proposed law in such a manner as to increase any proposed charge or burden on the people.' Between 1 March 1898 and 16 March 1898 the words 'in such a manner' were changed to 'so as'. Garran Papers, Manuscript 2001/8/27, National Library of Australia. Amendments to the rest of (current) section 53 are numerous.

64 Convention Debates, op. cit., 16 March 1891, p. 380.

65 ibid., p. 381. The Wrixon amendment which was the topic of discussion read ' (1.) The senate shall have equal power with the house of representatives in respect to all bills, except money bills, bills dealing with duties of customs and excise, and the annual appropriation bill, and these it shall be entitled to reject but not to amend.

3.3.5 Parkes' view that the lower house should have the greater power in relation to tax and appropriation bills was picked up by committee which drafted the Commonwealth of Australia Bill at the end of the 1891 Convention:

> It is not proposed by the bill to enable either house to coerce the other. It is proposed, however, to give to the upper house, that is to say, the senate, that power of veto which must be enjoyed by any house if it is to be a house of legislature at all; but it is not proposed to give it the power to amend in detail bills for the annual appropriation of revenue and for the imposition of taxation. The senate is, of course, entitled to have its opinion upon such matters heard ... This they will have the opportunity to do, so that it may not be necessary for them to take the extreme course of rejecting a bill because they do not like something in it... They will at least be entitled to make known their opinion to the other branch of the legislature.[66]

3.3.6 Parkes was fond of the sort of language [which is present in various state and overseas constitutions] and which is seen in the third paragraph:

> Because all taxes levied must be burdens on the people of the country ... these taxes must affect the people of the country in the very same way in which the imposition of burdens affect them.[67] (refer to paragraph 5.1.1).

3.3.7 The clause 'but the senate may not amend any proposed law in such a manner as to increase any proposed charge or burden on the people' was included in the first draft of the bill prepared by the committee appointed during the 1891 Convention.[68] So keen was Parkes on limiting the Senate's power in relation to tax and appropriation bills that when an amendment was proposed which would have allowed the Senate to amend appropriation and tax bills, Parkes declared:

> ... if an amendment of the character which is suggested is moved, I shall feel it my duty to submit another amendment restricting the senate from amending or touching in any way bills appropriating revenue, or imposing new burdens upon the people.[69]

3.3.8 The next day Mr McMillan proposed omitting the words

(2.) The act of union shall provide that it shall not be lawful to include in the annual appropriation bill any matter or thing other than the votes of supply for the ordinary service of the year'. ibid.

66 Sir Samuel Griffith, Convention Debates, op. cit., 31 March 1891, p. 526.

67 Convention Debates, op. cit., 17 March 1891, p. 449.

68 Convention Debates, op. cit., 3 April 1891, p. 706.

69 Convention Debates, op. cit., 3 April 1891, p. 721.

> 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.[70]

In response Sir Samuel Griffith pointed out that the words had been carefully chosen

> My hon. friend ... assumes a very serious responsibility in proposing this amendment, because this subject after several days' debate in the Convention, received the anxious attention of the committee for several days and from every point of view; and they did not adopt this form of words without carefully choosing every word, and considering how the proposed scheme would work out in practice.[71]

3.3.9 The relationship between originating and amending a bill was discussed during the 1891 Convention. With prophetic insight Sir John Downer noted

> If the clause were to simply stand as amended it might open a fruitful source of conflict between the two houses by analogy with what has occurred in other colonies, and with what is contained in the Canadian statute as to whether or not, by denying the upper chamber the power of originating money bills, you do not by implication reserve to them the power of amending such bills.

3.3.10 In reply Sir Samuel Griffith said

> Most of the conflicts that have occurred between the two houses of legislature in Australia have arisen from the use of exactly that form of words — 'the sole power of originating all bills appropriating revenue or imposing taxation.' Those are the words in the Queensland Constitutions. We have always maintained there that notwithstanding the use of those words, with no expressed reference to the power of amendment, our Legislative Council had no power of amendment, or that if they had the technical power, they had no right which they should be allowed to exercise. ... We all agree that only the house of representatives should have the power of originating money bills. ... Whether or not we come to the result of absolutely excluding any interference by the senate — and I do not think anybody insists upon the absolute exclusion of interference — we shall be in a position to frame the conditions, if any, upon which interference may be allowed with what may be technically termed money bills, although in substance they may be matters affecting great questions of public policy.[72]

3.3.11 The issue was whether limitations on the role of the Senate in relation to money bills should be modified by giving it the power of total or partial rejection. Sir

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70 ibid., p. 756.

71 ibid.

72 Convention Debates, op. cit., 16 March 1891, pp. 377—378.

John Downer wanted to add the words 'The senate to have the power of rejecting in whole or in part any of such last-mentioned bills'.[73] Sir Henry Parkes begged him not to press the amendment at that stage in order to allow more time to consider such an important issue.

3.3.12 The 1891 Convention demonstrated that the words of section 53 had been carefully considered in the context of the differing powers of the two houses. The difference in power reflected both the different constituencies of the houses as well as the practical requirement of allowing one house to determine an outcome where endless argument might otherwise threaten.

3.4 The 1897—98 Convention

3.4.1 The work of drafting, debating and amending the Constitution Bill was completed (for the most part) during the Australasian Federal Convention of 1897—98. Meetings took place in Adelaide, Sydney and Melbourne. The development of the Constitution Bill which eventually became the Constitution Act is recorded in the reports of the Convention Debates. The later debates are not considered here because the words which became the third paragraph of section 53 were not amended after 1891.

3.4.2 The respective powers of the two Houses in relation to finance was one of the more important issues during the Convention Debates of 1891, 1897 and 1898 and the Premiers' Conference of 1899.[74] Controversy over financial powers reflected the desire on the part of the smaller colonies to have a strong Upper House to protect the interests of the States.[75]

3.5 Robert Garran and John Quick

3.5.1 One of the 'players' in the federation movement was Robert (later Sir Robert) Randolph Garran who had an illustrious career as a lawyer and public servant. Garran was admitted to the Bar in 1891. He was one of the organisers of

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73 Convention Debates, op. cit., 16 March 1891, p. 380.

74 Quick and Garran, ibid., p. 219.

75 Odgers, op. cit., p. 552. A typical view was that put by the Hon John Hackett MLC, a delegate from Western Australia to the 1891 Convention: 'To us of Western Australia, and, I believe, to all the smaller states, this question of the senate and the powers that are to be vested in it is all-important. It is the one by which we must stand or fall; we cannot possibly give way.' Convention Debates, 12 March 1891, p. 277.

and a delegate to, the unofficial conferences supporting federation at Corowa (1893) and Bathurst (1896). He attended the 1897—98 official Federal Convention in his capacity as secretary to G.H. Reid, the premier of New South Wales. Here he became secretary to the drafting committee. He was the first Commonwealth public servant, the first secretary of the Attorney-General's Department (1901), the first parliamentary draftsman and the first solicitor-general (1916).[76]

3.5.2 (Sir) John Quick was a Victorian delegate to the Federal Convention. He and Garran worked together on *The Annotated Constitution of the Australian Commonwealth* (1901) which remains a classic reference on the history of federation and on the Constitution. Both authors had the opportunity (but from differing perspectives) to gain some insight into what the framers of the Constitution meant and the reasons for the adoption of the final version of the text. It is therefore worth quoting in full their comments on 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. This provision may be described as a limitation on the reserved power of the Senate to amend money bills, other than tax bills and annual appropriation bills. Seeing that the Senate cannot amend a bill imposing taxation, it may be naturally asked — how can the Senate possibly amend a proposed law so as to increase any proposed charge or burden on the people? The answer is that the Senate is only forbidden to amend tax bills and the annual appropriation bill; it may amend two kinds of expenditure bills, viz.: those for permanent and extraordinary appropriations. If the Senate could propose an increase in the amount of money to be spent in a public work bill — say from one million sterling to two millions sterling — that amendment would necessitate increased taxation in order to give effect to it, and consequently an addition to the burdens and charges on the people. The Senate may amend such money bills so as to reduce the total amount of expenditure or to change the method, object, and destination of the expenditure, but not to increase the total expenditure originated in the House of Representatives.[77]

3.5.3 In a later work, Quick provided some examples of bills which might come within the ambit of the third paragraph. In describing the limitations on the Senate he observed:

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76 The biographical data on Garran is from the *Australian Dictionary of Biography 1891—1939*, pp. 622—623.

77 Quick and Garran, ibid., p. 671.

> It cannot amend any proposed laws or bills such as Railway or Works Bills or Old Age Pension Bills so as to increase any proposed expenditure charge or burden on the people.[78]

3.6 Tracing the history of (present) section 53

3.6.1 Following Garran's death in 1957 (a month before his ninetieth birthday) copies of drafts of the Constitution Bill (amongst other documents) were found in his garage. These, together with other relevant documents in the possession of one of Garran's sons, are now housed in the manuscript collection of the National Library. The drafts are marked by hand-written annotations in black ink in Garran's writing. It is not possible to state authoritatively whether the comments were his own or those dictated by the drafting committee, but the annotations on the phrases which became section 53 are informative. The relevant section from one of the Adelaide drafts is reproduced below:

78 J. Quick, *Legislative Powers of the Commonwealth and the States of Australia,* Melbourne, 1919, p. 624.

Money Bills

54. Proposed laws **appropriating** any part of the public revenue or moneys, or **imposing** any tax or impost, shall originate in the House of Representatives.

But a proposed law shall not be taken to appropriate any part of the public revenue or moneys, or to impose any tax or impost, 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 services under the proposed law.

55.(1) **Subject to the last section,** the Senate shall have equal power with the House of Representatives in respect of all proposed laws, except laws imposing taxation and laws appropriating **revenue or moneys** for the ordinary annual services of the Government, which the Senate **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.

(2) Laws imposing taxation shall deal with the imposition of taxation only.[79]

3.6.2 On this draft the handwritten margin note next to section 55(1) reads

Senate may initiate incidental taxation, but may not amend a law so as to increase it.

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79 The Adelaide draft is dated April 1897, amended to 24 September 1897. This original draft is held in the manuscript collection of the National Library (MS 2001). It is currently (November 1994) on display in Parliament House on the Senate side. The sections quoted (54 and 55 of the 1897 draft) are equivalent to section 53 to 55 of the current *Constitution*.

This version (before the amendments shown) is identical to the version produced by the drafting committee at the 1891 Convention. The current third paragraph of section 53 is the least amended section to survive from the 1891 draft. From first to last the only amendment was to change 'in such a manner as' to 'so as'.

3.6.3 The underlining on the margin note is taken from the original draft. Directly under this comment is the admonition 'consider' written in pencil. (The note itself is in black ink.) It is interesting that the apparent anomaly (that there could be bills which the Senate **may** initiate but **may not** amend) may have been noted in the drafting committee meetings.[80] It is also interesting to contemplate the fact that the opportunity was not taken to resolve this apparent anomaly.[81]

3.6.4 Further insight into the original intention of the words can be found in the annotated plain English version prepared by Garran and circulated in March 1898. This version of the Constitution Bill contains the text on the left hand side of each page with an explanation of the text on the right hand side of the page. By this stage section 53 was in its current form. The explanation set out for section 53 is

> The Senate may not amend taxation bills nor the annual appropriation bill; and it may not amend any bill so as to increase any burden on the people.[82]

3.6.5 It is interesting to note that the single word 'burden' is considered by Garran to be sufficient explanation of 'proposed charge or burden'.[83]

3.7 Conclusions from history?

3.7.1 As noted above, an investigation of the textual origins of parts of the Constitution may be used to illuminate the interpretation and application of the words. The intentions of the drafters and those who adopted the draft can support the interpretation and application of the words, but they cannot be relied upon as the sole support.

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80 This anomaly or paradox has been commented on many times in the evidence to this inquiry. See for example Mr D. Rose *Submissions,* p. S276.

The relationship between originating and amending a bill had been discussed during the 1891 Convention. See 2.3.9 above.

81 Sir Robert Garran mused on the lack of amendment to the paragraph in his 1950 opinion:
(It may be, by the way, that the reason why the paragraph escaped clarification in the revision stages of the Convention that it formed part of the early compromise in one of the most critical issues — a compromise that had been more than once attacked and narrowly escaped defeat, and to tamper with which was dangerous.) [Sir Robert Garran, opinion, 13 April 1950]

82 R. Garran, *Draft Bill to Constitute the Commonwealth of Australia Together with an Explanation of its Provisions*, March 1898. Several copies are is held in the manuscript collection of the National Library (MS 2001). One copy is currently on display in Parliament House in the Senate display area.

83 If one were relying on a rigid contextual analysis, this cavalier attitude to the second 'proposed' in Garran's 'plain English' version would be a difficulty.

3.7.2 Having identified the limitations, one can focus on what can be learned from the information about the evolution of the words and the beliefs and philosophies of the writers. First, there was a clear intention to give the Senate the same legislative powers as the House of Representatives **except** in relation to appropriation and tax bills (however defined).

3.7.3 The motive for promoting the financial initiative of the House of Representatives was twofold: that it would defy the principles of good government to give the houses equal powers in relation to so important a matter; and that the house representing the people should have some powers not available to the house representing the interests of the states.[84] The fact that the states varied widely in population but that they would have equal representation in the Senate underlay reservations about Senate powers.

3.7.4 A study of the speeches during the conventions reveals that the discussion was, in fact, about the respective 'power' of the houses. During the debates the word 'suggest' was often interchanged with 'request'. The compromise that the Senate could suggest (request) where it could not amend arose towards the end of the 1891 proceedings and it does not appear to have been envisaged that requests might be pressed.

3.8 Parliamentary history of the third paragraph

3.8.1 A comprehensive parliamentary history of the third paragraph of section 53 would consist of a number of 'chapters'. It would include: the incidents in which there was disagreement over the application of the paragraph; the occasions on which the third paragraph was applied without disagreement; the times when there might have been discussion on the applicability of the paragraph but no such discussion took place; the departmental files recording correspondence between the Houses on the issue; records of private discussions involving parliamentary officers, parliamentary liaison officers, government and opposition managers of the business of the

84 Note comment by Dr J. Thomson that as a matter of fact and law the House of Representatives does not represent all the people. It only represents electors (ie. children and aliens are excluded) and it did not represent Northern Territory and ACT electors fully until 1973. Further, the House represents some electors more than others as there is no constitutional requirement of one vote, one value (see *McKinlay* (1975) 135 CLR 1 where a majority of the High Court held that section 24 of the Constitution does not require the number of people or the number of electors in electoral divisions to be equal). See *Submissions on the exposure draft*, p. S27.

chambers and parliamentary draftsmen; Office of Parliamentary Counsel drafting directions; and the so-called 'compact' of 1965.

3.8.2 Fascinating as such a history would be, it is not the Committee's intention to provide it in this report both for reasons of economy of time and because the ultimate focus of this report should be on the future and not the past. This review of the parliamentary history of the third paragraph will be confined to a discussion of the some of the incidents of disagreement involving the third paragraph since 1901 and a brief survey of some of the other occasions on which the Senate requested amendments (apparently without significant disagreement).

3.9 Disagreements relevant to section 53

3.9.1 The submission from the Clerk of the House of Representatives lists six instances of significant disagreement between the Houses on the interpretation and application of the third paragraph and analyses them in an appendix.[85] The particular nature of the disagreements related to whether the Senate could amend the bills or whether it should request the House to make the amendments in accordance with the fourth paragraph of section 53. The Clerk has selected six incidents but his submission does not imply that these were the only disagreements involving section 53.

3.9.2 Nor does this survey imply that the precedents mentioned were the most significant or that they can be grouped in a coherent way. They have been selected only to give a flavour of discussions on the issues over the years. Various examples of disagreements are mentioned throughout the report and, where possible, duplication of information has been avoided.[86]

3.9.3 The Committee does not propose to use parliamentary precedent as the only approach to the interpretation of the third paragraph of section 53, but the disagreements are relevant to the terms of reference of the inquiry in that they reveal how the paragraph has been interpreted and applied in the past.

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85 Mr L. Barlin, Clerk of the House of Representatives, *Submissions,* p. S200 and pp. S206—211.See also Papers on Parliament No. 19, p. 13.

86 See for example discussion on the Taxation Laws Amendment Bill (No. 4) 1993 at paragraph 1.6.3. See also discussion on the Surplus Revenue Bill 1910 at paragraph 9.5.4.

3.9.4 The time scale over which the disagreements mentioned by the Clerk of the House of Representatives took place is enlightening, as are the different reasons for disagreement. The first detailed discussion on the applicability of the third paragraph of section 53 took place during debate on the Sugar Bonus Bill 1903[87]. The Clerk has selected as the next significant dispute the Financial Emergency Bill 1932. The matter caused further difficulty during consideration of the States Grants (Tertiary Education Assistance) Bill 1981. Since then disagreements have occurred in relation to many bills including the States Grants (Technical and Further Education Assistance) Bill 1988, the Social Security Legislation Amendment Bill (No. 4) 1991, the Local Government (Financial Assistance) Amendment Bill 1992 and the Social Security Legislation Amendment Bill (No. 4) 1991.[88] Dispute over the application of the third paragraph in relation to the Taxation Laws Amendment Bill (No 4) 1993 was the immediate cause of referring the matter to the two committees. The matter was raised recently in November 1994 in relation to the Taxation Laws Amendment Bill (No.3) 1994[89] (refer to paragraph 1.6.3 — 1.6.9).

3.9.5 In each of these cases the Senate made an 'amendment' which the House considered should have been in the form of a request.[90] The following brief survey reveals the types of issues raised.

3.10 Sugar Bonus Bill 1903

3.10.1 The Sugar Bonus Bill 1903 authorised payment from the Consolidated Revenue Fund of a bounty for sugar cane grown under certain conditions.[91] The debate on the bill is hair-raising in its unabashed racism, but its relevance for section 53 is that while it appropriated money, the appropriation was not for the ordinary annual services of government. The Senate was therefore not precluded from amending the bill under the second paragraph of section 53.

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87 When the Bill was introduced into the House of Representatives and debated in both chambers, it was called the Sugar Bonus Bill. However, when assent was reported in the Senate on 31 July 1903, it was cited as the Sugar Bounty Bill. This exposure draft refers to the bill as the Sugar Bonus Bill. However, the 'bounty' variation is used where witnesses who used that form are cited.

88 Mr L. Barlin, *Submissions,* p. S200.

89 House of Representatives *Debates,* 17 November 1994, p. 3753.

90 Mr L Barlin, *Submissions,* p. S200.

91 Mr L. Barlin, *Submissions,* p. S206.
This was not the first bill in which the Senate had requested amendments. In its first session (1901—2) the Senate requested the House of Representatives to make a number of amendments in the schedule to the Customs Tariff Bill. *Parl. Debates,* vol. 12, pp. 15676—15728.

3.10.2 The Senate attempted to amend the Sugar Bonus Bill by reducing the stringency of the conditions under which the bounty could be paid.[92] The probable result would have been an increase in the number of successful applicants. In other words there would have been an increase in the appropriation of money.

3.10.3 The House of Representatives disagreed with the amendment. The Bill was returned to the Senate with a message stating that the Bill appropriated money, that the amendment would increase a proposed charge or burden on the people and that it was therefore disallowed under section 53.[93] On this occasion the Senate complied by sending a request to the House. The latter agreed to the request with a small change.[94]

3.10.4 The significance of the Sugar Bonus Bill is that it helped to define the sort of bill and the sort of clause within a bill, to which the third paragraph could apply. The fourth paragraph of section 53 allows the Senate to request an amendment to a bill which it 'may not amend'. The Sugar Bonus Bill established the Senate's right to request an amendment, which the Senate could not constitutionally make itself, in a bill for which it had a general power of amendment. (i.e. it was not a bill which the Senate may not amend.)[95]

3.10.5 Requests for amendments were made to two bills in 1908. In relation to the Surplus Revenue Bill the Senate sent a message requesting an extension of the period during which certain payments would be made.[96] In the Customs Tariff Bill 1908, the Senate requested amendments which would increase the rates of duty.[97] Neither occasion seems to have resulted in disagreements.

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92 ibid.

93 *Votes and Proc.,* 1903, p. 55.

94 *Votes and Proc., 1903,* p. 68.

95 This analysis is provided by J. Quick in *Legislative Powers of the Commonwealth and the States of Australia,* Melbourne, 1919, p. 627.

Further details on the Sugar Bounty Bill and requests/amendments can be found in Odgers, *Senate Practice,* op. cit., p. 607; Browning, op. cit., p. 443; Department of the Senate, *Constitution, Section 53 Financial Legislation and the Houses of the Commonwealth Parliament,* Papers on Parliament Number 19, May 1993, pp. 25— 28 and p. 45; 14 July 1903, *Debates,* vol. XIV, pp. 2013—2034, particularly Sir Edmund Barton at pp. 2014, 2015 and 2022 and Mr Isaacs at p. 2024.

96 Papers on Parliament No. 19, p. 28.

97 *Parliamentary Debates,* vol XLV, pp. 10484—10487.

3.11 Financial Emergency Bill 1932

3.11.1 This bill addressed the serious financial situation of the government caused by the depression. It reduced salaries, wages and pensions of certain categories of people, withheld payment of certain bounties until certain circumstances applied and authorised other action aimed at reducing public expenditure.

3.11.2 The Senate amendment dealt with the bill's intention to withhold the bounty payable under the *Gold Bounty Act 1930—31,* which provided for a bounty to be payable for a period of ten years from 1 January 1931. The House of Representatives returned the bill to the Senate with a message that it disagreed with a Senate amendment and asked that it be reconsidered because the amendment increased a proposed charge or burden on the people. The Senate's view was that it was not clear that the amendment would increase the charge or burden. In the end the Senate did not insist on a determination of its rights and did not insist on the amendments disagreed to by the House of Representatives.[98]

3.12 States Grants (Tertiary Education Assistance) Bill 1981

3.12.1 The bill provided for grants of financial assistance to the States and the Northern Territory for tertiary education in accordance with schedules attached to the bill. The Consolidated Revenue Fund and the Loan Fund were appropriated by the bill.[99] Clause 6 proposed the partial reintroduction of tertiary fees (at the Minister's discretion). Under provisions elsewhere in the bill, these fees, if imposed, could be offset against the appropriation required to pay the grants provided for in the bill.

3.12.2 The Senate attempted to amend the bill by omitting clause 6. Removal of the clause removed the possibility of reducing appropriation to pay for the tertiary education assistance. There was lengthy debate in the Senate on whether the amendment transgressed the third paragraph of section 53.

3.12.3 A significant element in the debate in the Senate was the effect of the Minister's discretion. It was argued that clause 6 (the discretionary re-introduction of fees for some students) and the fact that offsetting the fees against the appropriation required to pay the grants provided for in the bill was also discretionary, resulted in

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98 Browning, op. cit., p. 444; Senate *Debates,* 29 and 30 September 1932, p. 1007; Mr L Barlin, *Submissions,* pp. S200 and S209.

99 Mr L. Barlin, *Submissions,* p. S210.

uncertainty about whether the appropriation would be reduced. It was argued that section 53 implied that there must be a direct nexus between an amendment and an increased burden in order to require a request rather than an amendment.[100]

3.12.4 The point was made in this interchange:

> **Senator Button** — It is a very long time since I studied constitutional law, but I recall something about going straight to the essence of the particular instrument which one is examining.
>
> **Senator Chaney** — That was cooking, not constitutional law.
>
> **Senator Button** — Senator Chaney tells me that was cooking. I learned cooking too, but I am asking Senator Chaney to refresh his memory on constitutional law. The essence of the constitutional provision is a prohibition on the Senate's amending any proposed law which seeks to increase a charge or burden on the people. This proposed law, clause 6 of this Bill, is not a matter which goes to that question at all. It is an enabling provision which would give the Minister a discretion which he may never exercise. It goes to the question of the Minister's power.[101]

3.12.5 In the end the matter was settled along party lines. The House resolved that it considered the amendments would increase the burden on the people and did not consider the amendments. The Bill was laid aside.

3.13 States Grants (Technical and Further Education Assistance) Bill 1988

3.13.1 The bill provided for grants to the states for technical and further education. It authorised payment from the Consolidated Revenue Fund and the Loan Fund for the purposes of the grants. The bill was returned by the Senate with four amendments, one of which omitted a group of students from the list of students not to be counted for the purposes of calculating the maximum size of a grant, thereby increasing the potential maximum size of the grant.

3.13.2 The Deputy Speaker made a statement noting that the amendment could be increasing the proposed charge or burden. The amendment was rejected and the bill returned to the Senate. The Senate insisted on the amendment but the House

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100 The second reading debate is recorded in Senate *Debates*, 28 October 1981, p. 1761 ff. The matter was raised in a debate on the suspension of Standing Orders, Senate *Debates*, 10 November 1981, p. 1964 ff. The debate is summarised in Mr L. Barlin, *Submissions*, p. S210.

101 Senate, *Debates*, 10 November 1981, p. 1973.

disagreed. On 6 March 1989 the Senate resolved not to insist on the amendments.[102]

3.13.3 In the House the Minister cited an opinion from the Acting First Parliamentary Counsel that the amendment increased the proposed burden on the people. The Committee of Reasons[103] said that the removal of an element from the calculation used to determine payment to the states removed a limitation on the grants that could be made and therefore increased the proposed charge or burden on the people.[104]

3.13.4 The arguments put forward in the Senate were reminiscent of those used in the 1981 case. Although the amendment increased the maximum size of the grant it did not increase directly the actual size of the grant, which was subject to the discretion of the Minister.[105]

3.14 Social Security Legislation Amendment Bill (No. 4) 1991

3.14.1 The bill made various amendments to the *Social Security Act 1991* and another Act affecting a range of pensions and allowances. The Senate attempted to amend the bill by extending the eligibility for certain allowances to farmers in financial hardship who were not previously eligible.

3.14.2 The case was a significant one in relation to the application of the third paragraph of section 53. It put into clear relief the gap between the attitude of the House and that of the Senate in a way which was divorced from party lines.

3.14.3 When the bill was initially returned by the Senate the Deputy Speaker made a statement concerning the power of the House in respect of money bills and

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102 Browning, op.cit., p. 445; Senate *Journals*, 6 March 1989, No. 136, p. 1435; House of Representatives, *Votes and Proc.*, 21 December 1988, No. 99, p. 994; Mr L. Barlin, *Submissions*, p. S212.

103 When amendments made by the Senate are disagreed to by the House, a Committee of Reasons consisting of three (government) Members is appointed by the House to draw up reasons for disagreeing to such amendments. The procedure is not employed where substitute amendments are made or when a request for an amendment is rejected. For further information see Browning, op.cit., p. 441.

104 ibid.

105 Senate *Debates*, 21 December 1988, p. 4810.

questioned whether the amendments should have been put as requests. Nevertheless, the House agreed to the amendments.[106]

3.14.4 Later the Speaker made a detailed statement to the effect that one of the Senate's amendments would increase the charge or burden on the people and that the First Parliamentary Counsel (FPC) agreed with the House's conclusion on this matter. He noted that the Clerk of the Senate had contested the FPC's reasons. The Speaker stated that the Clerk would ensure that messages from the Senate returning bills would be examined to protect the interests of the House. A motion endorsing the Speaker's statement was carried, with support from both sides of the House.[107]

3.14.5 The matter was not discussed in the Senate but the Clerk of the Senate, in a paper on the issue, said that as it was not known whether any certificates would be issued or any benefits paid, the effect of the amendment on the total expenditure under the bill was uncertain. The Clerk has since noted that fact that the certificates were to be issued by state officials created greater uncertainty as to expenditure than would otherwise have been the case.[108]

3.15 Local Government (Financial Assistance) Amendment Bill 1992

3.15.1 The bill provided for funding arrangements for the states and local governments for local roads. The aim was to 'untie' funds for local roads and pay them to local or state governments through general purpose grants. Authorisation for the expenditure was contained in the principal Act.

3.15.2 The Senate attempted to amend the bill by increasing the amount payable to Tasmania. The actual amount was to be determined by the Minister up to a specified maximum. The Government had announced that any financial impact of this bill would be offset in other legislation (increases for local government to be offset by reduction in funding at state government level).

3.15.3 The bill was returned by the Senate with two amendments, the first of which was accepted by the House. The House sent a message to the Senate stating that the second amendment should have been put in the form of a request. The Senate

106 *Votes and Proceedings,* 1990—91/1236—44.

107 House of Representatives *Debates,* 19 December 1991, p. 3887; *Votes and Proc.*, 1990—91/1298.

108 Mr H Evans, *Submissions on the exposure draft,* p. S15.

did change the amendment to a request, but the message did not concede that it should have been a request.[109]

3.16 Social Security Amendment Bill 1993

3.16.1 The Bill for an Act to amend the *Social Security Act 1991* was returned by the Senate with an amendment. The Speaker noted that 'looked at from the view point of section 53 the matter is unclear'. Mr Sciacca (Parliamentary Secretary to the Minister for Social Security) acknowledged the statement and stated that 'the Government would not object on the grounds that the amendment should have been made as a request'.[110]

3.16.2 Other recent examples where the third paragraph of section 53 was at issue are discussed at paragraphs 1.7.3-1.7.10.

3.17 Conclusions from parliamentary precedents?

3.17.1 As stated above, this is not an exhaustive survey of parliamentary practice relating to the application of the third paragraph of section 53. One must be circumspect in drawing conclusions from the past, especially from such a brief survey of the past.

3.17.2 One conclusion that can be drawn from a study of the application of the third paragraph is that the grounds of disagreement have undergone a change from a focus on the amendment itself (that is, whether it increased a proposed charge or burden on the people) to a focus on interpreting the effects of the amendment according to a formula (that is, whether the effect of the amendment should be determined by using the 'necessary, clear and direct' approach or 'the probable, expected, intended effect' approach) (refer to chapter 10).

3.17.3 The Clerk of the Senate stated in October 1990 that:

> [i]n relation to the prohibition on the Senate amending a bill so as to increase any proposed charge or burden on the people, it has long been accepted that this means that the Senate cannot amend any bill in such a way as to directly increase expenditure under an appropriation... The prohibition does not arise... unless an amendment related directly to an

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109 House of Representatives, *Votes and Proceedings,* 24 June 1992, No. 135, p. 1598; Senate *Debates,* 25 June 1992, p. 4646 ff.

110 House of Representatives *Debates,* 26 May 1993; *Votes and Proc.,* No. 8, p. 99.

> actual appropriation proposed in the bill in question or contained in an act proposed to be amended by the bill.[111]

3.17.4 It is debatable that the concept of directness has 'long been accepted'. The test has been rejected by the Clerk of the House of Representatives[112], by the former First Parliamentary Counsel[113] and by the participants (other than the Clerk of the Senate) at the seminar organised by the Committee.[114]

3.17.5 Amongst other things, one lesson to be learned from parliamentary precedent on the application of the third paragraph is that any compromise on how to deal with such questions in the future, should take account of how an increase in expenditure will be determined.

3.17.6 Having considered the third paragraph of section 53 of the Constitution in its historical perspective, the Committee will now discuss the threshold question of whether the third paragraph of section 53 is justiciable.

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111 Mr H. Evans, October 1990, in *Papers on Parliament No. 19*, May 1993, p. 81. underlining has been added.

112 Mr L. Barlin, *Submissions*, p. S198 — 'The House position, pragmatic perhaps, has been that the probable expected or intended effects of the amendment should be taken into account.

113 Mr I. Turnbull, *Submissions*, p. S260.

114 Mr L. Barlin, Mr H. Evans, Ms H. Penfold, Mr D. Rose, Dr J. Thomson, *Transcript*, p. 66 ff.

Chapter 4 Justiciability

This chapter discusses the justiciability of section 53. The traditional view that section 53 is not justiciable is canvassed and authorities are cited in support of that view. The High Court took the opportunity in Western Australia v the Commonwealth *to reiterate the view that section 53 is not justiciable. The interrelationship between sections 53, 54 and 55, increasing emphasis on principles of representative government and submissions and judgments in recent High Court cases are then addressed.*

4.1 Are issues arising under section 53 justiciable?

4.1.1 The traditional view is that section 53 is not justiciable, that is, a court would not (possibly cannot) intervene in the legislative process if the requirements of section 53 are not being complied with and a law, which has been passed by both Houses and received Royal Assent is not invalid where it does not comply with section 53. However, there are arguments that can be raised in support of an alternative view. Further, whether or not the section is justiciable does not settle whether the High Court's interpretation of 'imposing taxation' for the purposes of section 55 should be applied to section 53. This matter is considered in chapter 9.

4.2 Historical overview

4.2.1 During the Convention debates, delegates alluded to the justiciability of section 53. Mr Isaacs remarked, in relation to sections 53 and 54, that it would be a terrible calamity if, after a law were passed, it was disputed and the courts had to declare the law unconstitutional and void.[115] It was recognised that the possibility of money bills being held invalid could cause serious damage to the economy.[116] However, on the other hand, it was argued that the courts should have the power to enforce the provisions because the balance of power between the Houses was seen as a vital part of the federal compact.[117] As a compromise, delegates to the Conventions decided that sections 53 and 54 would refer to 'proposed laws' and section 55 to 'laws'. The term 'proposed laws' would be used to indicate that the

115 Convention Debates, Adelaide, 13 April 1897, p. 472.

116 Mr D. Williams, *Exhibits*, p. E38 citing Convention Debates, Adelaide, 13 April 1897 at 44 per Isaacs.

117 ibid., p. E38.

matter was a question between the two Houses and merely a question of order.[118] Use of the word 'laws' would indicate that the law must comply with certain conditions, otherwise it could be declared unconstitutional.[119]

4.3 The traditional view

4.3.1 The traditional view of section 53 is that the rules in it deal with parliamentary procedures, and accordingly, any issues arising from section 53 should be resolved by the Parliament rather than the courts.[120] That view was originally accepted by Quick and Garran. They stated that:

> It will be noticed that the phrase 'proposed laws' is used in section 54, in the same sense as in section 53 ... After the proposed law has been passed by both Houses, and has been assented to by the Crown, it becomes an Act, and it cannot then be impeached in the Federal Courts for any breach of section 54 which may then happen to appear on its face.[121]

It appears that the same comment would be relevant where an Act contravened section 53.[122]

4.3.2 The view that section 53 is not justiciable has been stated by members of the High Court in a range of decisions.[123] In *Osborne* v. *The Commonwealth*[124], Sir Samuel Griffith CJ commented that:

> Sections 53 and 54 deal with 'proposed laws' - that is, Bills or projects of laws still under consideration and not assented to - and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by those sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a court of law.[125]

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118 Convention Debates, Adelaide, 13 April 1897 at 471 per O'Connor.

119 ibid, p. 471.

120 Mr M. Leeming, *Submissions*, p. S147.

121 *Commentaries on the Constitution*, The Australian Book Company, 1901, p. 674.

122 See Mr M. Leeming, *Submissions*, p. S147.

123 Professor C. Saunders, *Seminar Transcript*, p. 4.

124 (1911)12 CLR 321.

125 (1911) 12 CLR 321 at 336.

Sir Edmund Barton J. stated that sections 53 and 54 were 'merely directory'[126] and O'Connor J. commented that:

> This Court can have no cognisance of proposed laws, nor can it in any way interfere in questions of parliamentary procedure. Its jurisdiction arises only when the proposed law becomes a law ...[127]

Similar views were expressed by Barton ACJ in *Buchanan* v. *The Commonwealth*[128] and Isaacs J. in *The Federal Commissioner of Taxation* v. *Monro* who stated that section 53 *'is for parliamentary guidance only'*.[129]

4.3.3 Sir Robert Garran's opinion of 1950 concurred with this view. He stated that it seems clear that questions arising under section 53 are matters of parliamentary procedure, argument as to which can be addressed only by the Houses.[130] Most of the evidence received by the Committee supports the conclusion that section 53 is not justiciable.

4.4 The alternative view

4.4.1 On the basis of the Convention debates and the High Court authority on the issue, the deliberate reference to 'proposed laws' in sections 53 and 54 has been cited as the major reason for the non-justiciability of those sections. However, in later cases some members of the High Court have either not accorded authority to the views expressed by judges in earlier cases as to the non-justiciability of sections 53 and 54, or have sought to limit the principle that issues arising out of parliamentary procedures are not justiciable.[131] The factors that may support an alternative view include:

(a) the declining persuasive value of relevant precedents;

(b) the interrelationship between sections 53, 54 and 55;

(c) increasing judicial activism; and

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126 (1911) 12 CLR 321 at 352-353.
127 (1911) 12 CLR 321 at 355-356.
128 (1913) 16 CLR 15.
129 (1926) 38 CLR 153 at 188.
130 *Opinion*, p. 1 (see Appendix D).
131 Mr D. Williams, *Exhibits*, p. E41.

(d) judgments and submissions in recent cases such as *Northern Suburbs General Cemetery Reserve Trust* v. *The Commonwealth* [132] and *The State of Western Australia* v. *Commonwealth of Australia*[133].

(a) Declining persuasive value of relevant precedents

4.4.2 In *Cormack* v. *Cope*[134] a declaration was sought that the Petroleum and Minerals Authority Bill 1973 was not a proposed law by reference to which the Governor-General could lawfully dissolve both Houses pursuant to section 57 of the Constitution.

4.4.3 The Commonwealth argued that the High Court had no jurisdiction to determine the regularity of any of the steps in the law-making process in section 57. McTiernan J. was the only judge who accepted that argument. Barwick CJ, Gibbs and Mason JJ held that the Court had jurisdiction to intervene at any stage in the process, described in section 57, to restrain a breach of the Constitution. However, each of those justices suggested that the Court would not ordinarily interfere because consideration of the process after the law is passed would be sufficient to ensure that there had been compliance with the Constitution.[135]

4.4.4 Menzies and Stephen JJ held that the Court should not interfere in proceedings under section 57. But where section 57 has not been complied with, the Court may determine the validity of any law passed at a joint sitting. Menzies and Stephen cited *Osborne* v. *The Commonwealth* as authority for the proposition that the Court should not interfere in the law-making process.[136] However, Barwick CJ distinguished *Osborne* and stated that the principle in that case

> ... can .. be accepted if confined to the provisions of the Constitution with which the Court was then dealing. In my opinion, it is not acceptable as a statement of universal application, denying the Court jurisdiction to ensure observance of the conditions of the law-making process itself.[137]

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132 (1992-1993) 176 CLR 555.

133 Case No. P4 of 1994.

134 (1974) 131 CLR 432.

135 *(1974) 131 CLR 432 at 454 per Barwick CJ, at 466 per Gibbs J and at 474 per Mason J.*

136 (1974) 131 CLR 432 at 465 per Menzies J and at 472 per Stephen J.

137 (1974) 131 CLR 432 at 453-454.

4.4.5 The joint sitting at issue was held and the Petroleum Minerals and Authority Bill 1973 was passed by both Houses sitting together. The validity of the Act was then challenged in *Victoria* v. *The Commonwealth*[138] ('the PMA Case') on the ground that there had not been compliance with section 57 of the Constitution. The High Court held that the three month period provided for by section 57, had not elapsed before the House passed the bill a second time. Hence it was not a proposed law that could be submitted to a joint sitting of the Houses and it was therefore invalid. The majority held that the question, whether section 57 had been complied with, is examinable by a court.[139] In relation to this issue, Barwick CJ stated:

> The Court, in my opinion, not only has the power but, when approached by a litigant with a proper interest so to do, has the duty to examine whether or not the law-making process prescribed by the Constitution has been followed and, if it has not, to declare that which has emerged with the appearance of an Act, though having received the Royal assent, is not a valid law of the Commonwealth.[140]

McTiernan J. dissented and held that whether the requirements of section 57 were complied with was a political question and not within the judicial power of the Commonwealth.[141]

4.4.6 In those two cases, the Court made it clear that the Australian Constitution is a controlled Constitution and the Court evinced a willingness to scrutinise the compliance of the parliamentary process with the Constitution and to intervene, at least once legislation was enacted.[142] Professor Saunders suggested that the earlier High Court precedents on sections 53 and 54 may be less persuasive following the decisions in *Cormack* v. *Cope* and the PMA Case.[143]

(b) Interrelationship between sections 53, 54 and 55 of the Constitution

4.4.7 The deliberate reference to proposed laws in section 53 and 54 is the traditional justification for the non-justiciability of sections 53 and 54. However, this

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138 (1975) 134 CLR 81.

139 (1975) 134 CLR 81 at pp. 117-120 per Barwick CJ, 161-164 per Gibbs J, 177-180 per Stephen J and 181-184 per Mason J.

140 (1975) 134 CLR 81 at 118.

141 (1975) 134 CLR 81 at 135.

142 Professor C. Saunders, *Seminar Transcript*, p. 4.

143 ibid., p. 4.
Note that Mason J. distinguished sections 53 and 57 in the PMA Case (see paragraph 3.4.10).

justification can be criticised. Mr Williams AM QC MP suggested that it is hard to see why section 55 is justiciable and section 54 is not justiciable. Both sections appear to confer constitutional rights, that is, so far as they relate to the Senate, rights are conferred on the States and, so far as they relate to the House, rights are conferred on the people generally.[144]

4.4.8 A comment by Higgins J. in *Osborne* v. *The Commonwealth* may lend support to the argument that section 54 should be considered justiciable. He queried why an Act is invalid by reason of its substance under section 55 of the Constitution if it deals with matters other than the imposition of taxation, when a bill appropriating moneys for ordinary annual services is not invalid by reason of its substance under section 54.[145] This comment was referred to a number of times during the course of the public hearings.[146] There appeared to be some support for this proposition during the seminar. It was suggested that there may be '... some lack of logic in finding the rule in section 55 justiciable, but not that in section 54, whatever the textual justification for that may be'.[147] Evidently there is some historical support and some current thinking which supports the view that sections 54 and 55 should both be justiciable and '... if section 54 were found to be justiciable, that could open the door to judicial review of section 53 as well'.[148]

4.4.9 Higgins J also stated that sections 53, 54 and 56 - which deal with 'proposed laws' - do **not** deal only with directions to the Houses or directions as to the mode of handling bills.[149] These sections make specific prohibitions. For example, section 53 prohibits certain laws from being originated or amended in the Senate and section 54 provides that proposed laws appropriating moneys for the ordinary annual services shall only deal with such appropriation.

4.4.10 The term 'proposed laws' is used in section 57 of the Constitution in a similar way to sections 53 and 54. As section 57 has been held justiciable,[150] it could be argued that sections 53 and 54 may also be justiciable. However, sections 53 and 57 were distinguished by Mason J in the PMA Case. He stated that:

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144 See Mr D. Williams, *Transcript*, p. 41.

145 (1911) 12 CLR 321 at 374.

146 See, for example, *Transcript*, pp. 41, 85, 105.

147 Professor C. Saunders, *Seminar Transcript*, p. 4.

148 ibid., p. 4.

149 (1911) 12 CLR 321 at 373.

150 See *Cormack* v. *Cope* (1974) 131 CLR 432 and *Victoria v. The Commonwealth* (the PMA Case) (1975) 134 CLR 81.

> The observations in *Osborne* v. *The Commonwealth* and *Buchanan* v. *The Commonwealth* to the effect that the provisions of s.53 of the Constitution are merely directory have no application to s.57. The functions of the two sections are entirely dissimilar and leave no scope for an analogous reading of s.57 deriving solely from the reference in each section to the words 'proposed laws'.[151]

4.4.11 It was suggested that if one adopts an approach to the interpretation of the Constitution that is not exclusively literalist, the differences between sections 53 and 57 can be explained. Such an approach involves focussing on the context of the words where they appear. Adopting this interpretation, the term 'proposed laws' in section 53 and 57 may be capable of different meanings. Furthermore, use of the term could result in the justiciability of one provision (ie. section 57) and the non-justiciability of the other provision (ie. section 53).[152] The relationship between section 53 and 55 is considered further in chapter 9.

(c) Increasing judicial activism

4.4.12 Dr Thomson discussed the activism of the present members of the High Court, the principle of judicial review and the role of the Court as the guardian of the Constitution. He went on to query why the principle of judicial review does not prevail in relation to some sections of the Constitution. Dr Thomson stated that while the Constitution does not give any guidance in relation to this matter, it is widely held that the principle of judicial review does not apply to section 53. Yet it is agreed that the principle applies to later sections of the Constitution, but is inapplicable to section 81.[153] During the seminar, Dr Thomson stated that he thought section 53 could be held justiciable within the next twenty years.[154]

4.4.13 Professor Blackshield suggested that the justiciability of section 53 has become more of an open question because the High Court is, to some extent, shifting ground in terms of basic constitutional theory.[155] The traditional British model of responsible government involves, among other things, judicial deference to parliament. Professor Blackshield suggests that when the High Court discusses representative government, it has in mind a strong conception that all major public office bearers and the legislature, the executive and the judiciary have their own

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151 (1975) 134 CLR 81 at 184.

152 Dr J. Thomson, *Transcript*, p. 108. Refer also to paragraph 6.4.7.

153 *Transcript*, pp. 104-105.

154 *Seminar Transcript*, p. 12.

155 *Seminar Transcript*, p. 10.

direct fundamental responsibility to the Australian people. As a part of that conception, he suggests that the High Court will be more willing to insist on adherence to the Constitution, even by the Parliament itself.[156] Professor Saunders suggested that there may be a situation where judicial intervention was considered justified to protect basic principles of responsible government just as the Court has justified doctrines developed in recent cases by reference to representative government.[157]

4.4.14 Despite the factors that may lend some support to the view that section 53 is justiciable, the majority of witnesses thought that the High Court would continue to consider section 53 not justiciable.[158] However, even if such questions were considered justiciable, it is probable that the Court would be reluctant to interfere with Parliament's understanding of the matter.[159]

(d) Recent cases

4.4.15 There are two recent cases where issues concerning the justiciability of certain constitutional provisions have arisen, namely *Northern Suburbs General Cemetery Reserve Trust* v. *The Commonwealth* ('the Northern Suburbs Case')[160] and *The State of Western Australia* v. *Commonwealth of Australia* [*Mabo (No.3)*][161].

4.4.16 The justiciability of section 54 arose in the Northern Suburbs Case and the matters raised may be relevant to section 53. One of the issues in that case was whether, in levying the training guarantee charge, there had been a failure to comply with section 54. It was held that there had been no failure to comply with section 54 because the relevant appropriation was a standing appropriation and not an appropriation for the ordinary annual services of the Government.[162] The joint

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156 *Seminar Transcript*, pp. 10-11.

157 *Seminar Transcript*, p. 5.

158 See, for example, Mr P. Lahy, *Submissions*, p. S236; Mr D. Rose, *Submissions*, pp. S243, S289 and *Transcript*, p.38; Mr I. Turnbull, *Submissions*, p. S253; Professor C. Saunders, *Seminar Transcript*, p. 5; and Mr L. Barlin, *Transcript*, p. 83.

159 Mr M. Leeming, *Submissions*, p. 154 citing *State Chamber of Commerce and Industry* v. *Commonwealth* (1987) 163 CLR 329 at 344: 'The Court should not resolve such a question against the Parliament's understanding with the consequence that the statute is constitutionally invalid, unless the answer is clear.'

160 (1992-1993) 176 CLR 555.

161 Matter No. P4 of 1994. Also *The Wororra Peoples and Anor* v. *The State of Western Australia* Matter No. 147 of 1993 and *Teddy Biljabu and Ors* v. *The State of Western Australia* Matter No. P45 of 1993.

162 (1992-1993) 176 CLR 555 at 578-579.

judgment referred to the traditional view that a failure to comply with a procedural provision, such as section 54, was not justiciable and did not give rise to invalidity of the resulting Act when it was passed by both Houses and had received Royal Assent.[163] However, as there had been compliance with section 54, the Court did not deal with whether the section was justiciable.

4.4.17 It has been suggested that the reference to the traditional view by the majority was cautious[164] and that the case hints that these matters may be justiciable. However, eminent counsel have not taken these hints very seriously.[165]

4.4.18 At the time of publication of the exposure draft, the application of section 53 of the Constitution, and particularly the third paragraph, was currently before the High Court in *Mabo (No. 3)*. Two of the questions put by Mason CJ in relation to this case were:

> 13(a) Was the *Native Title Act 1993* passed in accordance with section 53 of the Constitution?
>
> 13(b) If no to 13(a), is the Act invalid?[166]

4.4.19 It was argued by Western Australia that three Senate amendments to the Native Title Bill contravened the third paragraph of section 53 of the Constitution.[167] One of the amendments concerned the insertion of a clause providing for the establishment of a Parliamentary Joint Committee on Native Title.[168] It was submitted that the establishment of such a committee would involve a 'burden' on the people as it would involve various administrative costs and other expenses, the revenue for which would be raised by taxation.[169] The other Senate amendments related to offers of financial assistance to States and Territories[170] and the protection of native title from debt recovery processes.[171]

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163 ibid., p. 578.

164 Professor C. Saunders, *Seminar Transcript*, p. 4.

165 See comment by Ms H. Penfold, *Submissions*, p. S123 concerning the view of Mr D. Rose QC.

166 Written Submissions on behalf of the State of Western Australia in *The State of Western Australia* v. *Commonwealth of Australia*, No. P4 of 1994, p. 3.

167 ibid., pp. 270-271.

168 This amendment was inserted at sections 204-207 of the *Native Title Act 1993*.

169 ibid., p. 471.

170 This amendment was inserted at section 200 of the Native Title Act.

171 This amendment was inserted at subsections 56.(5) and 56.(6) of the Native Title Act.

4.4.20 Counsel for Western Australia, Mr David Jackson QC, submitted that the approach which says section 53 orders business and is clearly directory, does not reflect the words of the section in terms of the ordinary meaning or the relationship between the two Houses and he suggested that it does not reflect the overall nature of the provisions contained in Part V of the Constitution.[172] He also submitted that section 53 is **not** concerned with intra-mural matters between the Houses or breaches of the Constitution which it is open to the Houses to waive. So to construe section 53 would be to equate it to standing orders and the provisions of section 53 should instead be viewed as limitations on the powers of the Senate.[173]

4.4.21 If the arguments of Western Australia were accepted, the powers of the Senate would be significantly restricted. It was suggested that Mr Jackson appeared to be arguing that anything which the Senate does that may involve increased expenditure 'somewhere along the line' is contrary to section 53.[174] During a public hearing, it was suggested that if one looks at the consequences of Western Australia's argument, one may say that such a consequence could never have been intended as it would mean that the House of Representatives would have control over the formation of Senate committees.[175]

4.4.22 During the Committee's seminar there was discussion as to the extent to which the High Court may pronounce on the justiciability of section 53 in *Mabo (No. 3)*. Professor Blackshield suggested that he would expect a similar outcome in that case to that in the Northern Suburbs Case. In the Northern Suburbs Case, section 54 had been complied with, so no determination of the justiciability of that section was considered necessary. It was noted that in *Mabo (No. 3)*, the Commonwealth Solicitor-General submitted that the Court should not pronounce on the issue (even to the extent that it answered the question in the Northern Suburbs Case) and that it should simply refuse to decide the matter.[176]

4.4.23 The judgment in this case was delivered on 16 March 1995. The High Court affirmed the traditional view of section 53 (and in particular, the third paragraph) as non-justiciable.[177] The Court noted that the traditional view accords both with the

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172 Case No. P4 of 1994, *Transcript*, 8 September 1994, p. 195.

173 Submissions of the State of Western Australia, op. cit., p. 270.

174 Mr H. Evans, *Transcript*, p. 18.

175 See discussion between the Chairman and Dr J. Thomson, *Transcript*, p. 111.

176 Professor Blackshield, *Seminar Transcript*, p. 17.

177 *The State of Western Australia* v. *The Commonwealth* (*Mabo No. 3*), Matter No. P4 of 1994, pp. 91-92. See also Dr J. Thomson, *Submissions on exposure draft*, p. 30.

text of section 53, which refers to 'proposed laws' rather than 'laws', and with the intention manifested in the Convention Debates.[178] The Court did however comment on the merit of the submission by stating that '[n]one of the Senate amendments appears to increase a 'charge or burden on the people''.[179]

4.4.24 While the submissions of Western Australia in the *Mabo (No. 3)* and the other factors previously outlined provide some support for an alternative view of section 53 (that is, that it may be justiciable), it appears that the High Court's affirmation of the traditional view of section 53 refutes the alternative view. However, the position may be slightly blurred by the Court's concluding comment on the merit of Western Australia's submission on this matter.

4.4.25 Mr Rose commented that as section 53 was held to be non-justiciable, the remarks about the section, in a context where they were not relevant to a justiciable issue, could be regarded as a usurpation of the Parliamentary function.[180]

4.4.26 Professor Blackshield suggested that even if there are justiciable issues associated with section 53, those issues would be limited. He stated that:

> The question of whether the High Court has power or jurisdiction to pronounce on issues ... is ... interlocked with the question of what the issues are. In order to have a justiciable question before it, the High Court must be able to identify fairly precise legal questions which are capable of reasonably objective black and white legal answers, and it must be able to formulate questions in an area like this on which the relevant factual evidence could be obtained without the court poking its nose too far into the intramural business of the parliament.[181]

4.4.27 Professor Blackshield went on to say that the third paragraph of section 53 would only give rise to a justiciable issue,

> ... where there is a proposed law coming into the Senate, and contained within that proposed law is a proposed charge or burden on the people ... and I think the words 'charge' or 'burden on the people' also would have to receive a fairly limited meaning. And all of that would mean that the justiciable version of this paragraph, if there were one, would be reduced to some fairly limited questions.[182]

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178 *Mabo (No. 3)*, op. cit., p. 92.

179 ibid.

180 See *Submissions on the exposure draft*, p. S36 and paragraph 10.7.10.

181 *Seminar Transcript*, p. 7.

182 ibid.

Evidently, any legal action involving the third paragraph of section 53 would probably be confined to very limited questions, if indeed it was justiciable at all.

4.4.28 In the exposure draft the Committee concluded that the third paragraph of section 53 of the Constitution was not justiciable at that stage. From *Mabo (No. 3)*, it appears clear that the High Court does not consider the third paragraph of section 53 (and indeed the whole of section 53) justiciable. However, the Committee notes that there may be limited occasions where, despite the High Court's traditional view of section 53, justiciable issues arise from that particular section. For example, if a proposed law which imposes taxation or appropriates revenue was originated in the Senate, that may give rise to a justiciable issue as the origination of the bill in that chamber would directly contravene the first paragraph of section 53.

4.5 Consistency: the justiciability of all or none of the paragraphs of section 53

4.5.1 The issue of whether some paragraphs of section 53 could be justiciable, and whether others may not be justiciable, was raised during the seminar. It was suggested that the preferable answer would be that either all or none of the paragraphs are justiciable. However, it was also contended that such a result is not logically necessary.[183] Professor Blackshield noted that, at one stage, there was a possibility that the first paragraph of section 55 may have been justiciable and the second paragraph not justiciable.[184] The final view was that the second paragraph of section 55 was justiciable and the basis for such a view appears to have been consistency and commonsense.

4.5.2 It has been suggested that the fifth paragraph of section 53 may be justiciable, at least in part. In 1990, the then Attorney-General, the Hon Michael Duffy MP stated that the fifth paragraph may be justiciable

> to the extent that the courts would not regard as law any bill that had not been passed by the Senate unless it had been passed at a joint sitting under s.57.[185]

4.5.3 Intervention by a court in the parliamentary process appears most unlikely, and it is also unlikely that non-compliance with the third paragraph of section 53

183 Professor A. Blackshield, *Seminar Transcript*, p. 11.

184 *ibid.*, p. 11.

185 *Opinion* 21 November 1990, p. 3 (see Appendix F).

would result in the invalidity of an enactment that has been passed by both Houses and received Royal Assent. The Committee declines to make a statement on the justiciability of the paragraphs in section 53, other than the third paragraph.

4.6 Consequences of non-compliance with section 53 if the section is considered justiciable

4.6.1 Professor Saunders suggested that, if section 53 were justiciable, the Court would have a number of options. It could restrain a House from acting in a particular way, for example, by granting an injunction to prevent repeated requests for amendment.[186] However, it was submitted that it would be most unlikely for the Court to intervene and restrain a House in that way.[187]

4.6.2 A second option for the Court would be to restrain presentation of a bill for assent, but it was submitted that restraint of a bill is an artificial device for achieving a purpose similar to that which would be achieved if the Court restrained a House. Invalidation after enactment is a further option. That course of action may be inconsistent with the application of section 53 to 'proposed laws' only. However, the reference to 'proposed laws' was not regarded as a major difficulty in the PMA case where the law was held invalid.[188]

4.6.3 Even if section 53 were considered justiciable, or at least partially justiciable, the Court may prefer to defer to Parliament's own approach to section 53, particularly if both Houses agree to the same approach. That agreement could take the form of a compact or it may be inferred from a decision to proceed with a bill by both Houses.[189]

4.6.4 Any exception to the non-justiciability principle is more likely to be in relation to determining the validity of a law after it has been passed. Any challenge to the validity of a law under section 53 would probably be made by an aggrieved taxpayer after the law has been passed.[190]

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186 See Dr I. Omar, *Submissions*, p. S172-173.

187 Professor C. Saunders, *Seminar Transcript*, p. 5.

188 ibid., p. 5.

189 ibid., p. 5.

190 Mr D. Rose, *Transcript*, p. 16.

4.7 Conclusions

4.7.1 In summary, the Committee considers that, despite the arguments to the contrary, the third paragraph of section 53 is unlikely to be regarded as justiciable by the courts. The Committee would add only that it considers that this conclusion is an appropriate one. Whether or not non-intervention by the courts is regarded by the courts as a matter of jurisdiction or discretion, the issues raised by the third paragraph are, in the opinion of the Committee, better left for the Parliament to resolve. Parliament may well take note of the views of the High Court on relevant matters, and may, indeed, decide that it should adopt those views. This is a separate issue from justiciability.

4.7.2 The Parliament, like the courts, has a duty to uphold the Constitution. In the next chapter the Committee explains how it views the way in which Parliament should discharge its duty in relation to section 53. The Parliament is the primary organ which should judge whether there has been compliance with the constitutional rules for the passage of money bills through the Parliament. This puts the onus on the Houses to reach agreement, in the light of the letter and spirit of section 53, and in that connection chapter 13 proposes a compact in relation to the more contentious aspects of the third paragraph. In the Committee's view, such a compact would show the Parliament's fidelity to the constitutional requirements of section 53.

Chapter 5 The Committee's approach

This chapter considers three possible approaches that could be adopted by the Houses in the interpretation and application of the third paragraph of section 53. One approach would be that the paragraph means whatever the Houses say it means. A second approach would engage the Houses in essentially the same exercise as the High Court in interpreting the paragraph and would involve ascertaining the proper legal meaning of the third paragraph of section 53. A third approach, between the two extremes, may give the Houses a little more flexibility in the interpretation of the paragraph than if the task were approached as a strictly legal one, yet that approach may also impose constraints on the Parliament. The chapter also outlines the Committee's opinion of Parliament's task in interpreting the third paragraph of section 53.

5.1 Consequences of non-justiciability: three possible approaches

5.1.1 The Committee concluded in chapter 4 that, on balance, the provisions of section 53 are non-justiciable. That is, it is unlikely that a court would either intervene during the passage of a bill in order to compel compliance or restrain non-compliance with the requirements of section 53, or find an Act to be invalid, subsequent to its passage, by reason of non-compliance with those requirements.

5.1.2 If the provisions of section 53 were justiciable, then the Houses of Parliament would clearly be bound by those provisions, according to their proper legal meaning as expounded by the High Court. In the absence of exposition by the High Court, through lack of litigation raising the relevant issues, the Houses would remain bound by the legal meaning of the provisions of section 53, but without the benefit of an authoritative determination of that meaning. In those circumstances the Houses would have to be guided by the opinions of those lawyers whose opinions commanded respect, and, with the assistance of those opinions, by a reasoned prediction of what the High Court would be likely to hold.

5.1.3 If, however, the provisions of section 53 are, as the Committee thinks, not justiciable, then the question arises of whether the meaning of section 53 is at large, that is, whether section 53 means whatever the Houses say it means.

5.1.4 Conversely, it could be argued that, even if section 53 is non-justiciable, its proper meaning is the same as that which would be accorded to it by the High Court if the section were justiciable. On this view, the task of the Houses in forming an opinion on the proper interpretation and application of section 53 would be essentially

the same as that of the High Court. That is, the task would be to ascertain the proper legal meaning of the section, guided, in the absence of judicial pronouncements, by respected legal opinion.

5.1.5 Between these extremes - at one end, that the meaning of section 53 is *whatever the Houses say it is, and, at the other, that the meaning of section 53 is* what the High Court would say it is, if it could - there is a third possibility. It may be that the non-justiciability of section 53 gives the Houses a little more flexibility in determining an appropriate interpretation and application of the section than they would have if the task were approached as if it were a strictly legal one, yet at the same time, section 53 may also be seen to impose constraints on the Parliament in an objective sense. Disregard of these constraints might be immune from judicial correction but would not be immune from criticism.

5.2 Meaning of section 53 not 'at large'

5.2.1 In the Committee's view, the interpretation and application of section 53 is not at large. Although the provisions of section 53 are unlikely ever to receive an authoritative judicial exposition, this does not mean, in the Committee's view, that it would be appropriate for the Houses to agree on a meaning of section 53 that was, for example, contrary to the plain meaning of the words of the section or to accepted constitutional interpretation practices. Section 53 is part of a Constitution intended to *provide rules and guidelines for the participants in government, those rules and* guidelines being subject to change, at least in a formal sense, only by the amendment procedure set out in section 128 of the Constitution. There would be no point to those rules and guidelines if the two Houses could simply agree on a new set of relations between themselves in disregard of the existing framework and in disregard of the mechanism for altering that framework.

5.2.2 Although it may be that there is no single, objectively correct meaning of section 53, it does not necessarily follow that the words of the section fail to provide any objective outer limits to the possible interpretations of its provisions. In the Committee's view, the Houses are bound by the provisions of section 53 at least to the extent that those provisions are clear, or, in other words, to the extent that there is, in relation to their meaning, a reasonable consensus amongst those qualified to address, and who have in fact addressed, that question.

5.2.3 It is very evident, however, from the wide range and extreme diversity of views[191] put to the Committee in evidence, that the meaning of the third paragraph of section 53, and its interrelation with the other paragraphs of that section and with other sections, is far from clear. So, the question that the Committee has posed for itself remains: must the Houses embark on the same kind of exercise as the High Court would undertake in order to ascertain the legal meaning of section 53, or do the Houses have more flexibility to interpret and apply section 53, given that it is likely to be non-justiciable?

5.3 Criteria for interpretation

5.3.1 Although the precise bases for the opinions of witnesses and other commentators were not always made clear, the diversity of opinion is partly explicable by the differing emphases placed on different criteria for interpreting the third paragraph of section 53. These criteria included:

- the plain meaning of the words of the paragraph;
- the structural interrelationship between the third paragraph and the other paragraphs of section 53, and between section 53 and related sections, ie. the coherence of the section and the Constitution as a whole;
- the drafting history of section 53 and related sections;
- the evident policy behind section 53 and related sections, and the purpose of the third paragraph itself;

191 For example, compare Mr Turnbull who submitted that the third paragraph applies to tax bills that do not impose taxation and appropriations (see *Submissions*, pp. S255-256); Mr Evans who suggested that the third paragraph applies only to bills appropriating money other than for the ordinary annual services of Government (see *Submissions*, p. S50) and Mr Morris who outlined a number of arguments that may suggest that the third paragraph was not intended to refer at all to the appropriation or expenditure of Commonwealth money (see *Submissions*, p. S8ff). See also the table of views at Appendix C.

- the practice of the Parliament in interpreting and applying section 53 since Federation[192];
- the views of the High Court in considering comparable sections;
- the relationship between the two Houses;
- the opinions of respected lawyers and other commentators; and
- the practicality and workability of particular interpretations.

5.3.2 The Committee suggests that is impossible to reconcile all the competing views. The criteria need to be considered in order to provide a coherent view of the third paragraph of section 53. However, in arriving at a coherent view of the paragraph, it is apparent that there will need to be compromise of one or more relevant criteria.

5.3.3 In assessing the competing views presented during the inquiry, the Committee notes that there may be some practices which could be usefully adopted by the Houses, yet the practices may stand outside a literal interpretation of section 53. However, while such practices stand outside a literal interpretation, they are not precluded by the words of section 53 themselves. If a literal interpretation would produce an absurd result and adopting an alternative practice would be more consistent with the identified policy of section 53, then it may be desirable to adopt such a practice.

5.4 The Committee's approach

5.4.1 In the Committee's view, the criteria noted above are all relevant to the interpretation and application of the third paragraph of section 53. Indeed, it would not be appropriate, in the Committee's view, to single out any one criterion and give it undue or disproportionate weight, although some witnesses occasionally tended to do so, either implicitly or explicitly. In the opinion of the Committee, **the task of the**

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192 For example, in *Youngstown Sheet and Tulse Co* v. *Sawyer* (1952) 343 US 579, 610 Frankfurter J. stated that:

> 'Deeply embedded traditional ways of conducting government cannot support the Constitution or legislation, but they give meaning to the words of a text or supply them'.

See Dr J. Thomson, *Submissions on the exposure draft*, p. S27.

Parliament is: to arrive at the most sensible and practical view of the third paragraph of section 53 that is consistent with the broad policy of the section (that policy being to preserve the financial initiative of the House of Representatives but otherwise to give the two Houses equal powers), harmonious with the drafting history of the paragraph and the subsequent course of parliamentary precedent, and can be reasonably sustained within the actual wording of section 53.

5.4.2 At first sight the Committee appears to be having an each-way bet, but given the relevance of the wide range of criteria noted above it is important, in the Committee's view, to take all of the criteria into account, to reach a balanced conclusion in the light of those criteria, and to make explicit the basis of that conclusion. The matter of the interpretation and application of the third paragraph of section 53 will not be advanced if a dogmatic view is taken that is based on one criterion to the exclusion of all others or on criteria which are not spelled out.

5.5 Scope for flexibility in interpreting section 53

5.5.1 In the Committee's view, the task of the Parliament is not to ascertain the strict legal meaning of section 53, although the Committee would not want to characterise the approach of the High Court to this question, if the Court were ever to adjudicate upon it, as necessarily a narrow one. In fact, the Court would be applying the very same criteria as the Committee has identified as the appropriate basis on which the Parliament should form a view. Moreover, if the High Court were to ascertain the legal meaning of section 53, it would, amongst other things, be very likely to take account of and give an appropriate measure of deference to parliamentary practice.

5.5.2 However, the Committee considers that the Houses do, in some ways, have more flexibility in approaching the interpretation and application of the third paragraph of section 53 than if it were a strictly legal question. As the section is probably not justiciable, a court is unlikely to give it a binding interpretation. However, as stated earlier, it does not follow that the Parliament can or should give the section any meaning it chooses, detached from the support of the relevant criteria for a persuasive, objective view. Where the High Court has given a legal interpretation of matters relevant to section 53, these views will clearly be given great weight. Within the outer, objective limits of reasonable interpretation, however, the Houses may have considerable flexibility to take a sensible and practical view, as illustrated by the following examples:

- despite the second use of the word 'proposed' in the third paragraph of section 53, it may be open to the Houses to agree that the Senate should not amend a proposed law so as to increase a charge or burden on the people, even where the proposed law does not itself contain a proposed charge or burden (refer to Chapter 10);

- it may be open to the Houses to agree that the fourth paragraph of section 53 does not prevent the Senate from requesting an amendment to a proposed law which it could nevertheless amend (or, alternatively, the House of Representatives may refuse to consider the request sent according to the fourth paragraph - refer to chapter 12);

5.5.3 The Committee does not express any conclusions in relation to these particular examples at this stage as the issues are discussed in detail later in the report. The point here is that, in the Committee's view, the Houses may take a broad and flexible view of the requirements of section 53, within the limits of reasonableness adverted to earlier. In this respect, it is important to identify not only what is positively required by section 53 but also what is not precluded by section 53.

5.6 Summary

5.6.1 In summary, the Committee reiterates that it sees the task of the Houses as being to form the most sensible and practical view of the third paragraph of section 53 that is, so far as is practicable:

- consistent with the broad policy of the section;

- harmonious with historical intention and parliamentary practice;

- reasonably sustainable within the wording of the section; and

- consistent with established guidelines of constitutional interpretation.

5.6.2 Consequently, the Committee's recommendations are designed to guide and assist the Houses in forming that view.

5.6.3 While such a view does not constitute the legal meaning of section 53 in the sense of an authoritative judicial determination, the Committee would also reiterate that, given the universality of the identified criteria of constitutional interpretation, the

difference between a (hypothetical) judicial approach and the recommended approach of the Houses should not be exaggerated. To be acceptable at the end of the day, both need to be persuasively supported by essentially the same criteria.