Chapter 6 Appropriations and expenditure: Does the third paragraph apply to appropriation and expenditure bills?

In this chapter, the Committee discusses whether the third paragraph applies to appropriation and expenditure bills. Current parliamentary practice treats the third paragraph as applying to appropriation and expenditure bills. However, a number of arguments in support of the proposition that the third paragraph does not apply to appropriation and expenditure bills have been canvassed. The Committee concludes that the Houses should continue to regard the third paragraph of section 53 as applicable to proposed laws relating to expenditure and appropriation.

6.1 Introduction

6.1.1 An appropriation of revenue or money is an authorisation of government expenditure made by legislation. There are also constitutional provisions which appropriate money or authorise the appropriation of money. Section 81 of the Constitution establishes the Consolidated Revenue Fund. It comprises all revenues or moneys raised or received by the Commonwealth Government. Section 83 of the Constitution provides that public money can only be spent (drawn from Treasury) under an appropriation made by law.

6.1.2 Appropriation bills include bills that propose a new appropriation and bills that amend an existing appropriation. Expenditure bills include appropriation bills as well as bills that, although not technically appropriating money, affect the amount that must or may be expended under a (standing) appropriation contained in an existing Act or proposed in another bill.[193]

6.2 The views of Quick and Garran and early parliamentary debates

6.2.1 Mr Turnbull submitted that it is clear from Parkes' comments that he had appropriations in mind.[194] Quick and Garran held that the third paragraph prevented amendments to appropriation bills other than those for the ordinary annual services (which come under the second paragraph of section 53).[195] They argued that increasing an appropriation inevitably leads to an increase of taxation, and adds to

193 See Mr D. Rose, *Submissions*, p. S284.

194 *Submissions*, p. S255.

195 Quick and Garran, op. cit., p. 668.

the burden on the people.[196] However, Quick and Garran's view at that time appears to have been that the third paragraph applied *solely* to appropriations — a view that complemented their assumption that the Senate could not amend any tax-related bills because of the second paragraph of section 53. This assumption has now been abandoned because later commentators have had the benefit of case law on the meaning of 'imposing taxation' (see chapter 9 below).

6.2.2 The third paragraph of section 53 was discussed in 1903 during debates on the Sugar Bonus Bill. Senator O'Connor, the Leader of the Government in the Senate[197], agreed that a request was necessary as an amendment would violate the right of the House (of Representatives) to originate appropriations.[198] He also stated that a bill must propose an appropriation in order to be subject to the third paragraph.[199] The Senate's agreement to substitute a request for an amendment indicated acceptance of the interpretation of the third paragraph in that case. However, Mr Evans notes that some Senators supported the request on the basis that it did not matter whether an amendment or request was proposed.[200]

6.2.3 In his 1950 opinion, Sir Robert Garran changed the view he had expressed in 1901 and argued that the third paragraph did not apply to appropriations. His main argument was that a 'charge or burden' refers to taxation and not expenditure. He stated that:

> A charge or burden on the revenue is not in the parliamentary sense, a charge or burden on the people ... It does not follow from increased appropriation that there will be increased expenditure; nor does it follow from increased expenditure that there will be increased taxation. What the paragraph forbids is an increased charge on the people; a mere appropriation does not constitute such a charge.[201]

Sir Kenneth Bailey agreed that the third paragraph did not apply to expenditure.[202]

6.2.4 Evidently, Sir Robert Garran had a 'change of heart' as to whether the third paragraph of section 53 applied to appropriations. Garran's conclusion in his 1950

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196 ibid., p. 671.

197 Senator O'Connor later became a judge of the High Court.

198 Senate *Debates*, 1903, pp. 2367, 2369 cited in Mr H. Evans, *Submissions*, p. S53.

199 ibid., pp. 2368, 2406 cited in Mr H. Evans, *Submissions*, p. S53.

200 Mr H. Evans, *Submissions*, p. S54.

201 *Opinion* 1950, p. 3 (see Appendix D).

202 Letter to Sir Robert Garran, 1950, p. 1 (see Appendix E).

opinion has been called unconvincing because he was aware of Parkes' intention[203] and it has also been suggested that this later view creates more difficulties than it solves[204].

6.3 Views of participants in the inquiry

6.3.1 The Clerks of both Houses accept that the third paragraph applies to expenditure. The view of the Clerk of the Senate is that the third paragraph applies to bills which the Senate may not initiate but which it may amend, that is, bills appropriating money other than for the ordinary annual services of the Government.[205] Mr Brazil takes a similar view to Mr Evans and refers to the speech of Senator Josiah Symon during the Sugar Bonus Bill 1903 in support of his view.[206] The Clerk of the House of Representatives considers that the third paragraph applies in relation to expenditure if an amendment is expected to increase government expenditure.[207]

6.3.2 It has also been suggested that 'charge' in the third paragraph refers to appropriations and 'burden' refers to taxation.[208] Some support for this construction can be drawn from the Clark draft of the 1891 Convention.[209]

6.3.3 The Committee has also considered a number of arguments that have been advanced in support of the proposition that the third paragraph does **not** apply to expenditure. Mr Morris raised a number of these arguments in his submissions. First, it was suggested that the words 'so as to increase any proposed charge or burden on the people' were not intended by the draftsmen to refer to appropriation or expenditure of Commonwealth moneys, but rather it is argued that those words were concerned with the raising of moneys by the Commonwealth.[210]

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203 See Mr I. Turnbull, *Submissions*, p. S255.

204 Mr H. Evans, *Submissions*, p. S52.

205 *Submissions*, p. S50.

206 *Transcript*, p. 48.

207 *Submissions*, p. S197.

208 Although it was suggested that this construction has only a superficial attraction. See Leeming M., 'Something That Will Appeal to the People at the Hustings': Paragraph 3 of Section 53 of the Constitution, (1995) 6 PLR 131 at 136.

209 ibid. Leeming notes, however, that there was a distinction in the language of the time between charges on the public revenue and charges on the people.

210 Mr A. Morris, *Submissions*, pp. S8-10. Sections 81, 82, 83, 87 and 94 of the Constitution are discussed in support of that argument. Those sections of the Constitution deal with the formation of the Consolidated Revenue Fund, the prohibition on drawing money from Treasury except by appropriation, the proportion of customs and

6.3.4 The suggestion is based on the following reasoning. The Constitution provides that all money raised by the Commonwealth must be placed in the Consolidated Revenue Fund. It was anticipated that funds would be appropriated to meet the expenditure of the Commonwealth and the balance would be distributed to the States. If the Senate increased the amount of money to be spent under an appropriation bill, the result would not be an increase in any proposed charge or burden on the people, but rather there would be a smaller amount of funds left for distribution to the states.[211]

6.3.5 Secondly, the second paragraph of section 53 prevents the Senate from increasing or reducing proposed appropriations for the ordinary annual services of the government. If the third paragraph was intended to mean the Senate could not increase other proposed appropriations, that would have been made explicit.[212] For example, the clause could have been drafted to read:

> The Senate may not amend proposed laws appropriating revenue or moneys so as to increase the amount of the appropriation.[213]

6.3.6 Professor Carney also advanced some arguments in support of the view that the third paragraph does not apply to appropriations. While an increase in the level of proposed appropriation or expenditure may burden the public purse, it may also confer benefits on the people or a class of people.[214] One must consider whether 'the people' refers to the state or, alternatively, to members of the public as a whole or as a class. It has been submitted that

> [t]he commentary on the paragraph assumes the former sense in relation to appropriation bills, and yet, adopts the latter sense when considering taxation bills. If it is not legitimate to adopt both senses when interpreting 'the people', surely the latter sense which looks to the direct effect on the people as such, is consistent with the natural and ordinary meaning of the language used.[215]

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excise duties to be applied towards Commonwealth expenditure and the monthly payment to the States of surplus revenue.

211 ibid., p. S10.

212 Sir Robert Garran, *Opinion*, 13 April 1950, p.3.
See also discussion of issue in Attorney-General's Department, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Taxation (Deficit Reduction) Bill inquiry, September 1993, p.3.

213 Mr A. Morris, *Submissions*, p. S83.
Note that this 'plain language approach' was described as a powerful argument by a proponent of the view that the third paragraph did apply to appropriations (see Mr P. Brazil, *Transcript*, p. 56).

214 Mr G. Carney, *Submissions*, p. S69.

215 *ibid., p.S69.*

6.3.7 Furthermore, if the paragraph applies to appropriation bills, it appears odd that the Senate is prevented only from increasing the level of appropriation proposed by the Government while it may thwart the wishes of the lower house with amendments to decrease government spending.[216] If the Senate wanted to increase an appropriation (although it is not permitted to do so), the people may benefit from the Senate amendment. However, where the Senate decreases government spending, the people might suffer a loss. This argument has been criticised on the ground that an amendment by the Senate to reduce an appropriation or a tax is consistent with the purpose of section 53, that is, to prevent the Senate initiating impositions of taxation or appropriations[217] and thereby to preserve the financial initiative of the House of Representatives.

6.3.8 At the joint meeting between the two committees, it was suggested that the difficulties in determining whether there has been an increase in expenditure within the meaning of the third paragraph (see chapter 11) arise because there is no direct link between appropriations and charges on the people. It was argued therefore that the third paragraph was not originally intended to apply to appropriations.

6.3.9 The view that the third paragraph does not apply to expenditure has been criticised as not giving sufficient emphasis to the historical background.[218] At the conclusion of the seminar, Professor Coper raised the issue of the third paragraph's application to appropriations. He questioned whether the view that the third paragraph did not apply to appropriations was open as a reasonable interpretation, based on the natural meaning of 'charge or burden' although parliamentary practice and acceptance of the contrary point of view might outweigh the natural meaning approach.[219] Mr Evans and Mr Rose agreed that those factors outweighed any alternative interpretation.[220]

6.3.10 There is historical support for the view that the third paragraph does apply to expenditure bills. The current parliamentary practice and the fact that the Clerks

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216 ibid., p.S69.

217 See Mr H. Evans, *Submissions*, p. S226.

218 See Mr I. Turnbull, *Submissions*, p. S256 and Mr H. Evans, *Submissions*, p. S217.

219 *Seminar Transcript*, p. 81.

220 ibid., p. 81. Note also Ms Penfold's comment on p. S354 that references by her to appropriations and tax do not indicate a view that the third paragraph applies to those matters. The reference reflects a belief that it is now too late to propose discarding either of those applications of the paragraph.

of both Houses accept that the third paragraph applies to expenditure are also powerful reasons in support of that view.

6.4 Loan bills: an alternative view of the third paragraph

6.4.1 Mr Mark Leeming has suggested that the third paragraph of section 53 may not apply to either taxation *or* appropriations, but that it may have been intended to apply to loan bills.[221] There may be some historical support for this view. In 1903 Sir John Downer concluded that the third paragraph was inserted with the object of preventing the Senate from increasing the amounts stated in loan bills.[222] Support for this interpretation can also be derived from the terms of the compact of 1857 in South Australia, which was influential in the development of the 1891 compromise as expressed in section 53. In the agreed resolutions, the definition of 'money bill' included 'bills the object of which shall be to raise money, whether by way of loan or otherwise'.[223]

6.4.2 Mr Leeming also cites further historical evidence in support of this view[224] and notes that, on their face laws for the purpose of raising loans do not come under the other paragraphs in section 53 which impose restrictions on the power of the Senate.[225] However, as Mr Leeming noted, the view can be criticised on the basis that if the third paragraph was intended to cover bills raising loans, the framers of the Constitution could have made that explicit when the third paragraph was drafted.[226] The Committee concludes that two factors militate against acceptance of this view of the third paragraph. First if the paragraph had been intended to cover loan bills, that may have been made more explicit and secondly, parliamentary practice does not support this interpretation.

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221 See Mr M. Leeming, *Submissions*, p. S142 and Mr Leeming's article 'Something that Will Appeal to the People at the Hustings': Paragraph 3 of Section 53 of the Constitution, (1995) 6 PLR 131 at 137.

222 *Parliamentary Debates*, 8 July 1903, p. 1843 cited by Mr Leeming in *Submissions*, p. S142 and 'Something That Will Appeal to the People at the Hustings' ..., op. cit., p. 137.

223 Mr M. Leeming, *Submissions*, p. S143 and 'Something That Will Appeal to the People at the Hustings' ..., op. cit., p. 137.

224 ibid., pp. 138-139.

225 ibid., p. 138.

226 *Submissions*, p. S144 referring to the speech of Senator Drafke, *Parliamentary Debates*, 8 July 1903, p. 1848. See also 'Something That Will Appeal to the People at the Hustings' ..., op. cit., p. 139.

6.5 Conclusions

6.5.1 The Committee recognises the force of the argument, owing something to the plain meaning of the words but supported also by the eminent opinions of Sir Robert Garran and Sir Kenneth Bailey, that the third paragraph does not apply to appropriation and expenditure. Moreover, this view would have the great merit of avoiding the problems relating to the determination of when an appropriation or expenditure measure does in fact increase a proposed charge or burden on the people.

6.5.2 However, the issues must be weighed against the evident historical intention and nearly a century of parliamentary practice in accordance with that intention. The fact that the Clerks of both Houses accept that the third paragraph should continue to apply to appropriation and expenditure bills, notwithstanding their differences in relation to precisely how the paragraph applies, also lends support to the practicality of continuing to apply the third paragraph to expenditure and appropriation bills. As a result of these factors, the Committee considers that the Houses should continue to adhere to their existing practice and treat appropriation and expenditure measures as subject to the third paragraph of section 53.

6.5.3 The Committee's first recommendation arises out of these conclusions. Some of the recommendations in this report stem directly from the Constitution. In other cases it is not possible to find an interpretation and application for the third paragraph of section 53 by relying only on the words of the Constitution. In these cases the Committee has had to consider the bare words of the Constitution in the context of parliamentary precedence and/or policy considerations. The following recommendation arises from a combination of constitutional interpretation, parliamentary precedence and the policy of sustaining the financial initiative of the House of Representatives.

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).

Chapter 7 Expenditure under standing appropriations

This chapter focuses on a number of parliamentary practices relevant to expenditure under standing appropriations. Those practices include the application of the third paragraph of section 53 to a bill containing a standing appropriation where a Senate alteration would increase expenditure under the appropriation.

Furthermore, it is considered that the third paragraph applies to a bill that does not itself contain an appropriation, if a Senate alteration to the bill will increase expenditure from a standing appropriation. The Committee considers that these practices should continue.

7.1 Introduction

7.1.1 This chapter examines the practices of the Parliament in relation to the third paragraph of section 53 concerning expenditure bills that contain appropriations and those where the appropriation is not contained in the bill itself. In particular, the Committee will examine the parliamentary practice of applying the third paragraph of section 53 to a bill that does not itself contain an appropriation where a Senate alteration to the bill would increase expenditure under a standing open-ended appropriation.[227] On a literal interpretation, a bill must contain a 'proposed charge or burden' for the third paragraph to apply.

7.1.2 As the parliamentary practice has arisen in relation to standing appropriations, the chapter will focus on these appropriations, but it will also look briefly at fixed appropriations. Consideration will also be given to whether a bill that increases expenditure under a standing appropriation should be originated only in the House of Representatives.

7.2 Fixed appropriations and standing appropriations

7.2.1 A significant part of government expenditure is authorised annually by the Parliament in statutes called Appropriation Acts (and sometimes also known as Supply Acts). The amounts appropriated under these Acts are fixed or specified

227 Chapter 10 discusses the tests that may be applied to determine if a Senate amendment increases the proposed charge or burden.

amounts for a particular financial year. These are referred to in the Constitution as appropriations for the ordinary annual services of government and may not be originated in, or amended by the Senate.

7.2.2 However, many items of government expenditure are not authorised annually by the Parliament. The money required to meet expenditure on these items is appropriated by other specific Acts. The appropriation provisions in such Acts are commonly referred to as 'special appropriations'. Special appropriations may be specific or indeterminate in both duration and amount.[228]

7.2.3 Special appropriations that are not restricted in their application to a particular financial year are known as standing appropriations.[229] Standing appropriations do not, as a rule, specify a monetary limit on expenditure (that is, they are open-ended appropriations). For the purposes of this chapter, a reference to a standing appropriation is a reference to a standing open-ended appropriation.

7.2.4 Subsection 1363(1) of the *Social Security Act 1991* is an example of a standing appropriation. It provides that:

> Subject to this section, payments of social security payments under this Act must be made out of the Consolidated Revenue Fund, which is appropriated accordingly.

Pursuant to this subsection, social security payments under the Social Security Act are automatically funded from the Consolidated Revenue Fund. It is irrelevant how many people are entitled to social security payments at any one time.

7.2.5 Both Mr Turnbull and Mr Wright explained to the Committee the effect of an amendment that increases expenditure under a program funded from a standing appropriation.[230] For example, a program funded from a standing appropriation on the Consolidated Revenue Fund may provide for grants of financial assistance to people who satisfy certain criteria. An amendment to relax the eligibility criteria for grants under the program will result in more grants being made, and consequently, will increase expenditure under the program. As the appropriation is open-ended and the amendment increases expenditure, this automatically affects the draw on the

228 Browning , op. cit., pp. 448-9.

229 ibid.

230 Mr I. Turnbull, *Submissions*, p. S259; Mr B. Wright, *Transcript*, pp. 88-89.

Consolidated Revenue Fund to provide the additional money needed for the increased number of grants. Mr Turnbull stated that:

> ... if a Bill relies on a standing appropriation, ... a Senate amendment increasing expenditure automatically increases the amount appropriated.[231]

7.2.6 Fixed appropriations are quite different in this regard. (A fixed appropriation specifies the amount of expenditure authorised). An amendment that increases expenditure under a program funded from a fixed appropriation does not increase the amount that has been appropriated.[232] If the program (discussed above) was funded from a fixed appropriation, by relaxing eligibility criteria for grants, the amendment could lead to the money that has been appropriated being used more quickly. However, the amendment does not increase the amount that has been appropriated to fund the grants. The amount that is appropriated under a fixed appropriation can only be increased by amending that amount to a larger amount.

7.3 Relevant provisions of the Constitution

7.3.1 In order to examine the application of the third paragraph of section 53 to standing appropriations, it is necessary to consider briefly the general application of the first and second paragraphs of section 53 to appropriations. The first paragraph provides that laws appropriating revenue or moneys shall not originate in the Senate. The second paragraph precludes the Senate from amending proposed laws that appropriate revenue or moneys for the ordinary annual services of the Government. It is generally agreed that (assuming the third paragraph applies to appropriations) the third paragraph applies to appropriations other than for the ordinary annual services of the Government.[233]

7.3.2 Section 56 of the Constitution provides that a proposed law for the appropriation of revenue or moneys may not be passed unless the purpose of the appropriation has been recommended by a message from the Governor-General. The recommendation must be made to the House in which the appropriation originates, namely the House of Representatives.

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231 Mr I. Turnbull, *Submissions*, p. S259

232 ibid., p. S259; Mr B. Wright, *Transcript*, pp. 88-89.

233 Refer to chapter 7.

7.4 Appropriation bills

7.4.1 According to current parliamentary practice, the third paragraph applies to a bill which contains a standing appropriation, where a Senate amendment to the bill would increase expenditure under the appropriation. Mr Evans submitted that the Sugar Bonus Bill 1903 established that the third paragraph applies to appropriation bills.[234] The Bill authorised payments from the Consolidated Revenue Fund (appropriated in the bill itself) of a bounty for sugar cane that was grown under certain conditions involving the use of white labour. The Senate alteration to the bill relaxed the criteria for a sugar grower to be paid the bounty. The alteration probably would have led to an increase in the number of eligible claims.

7.4.2 The Senate initially proposed the alteration as an amendment, but the House of Representatives took the view that it should be a request. The Senate ultimately agreed with the House of Representatives that the alteration should be in the form of a request.

7.4.3 The arguments put forward in the House of Representatives in favour of the Senate making a request included:

- There was no difference between a charge on the revenue (appropriation) and a charge on the people - it was the people's revenue. Therefore a proposal for an appropriation out of the Consolidated Revenue Fund imposed a charge or burden on the people.[235]

- Any provision in a bill of this kind (that is, appropriating revenue) which prescribed a larger expenditure than that proposed by the House was, to the extent of the excess, origination of further appropriation — and thus in contravention of paragraph 1 of section 53.[236]

7.4.4 The arguments put forward in the Senate in favour of the Senate making an amendment included:

- There was a difference between originating a bill and originating a proposal in a bill. Section 56 implied that the Senate might receive messages

234 Mr H. Evans, *Submissions*, p. S54.
235 *Parliamentary Debates*, 14 July 1903, p. 2014.
236 ibid., p. 2015.

recommending appropriation and by extension of this argument might appropriate revenue (even if under section 53 it could not originate a bill making an appropriation) and by further extension might alter an appropriation.[237]

- An increase in appropriation was not necessarily an increase in the burden on the people (for example, if the budget was in surplus there would be no need for increased taxes).[238]

7.4.5 The practice established by the Sugar Bonus Bill is related to standing appropriations. However, the third paragraph would also apply to a bill that contains a fixed appropriation if the effect of the Senate amendment would be to increase the amount that has been appropriated.

7.5 Parliamentary practice and appropriation bills

7.5.1 Mr Evans submitted that the interpretation of the third paragraph adopted in the Sugar Bonus Bill debate is 'rational and coherent'.[239] As previously stated, it is his view that the third paragraph applies only to bills which the Senate is precluded from initiating but entitled to amend, namely appropriation bills other than for the ordinary annual services of the Government.[240] Mr Evans argued that the bill itself must contain the proposed charge or burden.[241] Mr Turnbull submitted that in relation to an appropriation bill the proposed charge or burden is 'obvious'[242], that is, it is the appropriation itself.

7.5.2 The Committee accepts that the third paragraph applies to a bill which contains an appropriation. In this context, a reference to a proposed charge or burden is a reference to a charge or burden contained in the bill itself. This conclusion is supported by parliamentary practice and it is a reasonable interpretation of the words of the third paragraph of section 53. The Committee notes that in his submission on the exposure draft, the Clerk of the House of Representatives agreed with this recommendation.[243]

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237 *Parliamentary Debates*, 22 July 1903, pp.2375-5.
238 ibid., p. 2377.
239 Mr H. Evans, *Submissions*, p.S53.
240 ibid., p.S50.
241 ibid., p. S58.
242 Mr I. Turnbull, *Submissions*, p. S258.
243 Mr L. Barlin, *Submissions on the exposure draft*, p. S20.

Recommendation 2

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

7.6 Bills that do not contain appropriations

7.6.1 Mr Turnbull submitted that since 1910 it has been the parliamentary practice to treat the third paragraph as applying to a bill that does not itself contain an appropriation, if a Senate amendment to the bill would increase expenditure from a standing appropriation in another Act or bill.[244] Mr Evans takes the view that this practice should be limited to bills that amend Acts which contain standing appropriations in such a way as to affect expenditure under the appropriations.[245]

7.6.2 Mr Barlin outlined the approach of the House of Representatives to expenditure under the third paragraph:

> It is considered that the provisions would apply in respect of expenditure if an amendment is expected to cause an increase in the sum of money to be expended under an appropriation — in other words, expected to increase government expenditure. This is seen as a charge or burden on the people. It has been considered by the House that it is the proposed expenditure which is the charge or burden on the people — whether or not this is covered in an appropriation in the bill itself is not the point. The same sum of money is involved, and therefore the same charge or burden will result, whether it is funded by an appropriation in the bill which is subject to the amendment or by a consequential automatic extension of an appropriation located elsewhere — that is, in another bill or in an existing Act.[246]

This approach focuses on the effect of the Senate amendment and does not require that the bill being amended by the Senate contain an appropriation or amend an Act containing the relevant appropriation.

7.6.3 Mr Evans informed the Committee that, on a 'pure interpretation' of the third paragraph, an amendment to a bill that does not contain an appropriation so as to

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244 *Submissions*, p. S258, S263.

245 Mr H. Evans, *Submissions*, p. S55.

246 *ibid.*, *pp.* S197-198.

increase expenditure from a standing appropriation could be made by the Senate.[247] However, Mr Evans acknowledged that the parliamentary practice is to require such an amendment to be made by way of a request.[248]

7.6.4 Mr Evans submitted that the parliamentary practice was established by the debate concerning the Surplus Revenue Bill 1910.[249] Under clause 5 of that bill, the Commonwealth was to pay Western Australia a certain amount of money over a ten year period. In the first year approximately £250,000 was to be paid and in each subsequent year that amount was to be reduced by approximately £10,000. The Senate alteration provided for the payments to Western Australia to be continued beyond the ten year period.

7.6.5 There was uncertainty in the Senate as to whether the alteration should be moved as an amendment or a request.[250] The matter received little consideration in the Senate and was glossed over with the remark 'What does it matter whether we proceed by way of request or amendment?'[251]. The Senate ultimately proceeded by way of a request. Mr Evans submitted that the parliamentary practice was hastily adopted without proper thought being given to the implications of such a practice.[252]

7.7 Bills not containing appropriations: expenditure and non-expenditure bills

7.7.1 As has already been stated, it is parliamentary practice to treat the third paragraph as applying to a bill that does not itself contain an appropriation, if a Senate amendment to the bill would increase expenditure from a standing appropriation.

7.7.2 Bills that do not contain appropriations can be divided into bills that affect expenditure under a standing appropriation ('expenditure bills') and bills that do not

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247 Mr H. Evans, *Transcript*, p. 15

248 ibid., pp. 15-16; *Submissions*, p. S55.

249 The bill amended the Surplus Revenue Act 1908. However it is not clear what section of that Act contained the appropriation.

250 *Parliamentary Debates*, 25 August 1910, p. 2060.

251 ibid.

252 Mr H. Evans, *Submissions*, p. s56; *Transcript*, p. 15.

('non-expenditure bills').[253] These bills need to be examined in relation to the parliamentary practice.

(a) Expenditure bills

7.7.3 A bill that increases expenditure from a standing appropriation where that appropriation is in an existing Act is an expenditure bill. For example, a bill that amends an Act that contains a standing appropriation to increase the upper limit on payments under the Act, or to expand the class of persons who are eligible to receive payments under the Act, would be regarded as increasing expenditure. A bill that extends the object or purpose of a standing appropriation or alters the destination of the appropriation is also an expenditure bill.[254]

7.7.4 Mr Evans' view is that an expenditure bill does not contain a proposed charge or burden and, consequently, the third paragraph should be regarded, ideally, as having no application to such a bill.[255] (The charge or burden, that is, the relevant standing appropriation, is contained in the Act that the bill amends.[256]) Mr Evans submitted, however, that the third paragraph has been applied in relation to *expenditure bills since 1910 as if they did contain appropriations.*[257] *It would not be* possible to marry practice with Mr Evan's interpretation without overthrowing long-standing parliamentary precedents, a fact acknowledged by Mr Evans.

7.7.5 Mr Turnbull noted that where a bill does not itself contain an appropriation, it is difficult to identify the 'proposed' charge or burden.[258] He suggested that in relation to an expenditure bill the proposed charge or burden is the 'standing appropriation as proposed to be affected by the Bill'.[259] That view has been adopted by the Office of Parliamentary Counsel.[260]

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253 Chapter 9 discusses whether a bill that decreases expenditure falls within the ambit of the third paragraph. A bill that increases expenditure is, of course, subject to the third paragraph.

254 Browning, op.cit., p.410.

255 *Submissions*, p. S229.

256 *Seminar Transcript*, p. 65.

257 ibid.

258 Mr I. Turnbull, *Submissions*, p. S258.

259 ibid.

260 *Submissions*, p. S125.

7.7.6 Mr Rose also suggested that the proposed charge or burden is not limited to that contained in the bill itself, but may include 'an *existing* charge or burden *as it would be altered by the provisions proposed in the bill*'.[261]

(b) Non-expenditure bills

7.7.7 A non-expenditure bill is a bill that amends an Act but not so as to affect expenditure from a standing appropriation. An example of such a bill would be a bill that merely decreases the level of penalties for offences contained in an Act. A non-expenditure bill neither contains a 'proposed charge or burden' nor does it 'propose' to affect the relevant standing appropriation.

7.7.8 The Attorney-General's Department submitted that it appeared to have been accepted by the Houses that the third paragraph applied to amendments even though they did not increase any charge or burden proposed in the bill itself.[262] The approach taken by the House of Representatives as outlined by Mr Barlin appears to support this view.

7.7.9 The Attorney-General's Department initially suggested that in such a case the proposed charge or burden is the charge or burden proposed in the amendment (to the bill) proposed by the Senate.[263] That view was based on the approach taken to certain Social Services Bills in 1960. Mr Turnbull did not accept that suggestion on the ground that it confused the Senate amendment with the bill it was amending.[264] In a subsequent submission, the Attorney-General's Department explained that after a closer examination of the Social Services Bills, the Department no longer holds the view that the proposed charge or burden is the charge or burden proposed in the amendment put forward by the Senate.[265]

7.7.10 Mr Rose took the view that the third paragraph would not apply to a non-expenditure bill.[266] However, he argued that, even though the third paragraph did not apply, the Senate was not free to amend a non-expenditure bill to increase expenditure under a standing appropriation. This view was based on two propositions. First, a Senate amendment increasing expenditure under a standing appropriation is

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261 *Submissions*, p. 278.
262 Mr P. Lahy, *Submissions*, pp. 238-239.
263 Mr P. Lahy, *Submissions*, p. S238.
264 Mr I. Turnbull, *Submissions*, p. S259.
265 *Submissions*, p. S248; p. S278.
266 ibid., p. S248, S287.

a law appropriating revenue or money within the meaning of the first paragraph.[267] Secondly, the first paragraph of section 53 precludes, not only the introduction of a bill appropriating revenue or moneys or increasing amounts under a standing appropriation, but also the insertion in a bill of a clause doing either of those things.[268]

7.7.11 Mr Turnbull considered the argument advanced by Mr Rose and suggested that the better approach was to treat the second 'proposed' as a mistake, and ignore it. Mr Turnbull contended that this would give effect to the intention of the third paragraph.

7.7.12 Mr Barlin would support the application of the third paragraph of section 53 to non-expenditure bills because applies a broad interpretation to the paragraph:

> In ordinary language ... the paragraph applies to any amendment the expected effect of which is to impose a greater financial imposition on the people than would be the case if the amendment were not passed. ... [T]he limitation applies whether the imposition is a direct one (such as increasing liability to taxation) or a perhaps less direct one (such as increasing government expenditure, which must then be funded). [269]

7.8 Parliamentary practice and bills not containing appropriations

7.8.1 None of the submissions suggested that the parliamentary practice, in relation to expenditure bills, should not continue. Mr Turnbull submitted that the practice is correct. He suggested that if the practice was not in place, there would be a gap in the scheme of section 53 that allowed the Senate to indirectly increase appropriations by amending bills from the House of Representatives which did not propose a charge or burden.[270] Mr Barlin also agreed that the current practice should continue.[271]

7.8.2 The parliamentary practice in relation to expenditure bills is inconsistent with the interpretation of the third paragraph advanced by Mr Evans. Nonetheless, he

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267 ibid., p. S287. Refers to advice dated 26 November 1962 by the then Attorney-General, the Hon Sir Garfield Barwick QC MP (see *Submissions*, p. S290-292.

268 ibid., p. S249. Mr Evans also considers that an amendment can, in some circumstances, be a proposed law for the purposes of the first paragraph of section 53.

269 Mr L Barlin, *Submissions*, p. S196.

270 Mr I. Turnbull, *Submissions*, p. S258.

271 *Seminar Transcript*, p.66.

agreed that the practice should not be overturned.[272] In his submission on the exposure draft, Mr Evans argued that the recommendation on this matter would increase uncertainty and that it would be better to confine the application of the third paragraph to bills containing appropriations or amending Acts containing appropriations[273].

7.8.3 The Committee accepts the parliamentary practice which has been in place since 1910 in relation to a bill that itself affects expenditure (expenditure bill). The practice is consistent with the interpretation that a reference in the third paragraph to a proposed charge or burden is not limited to a charge or burden contained in a bill, but includes a reference to a standing appropriation as proposed to be affected by a bill.

7.8.4 Whether the third paragraph of section 53 applies to non-expenditure bills is less clear. Notwithstanding the absence of a proposed charge or burden in the bill itself, the application of that paragraph to non-expenditure bills is in keeping with the broad policy of section 53, that is, to preserve the financial initiative of the House of Representatives but otherwise the two Houses have equal powers. However, if Mr Rose's view were accepted, the Senate would be precluded from amending non-expenditure bills to increase expenditure under a standing appropriation by the first paragraph of section 53 because such an amendment is a law appropriating revenue or money within the meaning of that paragraph.

7.8.5 The Committee considers it inappropriate for the Senate to make an amendment to a bill (which does not contain a standing appropriation and therefore does not itself propose a charge or burden) to increase expenditure under a standing appropriation, regardless of whether the bill itself affects expenditure under a standing appropriation. Such an amendment would be inconsistent with the broad policy of section 53 and the purpose of the third paragraph of section 53 or alternatively, in relation to non-expenditure bills, it may be inconsistent with the first paragraph according to Mr Rose's view. 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.

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272 Mr H. Evans, *Transcript*, pp. 15-16, *Submissions*, p. S230.

273 *Submissions on the exposure draft*, p. S9.

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.

7.9 Should expenditure bills be originated in the Senate?

7.9.1 If a bill that itself affects expenditure under a standing appropriation (expenditure bill) is a bill appropriating revenue or money within the meaning the first paragraph of section 53, it would appear that such a bill should be originated only in the House of Representatives because of the prohibition in the first paragraph.

7.9.2 Mr Rose submitted that the long-established views, at least of successive governments, are that a bill which increases expenditure under a standing appropriation is a proposed law appropriating moneys within the meaning of the first paragraph of section 53. A Governor-General's message under section 56 is required for such a bill.[274] Mr Rose also referred to an advice dated 26 November 1962 of the then Attorney-General, the Hon Sir Garfield Barwick QC, MP, who expressed the same view.[275] Mr Turnbull indicated that the existing practice was to treat such bills as requiring a Governor-General's message and that such bills were introduced into the House of Representatives.[276]

7.9.3 Mr Evans told the Committee that, as part of the parliamentary practice, expenditure bills had been introduced into the Senate and the Senate had amended such bills to further increase expenditure under a standing appropriation.[277]

7.9.4 The Committee considers that, regardless of whether a bill which increases expenditure under a standing appropriation is a bill that falls within the first paragraph, it is inconsistent with the broad policy of the third paragraph that such a bill be

274 Mr D. Rose, *Submissions*, p. S246.
275 *Submissions*, pp. S290-291.
276 Mr I. Turnbull, *Submissions*, p. S261.
277 *Seminar Transcript*, p.65; *Transcript*, p. 16.

originated in the Senate. In his submission on the exposure draft, the Clerk of the House of Representatives agreed with this position.[278]

7.9.5 One consequence of originating all such bills in the House is a check on the flexibility of the Government to originate bills according to its own timetabling needs. This is an understandable concern which would be held by whichever political party or parties forms government. The Committee notes that the submission from the leader of the House and the manager of government business in the Senate addresses this matter.[279] The submission refers specifically to a proposal that bills dealing with the tax base and tax rates should not be originated in the Senate, and notes that the Government would prefer a non-binding practice, supported by advice from the Office of Parliamentary, rather than a prohibition.

7.9.6 The Government's approach recognises the principle of supporting the financial initiative of the House of Representatives but marries that principle with the need for flexibility when a practice is not forbidden by the Constitution. The Committee recognises this principle in relation to tax-related bills (see chapter 9) on the grounds that such bills are not constitutionally prevented from being originated in the Senate. However, expenditure bills under a standing appropriation should be distinguished from tax-related bills. Although it is not necessary in this context to pronounce absolutely about the constitutional status of these expenditure bills, the Committee accepts the advice of Mr Rose and others that, in accordance with the Constitution, the bills should be originated in the House of Representatives.

Recommendation 4

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

7.10 Proposals by Mr Evans

7.10.1 In evidence to the inquiry, Mr Evans made a number of proposals concerning expenditure. Mr Evans stressed that the proposals were not designed to give effect to what he considered to be the 'correct' interpretation of the third

278 *Submissions on the exposure draft*, p. S21.

279 Hon K Beazley MP and Senator the Hon J Faulkner, *Submissions to the exposure draft*, pp. S79—80.

paragraph, but rather to make the best use of the precedents and to formulate a coherent and consistent interpretation of that section given those precedents.[280]

7.10.2 Mr Evans submitted that under the existing parliamentary practice, the third paragraph could be extended to apply to an unwieldy range of bills and amendments that indirectly affect appropriations.[281] Mr Evan's proposal appears to address these concerns. It provides that:

> it should be explicitly declared by the Senate that the paragraph does not apply to bills in respect of appropriations unless such bills contain appropriations or amend acts which contain appropriations in such a way as to affect expenditure under the appropriations, and does not apply to bills originating in the Senate.[282]

In his submission on the exposure draft, Mr Evans reiterated his view that the third paragraph of section 53 should only apply to bills containing appropriations or amending acts containing appropriations. This class of bills could be extended. Mr Evans suggests that bills which increase expenditure under a standing appropriation should contain a clause appropriating the additional money. Mr Evans' comments that this would be a step towards greater financial responsibility and accountability on the part of the legislature.[283]

7.10.3 Mr Turnbull commented that Mr Evans' view on the application of the third paragraph is inconsistent with current parliamentary practice. It is also inconsistent with Mr Evans' interpretation of section 53 (that the third paragraph applies only to bills which the Senate is precluded from initiating, but entitled to amend, namely appropriation bills other than for the ordinary annual services of the Government).[284] In reply, Mr Evans reiterated that he had been arguing what he saw as the correct interpretation of section 53, but that his recommendation were designed to take account of existing precedents.[285]

7.10.4 Mr Rose also considered that Mr Evans' recommendation was too narrowly expressed.[286] He argued that the recommendation should not be limited to a bill

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280 *Submissions*, p. S301.
281 Mr H. Evans, *Submissions*, pp.S55-56.
282 Mr H. Evans, *Submissions*, p. S56-57.
283 *Submissions on the exposure draft*, p. S9.
284 Mr I. Turnbull, *Submissions*, p. S261.
285 Mr H Evans, *Submissions,* p. S301.
286 Mr D. Rose, *Submissions*, p. S247.

that amends *'an Act containing the relevant appropriation'*. It should extend to any bill that would result in an increase in expenditure under any standing appropriation, regardless of whether that appropriation was contained in the Act being amended by the bill *'or elsewhere'*.[287]

7.10.5 In a later submission, Mr Rose suggested that the Clerk's proposal should at least include bills which require or authorise payments and which will result in an increase in expenditure under *'any'* standing appropriation, *'whether or not the Act containing the appropriation is being amended'*.[288]

7.10.6 Mr Rose's submission on the exposure draft quoted *Australian Senate Practice* as stating that section 53 is applicable where the proposed amendment, if enacted, would increase the amount expendable under any appropriation in the bill before the Senate *or elsewhere*.[289] Evidently, in Mr Rose's view, the third paragraph may apply where appropriations are located other than in the bill itself or in an Act being amended by the bill.

7.10.7 The approach taken by the House of Representatives as outlined by Mr Barlin indicates that the standing appropriation may be contained in an existing Act or bill, that is, it need not be contained in the Act that the bill is amending. Ms Penfold submitted there were very few standing appropriations which were likely to be affected by other Acts that were not part of the same legislative scheme or package. In her view, very few standing appropriations risk being affected by arguably unrelated Acts.[290] Mr Evans noted that there is enormous scope for provisions and amendments which affect standing appropriations.[291]

7.10.8 *In the exposure draft the Committee considered that Mr Evans'* recommendation was too narrowly framed in relation to standing appropriations. The Committee acknowledged that, by limiting the application of the third paragraph to bills that amend Acts that contain standing appropriations, it may be easier to determine whether a bill, and a Senate alteration to the bill, will affect expenditure under a standing appropriation. However, the Committee's view was that this could be determined even if the standing appropriation is contained in another Act or bill.

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287 ibid.

288 ibid., p. S288.

289 *Submissions on the exposure draft*, p. S35 quoting the Commonwealth submission in *Western Australia* v. *The Commonwealth*, pp. 57-58, paragraph 10.8.

290 Ms H. Penfold, *Submissions*, p. S355.

291 Mr H. Evans, *Submissions*, p. S302.

If the recommendation regarding the addition of appropriation provisions to cover increases to expenditure under standing appropriations were adopted, it would result in many more Governor-General's messages under section 56 of the Constitution. In practice this approach would be unwieldy verging on unworkable.

7.10.9 The issue of expenditure where the appropriation is not within the bill being considered or in an Act amended by the bill, again arose in submissions on the exposure draft. Mr Evans referred to the submission in *Western Australia* v. *The Commonwealth* that the Native Title Act was invalid because the amendments made to the bill in the Senate were contrary to section 53 of the Constitution.[292] Mr Evans suggested that the High Court's observation, that none of the Senate amendments appeared to contravene section 53, confirms the treatment of the amendments by both Houses at the time.[293] Mr Evans stated that the alterations in question

> ... were moved in the form of amendments and not as requests because they did not directly increase expenditure under any appropriation contained in the bill or [in] any act amended by the bill.[294]

7.10.10 In response Mr Rose submitted that Mr Evans' suggestion, whereby the third paragraph of section 53 is limited to Senate amendments that increase expenditure either under the bill being amended or under an appropriation in an Act being amended by the bill, was unfounded.[295] Mr Rose explained that there is reason to think that the High Court may have been unaware of the appropriations in question and even if it was aware of them, the relevant remark would still not support Mr Evans' suggestion.[296] Mr Rose argued that, in the circumstances

> [t]he most that might reasonably be inferred is that (in the words of the Commonwealth submission ...) the amendment was not one that '*would*' have increased the 'amount expendable under the existing appropriation'. This had nothing to do with the location of the appropriation. It is simply due to the fact that the total amount expendable under the appropriation would have depended on many other factors - eg the total could have been less if there had been a sufficient reduction in the numbers of parliamentary committees, in travel by members of Parliament, or in public offices etc.[297]

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292 Refer to paragraph 4.4.19.

293 *Submissions on the exposure draft*, p. S5.

294 ibid., p. S5.

295 ibid., p. S70.

296 ibid.

297 ibid.

7.10.11 Mr Rose commented that while the High Court has referred to the need for consistency between sections 53 and 55 (in *Air Caledonie*), this does not mean that the Parliament should follow every dictum from the Court. Further, since the Court held section 53 to be non-justiciable, the Parliament is entitled to regard the Court's remarks about section 53, in a context where it was not relevant to a justiciable issue, as a usurpation of the Parliamentary function.[298]

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

7.10.13 Mr Evans' second proposal was that:

> every government bill which amends an act containing a standing appropriation so as to increase expenditure under the appropriation should contain a clause appropriating the additional money, should be classified as an appropriation bill, and should be introduced in the House accordingly.[299]

7.10.14 Both Mr Turnbull and Mr Rose considered that the second recommendation was not necessary because such a bill was already a bill appropriating revenue or money.[300] Mr Rose also submitted that it was not clear why the proposal should only apply to government bills, although he did acknowledge that it was of little practical significance because it was unlikely that a non-government bill would be passed by the House of Representatives.[301]

7.10.15 The Committee considers that it is not necessary for such bills to contain an appropriation clause. The Committee notes that recommendation 4 is consistent with Mr Evans' suggestion that such bills be originated in the House of Representatives.

7.10.16 Mr Evans' third proposal was that:

> Where a government bill originating in the House amends an act containing such an appropriation [ie. standing], in relation **to each amendment** to such a bill circulated in the Senate, the responsible Senate minister should be required to provide, before the amendment is

298 ibid., p. S69.

299 Mr H. Evans, *Submissions*, pp. S56-57.

300 Mr I. Turnbull, *Submissions*, p. S261; Mr D. Rose, *Submissions*, p.S288.

301 *Submissions*, p. S288.

> moved, a statement of whether the amendment would, in the Government's view, affect expenditure from the appropriation, and to give a statement of reasons for that view.[302](emphasis added)

7.10.17 Mr Evans also suggested that:

> Where an amendment, which will affect expenditure from an appropriation is to be moved in the Senate, is stated by a Minister to have the effect of increasing expenditure from such an appropriation, the amendment shall be moved as a request to the House of Representatives.[303]

7.10.18 The Committee recognises that Mr Evans' fourth proposal is related to his earlier proposals. That is, the proposal is related to appropriation bills where the bill contains an appropriation or amends an Act containing an appropriation so as to increase expenditure under an appropriation.[304] As noted above the Committee does not consider such a limitation necessary. However, it considers that the idea in this proposal could be usefully applied to all expenditure and appropriation bills.

7.10.19 If the responsible Senate Minister made a statement to the Senate as to whether a proposed Senate alteration would increase expenditure under a standing appropriation, this may assist Senators in deciding whether the alteration should be moved as a request or an amendment. Assuming the Senator obtained advice from the Attorney-General's Department and the Office of Parliamentary Counsel, the Senate would then have a basis for making a decision as to whether an alteration should be a request or an amendment. However, if the Senate disagreed with the advice tendered, it could then decide how to proceed with the alteration.

7.10.20 The Committee suggests that when there is a proposed Senate alteration to a bill which has originated in the House of Representatives and the responsible Senate Minister considers that the amendment will increase expenditure under a standing appropriation, the Minister should give a statement to the Senate to that effect.

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302 Mr H. Evans, *Submissions*, pp. S57, S221-222.

303 ibid., p. S222.

304 ibid., p. S221.

Chapter 8 Taxation: Does the third paragraph apply to tax and tax-related burdens?

This chapter considers whether the third paragraph applies to tax and tax-related burdens. It traces the history of the third paragraph in relation to taxation, focusing particularly on the 1950 opinion of Sir Robert Garran and the 1990 opinion of the then Attorney-General, the Hon Michael Duffy. The Committee concludes that the third paragraph does apply to tax and tax-related burdens.

The chapter also considers whether proposed laws containing provisions for the imposition or appropriation of fines, penalties, fees for licences or fees for services are subject to the third paragraph. The broad view, namely that those imposts are subject to the third paragraph, and the narrow view, that the imposts are not subject to the third paragraph, are discussed. The Committee concludes that those imposts should not be regarded as subject to the third paragraph of section 53.

8.1 Convention debates and the views of Quick and Garran

8.1.1 During the 1891 Convention, there was considerable disagreement about the Senate's power in relation to 'money bills'. Sir Henry Parkes asked the rhetorical question:

> Why do we hesitate to give them [ie. the Senate] the same power in dealing with what are sometimes erroneously termed money bills?[305]

He continued:

> Because all taxes levied must be burdens on the people of the country. The freest condition would be to have no tax; and every tax, let it take what form it may, is a burden upon a free people. Every expenditure derived from the revenues produced by these taxes must affect the people in the same way in which the imposition of burdens affects them.[306]

8.1.2 Sir Robert Garran quoted Parkes as going on to say that the principle was that the popular chamber alone should deal with measures 'affecting the imposition of burdens and the distribution of revenue derived from the taxes so imposed'. He also stated that the Senate should not have the power of veto, in whole or in detail, over 'any bill introduced for the purpose of expending money ... or for increasing the

305 Convention Debates, Sydney, 17 March 1891, p. 449.

306 ibid.

burdens on the State'.[307] It is clear that Sir Henry Parkes viewed the word 'burden' as including tax and tax-related burdens.[308]

8.1.3 Quick and Garran's *Annotated Constitution of the Australian Commonwealth* has been cited in support of the view that the third paragraph of section 53 only applies to certain appropriations (that is, bills appropriating money other than for the ordinary annual services).[309] The relevant passage reads:

> 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.[310]

That passage also goes on to state that:

> 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 million 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.[311]

8.1.4 Evidently taxes were indirectly referred to by Quick and Garran. It would appear somewhat anomalous if appropriations are subject to the third paragraph because they will necessitate increased taxation of the people, yet taxes themselves are not within the ambit of the third paragraph. Mr Ian Turnbull QC recognised this anomaly and suggested that it follows from Quick and Garran's statement that an amendment that itself increases taxation must add to the burden on the people.[312]

8.1.5 Quick and Garran seem to have assumed that the second paragraph of section 53 - dealing with laws imposing taxation - applied to all bills that, as a matter of law, result in an increase in taxation.[313] Mr Rose suggested that the

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307 *Opinion*, p. 2 (see Appendix D).

308 Tax-related burdens may include increases in the rate or incidence of tax and variations in deductions, whether or not these measures are regarded as imposing taxation.

309 See Mr H. Evans, *Submissions*, pp. S50-52.

310 Quick and Garran, op. cit., p. 671, para. 249.

311 ibid.

312 *Submissions*, p. S256.

313 See Opinion of the Hon. Michael Duffy MP, 21 November 1990, p. 3 extrapolating from *Annotated Constitution of the Commonwealth* (1900), p. 671 (see Appendix F).

Commonwealth quickly departed from that view.[314] He stated that if the Quick and Garran view did reflect that of most of the founding fathers, it would be hard to explain early legislation such as the *Customs Act 1901*, which contained essential provisions defining the tax base, and the *Land Tax Assessment Act 1910* which combined provisions on the tax base with administrative and other provisions.[315] This legislation appears to have been enacted based on the view that amendments which enlarge a tax base, where the tax is imposed in an existing Act, do not impose taxation. Mr Rose suggested that Sir Robert Garran was probably involved in the formulation of that early legislation.[316]

8.1.6 Sir Robert Garran stated, in his 1950 opinion, that the clause preventing Senate amendments so as to increase the charge or burden on the people may have been inserted 'to please the old man'[317] (that is, Sir Henry Parkes). He suggested that Parkes probably regarded the clause as referring to taxation only.[318] Garran argued that tax bills which do not impose taxation are subject to third paragraph.[319] The rationale for that view was that the second paragraph prevents any amendment of a bill imposing taxation, so the third paragraph must apply to tax bills that do not impose taxation. Sir Kenneth Bailey's letter agreed with Garran's assertion.[320] It appears that by 1950 Garran had changed his view from that which he held when the *Annotated Constitution of the Commonwealth* was published in 1901. There are a variety of explanations that may account for this 'change of heart'. One possibility is that the original view of Quick and Garran in 1901 was a slip resulting from inadequate consideration of the issue.[321] The significance of the use of 'imposing taxation' in the first two paragraphs of section 53 is considered further in the next chapter.

8.1.7 Mr Evans noted that the expression 'charge or burden' is strongly suggestive of taxation. However, he suggests that Senators on both sides of the debate on the Sugar Bonus Bill 1903 rejected the notion of any such application.[322]

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314 *Transcript*, p. 28.

315 Mr D. Rose, *Submissions*, p. S243.

316 ibid.

317 *Opinion*, p. 6 (see Appendix D).

318 ibid., pp. 4-5.

319 ibid., p. 4. 'Tax bills that do not impose tax' are bills that, for example, expand a tax base or increase the rate of taxation, whether the tax is imposed in another Act.

320 ibid., p. 1.

321 Mr D. Rose, *Submissions*, p. S244.

322 Mr H. Evans, *Submissions*, p. S57.

8.2 Pre-1990 practice

8.2.1 Prior to 1990, the parliamentary practice was that the third paragraph of section 53 only applied to appropriations and did not cover bills that dealt with taxation. It was submitted that this practice was illogical and inconsistent.[323] As outlined earlier, if the third paragraph applies to appropriations because an amendment increasing an appropriation leads to increased taxation and is therefore a burden on the people, then it would be curious if an amendment that itself increases taxation was not also a burden on the people and subject to the third paragraph (unless it fell within the ambit of the second paragraph of section 53).

8.3 Post-1990 practice

8.3.1 In an opinion dated 21 November 1990 the then Attorney-General, the Hon Michael Duffy MP, gave written advice as to whether the proposed Senate amendments to the Taxation Laws Amendment (Rates and Provisional Tax) Bill 1990, to increase the marginal rate of income tax to 60% on incomes exceeding $100 000, were subject to the third paragraph of section 53. Mr Duffy stated that, according to existing Senate practice (at that time), the third paragraph prevented the Senate increasing an appropriation, but it did not apply to bills dealing with taxation.[324] A memorandum from the Clerk of the Senate, referred to in Mr Duffy's opinion, stated that 'taxation bills ... are the subject of a different provision', by which he presumably meant the second paragraph of section 53. However, Mr Duffy stated that this was not an accurate statement unless the expression 'taxation bills' was limited to bills which impose taxation.[325]

8.3.2 Mr Duffy's opinion concluded by stating that:

> As a matter both of ordinary language and Constitutional principle, I see no reason why the third paragraph of s.53 should not apply to amendments of bills dealing with taxation (though not 'imposing' it) where the amendments would increase the rate of taxation that is imposed by another Act.[326]

8.3.3 The practice that the third paragraph of section 53 applies to amendments of bills dealing with taxation has been adopted and continued by the House of

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323 Mr I. Turnbull, *Submissions*, p. S256.

324 Opinion, p. 3 (see Appendix F).

325 ibid., p. 3.

326 ibid., p. 3.

Representatives since 1990. That practice would appear consistent with the plain meaning of the words as the expression 'charge or burden' is suggestive of taxation.

8.3.4 It has been suggested that issues associated with section 53 of the Constitution have arisen more frequently in recent years. This may be attributable to two reasons. First, the political complexion of the Senate has changed and there are now many non-government amendments in that chamber. Secondly, prior to 1990, the paragraph was not interpreted as applying to taxation and this meant the scope for disputes concerning the third paragraph of section 53 was restricted.

8.4 Views of participants in the inquiry

8.4.1 Mr Evans submitted that the third paragraph of section 53 applies only to appropriation bills other than for ordinary annual services and not to taxation bills. He suggested that the 1950 Garran opinion is the only authority for the alternative interpretation[327] (that is, that the third paragraph applies to tax-related bills). Mr Evans considers that if a bill to increase taxation is not a bill imposing taxation, such a bill can be introduced and amended in the Senate.[328]

8.4.2 Mr Evans' view that the third paragraph does not apply to taxation has been criticised for ignoring the wide ambit of the words of the paragraph.[329] Mr Brazil, however, also suggested that the view, whereby the third paragraph does not apply to tax bills that do not impose taxation, is a *possible* view of that paragraph.[330] However, he recognised that the 'ordinary language approach', under which the third paragraph would apply to taxation measures, was a powerful argument.[331]

8.4.3 Mr Barlin and Mr Turnbull appeared to agree that the third paragraph does apply to taxation bills that do not impose taxation.[332] Mr Rose also supports that view.[333] However, as he considered section 53 is not justiciable, he raised the issues but did not express concluded views because he suggested that is a matter

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327 *Transcript*, p. 8.
328 *Submissions*, p. S61.
329 Mr I. Turnbull, *Submissions*, p. S257.
330 *Submissions*, pp. S272-273 and *Transcript*, p. 50.
331 *Submissions*, p. S51.
332 See *Submissions*, p. S204 and *Submissions*, p. S256.
333 See *Submissions*, pp. S242, S283 and Appendix C.

for the Houses to determine.[334] Professor Blackshield thought that the third paragraph could only apply to bills that increase a tax or a charge in the nature of a tax.[335]

8.5 Conclusions on tax and tax-related measures

8.5.1 The Committee considers that the third paragraph of section 53 does apply to charge or burdens in the nature of tax or tax-related measures. In this respect, the Committee has placed great weight on the plain meaning of the words of the third paragraph, the limited number of taxation bills which would fall within the first and second paragraphs of section 53, the authoritative opinions of Sir Robert Garran (with whom Sir Kenneth Bailey agreed) and the Hon Michael Duffy, and recent parliamentary practice. While many arguments lead to this conclusion, it arises chiefly from the Constitution itself.

8.5.2 The Committee considers precisely which tax or tax-related measures are encompassed by the third paragraph in the next chapter.

Recommendation 5

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

8.6 Fines, penalties, licence fees and fees for services

8.6.1 The first paragraph of section 53 prevents proposed laws appropriating revenue or moneys or proposed laws imposing taxation from being originated in the Senate. However, that paragraph goes on to provide 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 is whether the latter class of proposed laws is subject to the third paragraph of section 53.

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334 See comment in relation to the imposition of taxation, *Submissions*, p. S243 (paragraph 4).

335 *Seminar Transcript*, p. 7.

8.7 Narrow view

8.7.1 Quick and Garran's discussion of the third paragraph does not include reference to fines, penalties and fees for licences or services.[336] Consequently, it has been suggested that Quick and Garran appear to take the view that those imposts are not subject to the third paragraph.[337] This view is the 'narrow view'.

8.7.2 Mr Evans subscribes to this view. He suggests that the claim that a number of items can be charges or burdens, including the fines and fees referred to in the first paragraph of section 53, introduces uncertainty into the operation of the third paragraph and 'founders' on the difficulty that the Senate can introduce its own bills to impose such charges or burdens.[338]

8.7.3 Professor Pearce is also a proponent of the narrow view. He supports the view that 'charge' could be read as 'a taxing measure or a charge against the Consolidated Revenue Fund of the Government and thereby, presumably, of the people'.[339] He concludes that the term does not include those imposts mentioned in first paragraph of section 53 (that is, 'fines or other pecuniary penalties, the demand or payment or appropriation of fees for licences, or fees for services'). According to the narrow view, the Senate should be able to amend upwards these imposts if it is able to originate them.

8.7.4 Mr Ian Turnbull submitted that the words of Henry Parkes clearly exclude fines, penalties and fees from the ambit of the third paragraph. He argued that the phrase 'charge or burden on the people' is not consistent with these amounts, which are payable by a limited group of persons.[340] Mr Turnbull also notes that the Clerks of both Houses and parliamentary practice treat the relevant imposts as not subject to the third paragraph of section 53.[341]

8.7.5 It appears that in England fees for services are not generally regarded as charges on the people. *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* comments that:

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336 Quick and Garran, op. cit., p. 671, para. 249.

337 Mr P. Lahy, *Submissions*, p. S239.

338 *Submissions*, p. S218.

339 Pearce D., 'The Legislative Power of the Senate' in Zines L. (ed.), *Commentaries on the Australian Constitution*, Butterworths, Sydney, 1977, p. 135.

340 *Submissions*, p. S257.

341 ibid., p. S257.

> ... reasonable fees for services rendered are not normally regarded as charges, nor are fees intended to meet administrative expenses if they are subject to a defined and reasonable limit, and relate to the service rendered.[342]

8.8 Broad view

8.8.1 Sir Kenneth Bailey was a proponent of the broad view. He stated that a provision imposing a pecuniary penalty, or for the payment of fees for licences or services, should be regarded as a 'charge or burden on the people'.[343]

8.8.2 Some submissions have been critical of the narrow construction of the term on a number of grounds. First, it has been suggested that the narrow interpretation fails to accord 'charge' its normal meaning.[344] Secondly, given that the imposts are not generally subject to the first and second paragraphs of section 53, it can be argued that the third paragraph was included to prevent the Senate amending bills so as to increase those imposts.[345]

8.8.3 Thirdly, the argument that the Senate should be able to amend those imposts excluded from the first paragraph[346] if it is able to originate such imposts fails to take into account that the third paragraph only prevents increases in proposed charges and burdens on the people.[347]

8.8.4 The fourth criticism is that had the draftsmen intended that proposed laws for the demand, payment or appropriation of fees for licences or fees for services should be excluded from the operation of the third paragraph, they would have made the provision explicit.[348] The fact that such bills are generally excluded from the expression 'imposing taxation' is no reason to conclude that they are excluded from the words 'any proposed charge or burden on the people'.[349]

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342 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Butterworths, London, 1989, p. 727.

343 Letter to Sir Robert Garran, Canberra, 21 April 1950 (see Appendix E).

344 Professor G. Carney, *Submissions*, p. S70.

345 ibid., p.S70.

346 Note that such imposts may not necessarily be excluded from the first paragraph of section 53 (see paragraph 6.7.1), but this was the wording used by the commentator.

347 ibid., p.S70.

348 Mr A. Morris, *Submissions*, p.S98.

349 ibid., p. S99.

8.8.5 It has been submitted that the terms 'charge' and 'burden' were used because they are not technical legal words and they were intended to comprehend every type of charge or burden that may be exacted by government.[350] However, that view is open to the objection that fees for licences or services (which cannot exceed reasonable charges) and penalties are not 'charges or burdens on the people' of the kinds envisaged in the third paragraph of section 53.[351] Rather they are fees levied as a direct consequence of rights accorded or services rendered. Furthermore, penalties are punitive in nature and it could be argued that the imposition of a charge or burden on particular individuals is appropriate in certain cases.

8.8.6 If a fee for service is subject to the third paragraph, the difficulties in determining whether a 'charge or burden' constitutes the imposition of taxation should be noted in this context. Should a fee prescribed under Commonwealth law for the compulsory inspection of meat before it is to be exported be characterised as the imposition of taxation or a 'fee for service'?[352] The characterisation is obviously important because if the charge imposes taxation, the Senate is subject to the constraints imposed by the first and second paragraphs of section 53. However, if the charge does not impose taxation, the Senate may only be subject to the more limited constraints imposed by the third paragraph of section 53, or no constraints at all.

8.9 Conclusions on fines, penalties, licence fees and fees for services

8.9.1 The first paragraph of section 53 provides that a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation by reason only that it contains provisions for the imposition of fines, penalties, fees for licences or fees for services. This does not mean that those imposts are automatically excluded from the operation of the first paragraph. Rather, a proposed law is not to be taken to impose taxation *merely* by reason of it containing those kinds of imposts. It will often be difficult to determine whether a particular impost is a licence fee or a fee for service or in fact, a tax.[353] If such an impost does amount to the imposition of taxation, then it cannot be originated in or amended by the Senate.

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350 ibid., p. S16.

351 Mr P. Lahy, *Submissions*, p. S239.

352 Mr A. Morris, *Submissions*, p. S19. See the general discussion of this issue in *Air Caledonie International* v. *The Commonwealth of Australia* (1988) 165 CLR 462 at 467.

353 See *Air Caledonie International* v. *The Commonwealth* (1988) 165 CLR 462 at 470-471 per Mason CJ and Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ, and *Northern Suburbs General Cemetery Reserve Trust Fund* v. *The Commonwealth of Australia* (1993) 176 CLR 555 at 571 per Mason CJ, Deane, Toohey, and Gaudron JJ, 584 per Brennan J, 588 per Dawson J and 596 per McHugh J.

8.9.2 Where such imposts do not amount to the imposition of taxation, it is appropriate for the Houses to treat fines, penalties, licence fees and fees for services as prima facie outside the first two paragraphs of section 53. The question then is whether such imposts may be charges or burdens within the third paragraph.

8.9.3 The evident reason for the prima facie exclusion of fines, penalties, licence fees and fees for services from the concept of taxation is that those imposts either serve other purposes (such as providing a sanction for unlawful behaviour) or are in exchange for something received in return. The Committee considers that the same reason supports their exclusion from the operation of the third paragraph, even though 'charge or burden' is, on the face of it, a more general and less technical expression than the 'imposition of taxation'.

8.9.4 The Committee subscribes to the 'narrow view' on this issue mainly because it best upholds the underlying policy of section 53. It would add also that the exclusion of fines, penalties, licence fees and fees for services from the operation of the third paragraph of section 53 accords with current parliamentary practice. Such imposts should be scrutinised in order to determine whether in truth they amount to the imposition of taxation, but that will have consequences only for the first two paragraphs of section 53.

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.

Chapter 9 Tax bills which are subject to the third paragraph of section 53

The last chapter argued that the third paragraph of section 53 applies to tax bills. The question then arises — what kinds of tax bills might attract the prohibitions of the third paragraph? Tax bills which impose taxation are entirely beyond the Senate's powers to amend, by virtue of the second paragraph of section 53. These clearly, would not be included in the lesser prohibition (against increases only) contained in the third paragraph. That leaves tax bills which do something other than impose taxation but which otherwise contain a charge or burden on the people, to be potentially subject to the third paragraph. It is emphasised that the third paragraph can apply only to taxation bills where the tax is imposed in another Act. The particular questions in relation to these matters are whether bills affecting the tax rate and those affecting the tax base may be subject to the third paragraph of section 53, or do they impose taxation (thus making them subject to the second paragraph but not the third).

The meaning of 'proposed laws imposing taxation' in both the first and second paragraphs of section 53 is therefore pivotal. The Committee considers the meaning of 'imposing taxation' in section 55 of the Constitution and whether that meaning can be applied to section 53. The case law on imposing taxation for the purposes of section 55 is considered, as well as the relationship between sections 53 and 55. Having determined which tax bills are subject to the first two paragraphs of section 53, those which could come within the sphere of the third paragraph are considered.

The final part of the chapter considers the application of the third paragraph of section 53 to tax bills which are originated in the Senate.

9.1 Introduction

9.1.1 The debate about the application of the third paragraph of section 53 to tax bills begins not in the third paragraph, but in the first two paragraphs of section 53. The first paragraph prevents bills imposing taxation from being originated in the Senate and second paragraph prevents bills imposing taxation from being amended by the Senate. The third paragraph would not repeat a prohibition already spelt out in the second paragraph, so insofar as the third paragraph applies to tax bills, it must apply to tax bills other than those which impose taxation. It is clearly important to determine the meaning of 'imposing taxation'.

9.1.2 Because section 53 is not justiciable it is open to the Houses to determine the meaning of 'imposing taxation' for the section. They must proceed in the absence of case law on section 53, but they can seek guidance in the High Court's determinations regarding section 55. This latter section uses the same phrase and, significantly, uses it in the same context as section 53 — that is, the relative roles of the two Houses in relation to tax bills and laws. There is a series of High Court cases which contemplate the meaning of 'imposing taxation' and these are considered below.

9.1.3 Having discovered the meaning of 'imposing taxation' in section 55, it then remains to discern the relevance of the findings for section 53. While words and phrases do not always have a consistent meaning throughout the Constitution, there are sound reasons for according 'imposing taxation' a consistent meaning for the purposes of sections 53 and 55. The High Court has noted that sections 53, 54 and 55 are part of a unified constitutional scheme to regulate relationships between the Houses. To make sense of the three sections requires consistent meanings be applied to like terms. The connection between section 53 and 55 will be further considered below.

9.1.4 Deciding which tax bills are affected by the second paragraph of section 53 and therefore which (remaining) tax bills might be affected by the third paragraph is relatively straightforward, so long as the bill originated in the House of Representatives. The difficult task is to determine whether or not the third paragraph applies to tax bills which originate in the Senate. Origination in the Senate is forbidden if the bill actually imposes taxation (first paragraph of section 53), but it is constitutionally possible for other tax bills. The chapter concludes with observations on this matter.

9.2 The meaning of 'imposing taxation' in section 55

9.2.1 Section 55 of the Constitution reads:

> Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing

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

9.2.2 It should be noted that the section deals with 'laws', unlike sections 53 and 54 which address 'proposed laws'. The significance of this is that if section 55 is breached it is the law itself which is at risk (or at least those matters which offend the section), whereas the restrictions in sections 53 and 54 apply to the legislative period itself, not to the end result of the legislative operation. Because section 55 deals with laws not bills, the courts have become involved in determining if the provisions of section 55 have been satisfied. The result is a moderately rich vein of case law which contemplates the meaning of 'imposing taxation'.

9.2.3 Some of the evidence given to the Committee suggested that the case law on 'imposing taxation' may be less than settled.[354] Other evidence strongly contested the view that the court's views of 'imposing taxation' were anything less than stable and consistent. Indeed, any other finding would create chaos by invalidation existing tax legislation.[355]

9.2.4 Because of the doubts raised, particularly in relation to tax rates, the Committee has reviewed recent High Court cases and the evidence given to the Senate inquiry on the Taxation (Deficit Reduction) Bills in 1993[356] in addition to the evidence given to its own inquiry. It concludes that the High Court's findings on

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354 Mr A. Morris, *Submissions,* pp. S305—6. Mr Morris described a 'narrow' view — that a law imposes a tax if it creates a new form of tax, and a 'wide' view — that laws increasing rates and expanding the tax base imposed tax. He noted that existing High Court authority favoured the narrow view, but contended that the High Court had not considered the matter since *Re Dymond* and could widen its view in the future. Mr Morris cited evidence given to the 1993 Senate inquiry relating to section 55 as supporting his view.

355 See, for example, Mr D. Rose, *Seminar Transcript,* p. 27: 'The starting point was, of course, the High Court decisions on section 55 — that a law does not impose taxation if it is merely dealing with the tax base of a tax that is imposed by another act. That seemed to me to be clearly established by a series of High Court cases and recently confirmed in the second fringe benefits tax case. If that view did not continue to be followed by the High Court we would have massive invalidity of tax legislation that has been put on the statue books since 1901 ...'

356 In September-October 1993 the then Senate Standing Committee on Legal and Constitutional Affairs conducted a general references inquiry on the Taxation (Deficit Reduction Bill) 1993, and a bills inquiry on the Taxation (Deficit Reduction) Bill (No. 1) 1993 and the Taxation (Deficit Reduction) Bill (No. 2) 1993. These inquiries extensively canvassed views on the meaning of 'imposing taxation' for the purpose of section 55 of the Constitution. The evidence has been studied in preparation for this chapter of the current report.

'imposing taxation' in relation to matters affecting the tax base are both clear and settled. However, it must be kept in mind that the cases relate to imposing taxation for the purposes of section 55. To apply the findings to section 53 must itself be argued as a separate step.

9.3 Case law on 'imposing taxation' for the purposes of section 55: *Re Dymond*

9.3.1 The case law on 'imposing taxation' builds on parliamentary and drafting practice in dividing tax bills into various categories. The distinction between Taxing or Tax Acts and Assessment Acts and other tax-related Acts, sometimes called Application Acts, has been made in many High Court judgments. *Osborne v the Commonwealth*[357] dealt with the *Land Tax Act 1910* and the *Land Tax Assessment Act 1910*. The Court noted the distinction between Tax Acts which impose taxation and Assessment Acts which do not. Even though without the provisions of the Assessment Act no tax could be collected under the Tax Act, the Assessment Act 'of itself ... imposes no tax'.[358]

9.3.2 *Munro's* case also supported a narrow interpretation of 'imposing taxation'.[359] The case held that an Act could impose taxation without adding any detail including rates. Isaac J said

> ... an Act 'imposes' taxation even if it merely takes the first step as declaring that there shall be a poll tax leviable on such persons and at such rates as may be declared by some future Act.[360]

The case is sometimes cited for its observation that it is not the completeness or otherwise of the provisions of the law or proposed law but the character of the bill.[361] While this case is a very early one it is uncontradicted in any later judgment.[362]

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357 (1911) 12 CLR 321.

358 (1911) 12 CLR 321 at p. 354.

359 *Federal Commissioner of Taxation v Munro* (1926) 28 CLR 153.

360 (1926) 38 CLR 153 at p. 189.

361 (1926) 38 CLR at pp. 186-7.

362 Mr D. Rose, Senate Legal and Constitutional Affairs Committee inquiry in the Taxation (Deficit Reduction) Bill 1993, *Submissions*, p. 102.

9.3.3 *Re Dymond*[363] is regarded as a leading 'modern' case on imposing taxation in section 55. It is often cited when describing the simplest, two-fold division of taxing legislation:

> By reason of the provisions of s. 55 it has been the invariable practice since the establishment of the Commonwealth, when Parliament has proposed to levy a tax on any subject of taxation, to pursue that object by means of two separate Acts, the one of which actually imposes the tax and fixes the rate of tax, and the other of which provides for the incidence, assessment, and collection, of the tax and for a variety of incidental matters.[364]

9.3.4 Two points have been made about this passage. First, it follows *Osborne v the Commonwealth*[365] by expressing imposing the tax **and** fixing the rate as separate concepts. If the Court intended the fixing of the rate to be an integral part of imposing the tax it could easily have achieved this end by the use of inclusive words. Second, the Court was quite clear and firm on the view that matters relating to the tax base or the incidence of taxation do not impose taxation.

9.3.5 Of these two points, the latter is widely accepted because of the unambiguous nature of the Court's pronouncements. The observation on rates is more difficult. The nature of the section 55 cases is that they deal with various subjects of taxation and whether various sections 'deal with the imposition of taxation' so findings on the tax base are common. The topic of tax rates appears not to have been the subject of section 55 cases, so inductive logic must be applied to glean information in this area. One can begin with the fact that tax rates are not invariably included in the Taxing Act which imposes taxation.

9.3.6 While *Re Dymond* addressed the most basic division of bills (into Taxing Acts and Assessment Acts), in fact many other divisions are used in practice. As noted above, the rates themselves may be included in separate legislation as in the *Income Tax Rates Act 1986.* Mr Ian Turnbull has pointed out that the fact that rates are not necessarily included in the Taxing Act supports the view that they are not part of the imposition of the tax:

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363 *Re Dymond,* (1959) 101 CLR 11. The main judgment was written by Fullager J. with whom Dixon CJ. and Kitto and Windeyer JJ. agreed.

364 (1959) 101 CLR 11 at p. 18.

365 per O'Connor J, '... the *Tax Act*, is restricted to declaring the imposition of the tax and fixing the rate.' (1911) 12 CLR 321 at p. 354.

> ... there are cases where a bill imposes a tax and the rates are to be fixed by regulation. ...if you can impose tax in your bill without having any rates at all, then it seems to me that rates are not an essential part of the imposition exercise, so there is a distinction between the imposition and the other things that surround the tax.[366]

9.3.7 This conclusion has troubled some because the ordinary 'common sense' meaning of an Act seems to allow a different interpretation.[367] The 'common sense' view has also been put in relation to bills dealing with the tax base. Assessment Acts often deal with, for example, the removal of a tax exemption. The effect of such a removal would seem to 'impose' a tax on people who did not previously pay it. The High Court has expressly rejected this approach. Even though the imposition of the tax in the Tax Act can have no operation by itself, the provisions which give it operational detail do not of themselves amount to an imposition of taxation.[368] The High Court does not ask people to suspend common sense, but the approach to constitutional interpretation cannot be confined to general language usage. Some words and phrases have a legal meaning and 'imposing taxation' is one such phrase.

9.4 Later cases on imposing taxation for the purposes of section 55

9.4.1 Later cases have endorsed the view in *Re Dymond* that only the Taxing Acts impose tax and Assessment Acts and other incidental tax Acts do not. The *Second Fringe Benefits Tax Case*[369] reviewed the history of the Court's dealings with imposing taxation and noted that a contrary view expressed in *Munro's case*[370] and *Moore*[371] had been laid to rest by *Re Dymond*. The latter case supported Isaac J's view in *Munro's case* which is quoted in 9.3.2. above. The majority judgment in the *Second Fringe Benefits Tax case*[372] cited with approval an earlier case which clearly expressed the narrow range of 'imposing taxation':

> It has been held on several occasions that various Assessment Acts do not impose taxation, and it has been so held though such Acts contain

366 Mr I. Turnbull, *Transcript,* p. 73.

367 See for example, Mr H. Evans, *Seminar Transcript,* p. 38 and *Transcript,* p. 17.

368 See for example *Osborne v the Commonwealth,* (1911) 12 CLR 321 at pp. 355—6.

369 (1987) 163 CLR 329, at p. 341.

370 (1926) 38 CLR 153.

371 (1951) 82 CLR at p. 564.

372 Mason CJ. and Wilson, Dawson, Toohey and Gaudron JJ.

> provisions that a person should be liable to pay tax or be chargeable with tax.[373]

9.4.2 The Court recognised the continuing legitimacy of the division of legislation so that only the Taxing Act imposed taxation for the purposes of section 55:

> In the light of ss. 53 and 55 the Parliament has adopted the practice of enacting both a Tax Act and an Assessment Act, the former containing the grant of money and imposing taxation, the latter dealing with the means of assessing and collecting the tax, including the imposition of a duty to lodge returns.[374]

9.4.3 The High Court further considered the application of 'imposing taxation' in *Mutual Pools & Staff v Commissioner of Taxation*. Deane J adopted the usage 'Taxing Act' and 'Assessment Act' and noted that the substantial operation of the former was to impose duties of excise while the Assessment Act was not a law 'imposing duties of excise (or other taxation) for the purposes of s 55 of the Constitution'.[375] Dawson, Toohey and Gaudron JJ also adopted the traditional view that only the Taxing Act imposes taxation: 'The law imposing taxation in this case is the *Sales Tax Act (No. 1)* ... The *Sales Tax Assessment Act (No 1)* does not impose tax'.[376]

9.4.4 The traditional way of considering 'imposing taxation' is to view it as the creation of the legal liability to pay a tax. A recent case, *Australian Tape Manufacturers Association Ltd v The Commonwealth,* which dealt more with the nature of a tax than the nature of imposing, nevertheless suggests an alternative way of considering 'imposing', by considering its effects. The judgment of Dawson and Toohey JJ notes

> ... it remains true to say that the effect of the imposition of a tax is to create a debt which is met by the payment of money.[377]

9.5 Summary of 'imposing taxation' for the purposes of section 55

9.5.1 The Committee is satisfied that for the purposes of section 55 'imposing taxation' means the creation of a liability to pay a tax and the liability is expressed in

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373 *Second Fringe Benefits Tax Case*, (1987) 163 CLR at p. 341, citing Latham CJ. in *Cadbury-Fry-Pascall* (1944) 70 CLR 362 at p. 373.

374 *Second Fringe Benefits Case,* (1987) 163 CLR at p. 341.

375 (1992) 66 ALR 223 at pp. 226 and 231.

376 ibid., at p. 231.

377 (1993) 176 CLR 480 at p. 527.

the Taxing Act. The details of who should pay the tax (or who should be exempt) and other matters to be found in the Assessment Act or other tax related Acts, do not impose taxation. This remains true when (following a common legislative practice) the Assessment Act is incorporated with and read as one with the Taxing Act. The effect of incorporating an Assessment Act in a Taxing Act merely adds detail to and defines the ambit and operation of the tax. It does not impose it.[378]

9.5.2 Having explored the High Court's view that tax base matters are not part of the imposition of the tax, it is necessary to consider whether the same holds true for matters relating to the tax rate.

9.6 Possible distinctions between tax rates and the tax base

9.6.1 The Committee has considered the arguments of the former Chief General Counsel and others that matters affecting tax rates are similar to matters affecting the tax base (or incidence of taxation).[379] The position of bills dealing with tax rates is not so clear cut as those dealing with the tax base because the case law on section 55 does not expressly deal with rates.

9.6.2 The Committee notes the argument, that because *Re Dymond* and other cases use the expression 'imposing taxation **and** fixing the rates' there is an implication that the two are separate. The use of language such as 'imposing taxation including the fixing of rates' could have settled the point, but the Court has not, in fact, taken this step. An additional argument for separating rates from the imposition of the tax is that some legislation puts the rates in a separate Act or even in regulations. It has never been suggested that a tax was not validly imposed because the rates were separate. (see 9.3.5 and 9.3.6 above).

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378 It has been suggested (for example during the Senate inquiry into the Taxation (Deficit Reduction) Bill 1993) that in the *Mutual Pools* case (1992) 173 CLR 450, the incorporation of the Assessment Act into the Taxing Act may have had the effect of giving an 'imposing' character to the Assessment Act itself. This is an incorrect deduction. If the incorporation had been successful, the incorporation of the amended Assessment Act in the Tax Act would have resulted only in the **latter** Act 'imposing' both the swimming pool tax and the excise duties. It would have contravened the last part of section 55 because, by 'imposing' the swimming pool tax as well as the excise duties, it would have 'deal[t] with' a matter other than excise duties.

379 Mr P. Lahy and Mr D. Rose, *Submissions*, pp. S 237 and p. S242. The arguments referred to in the submission are put in greater detail in evidence to the Senate Legal and Constitutional Affairs Committee inquiry into two Taxation (Deficit Reduction) Bills in 1993, *Transcript*, p. 154 and elsewhere.

9.6.3 The main argument for regarding tax rates as similar (in regard to imposing taxation for the purposes of section 55) to the tax base, is a philosophical one. 'Imposing taxation' is the legal creation of a liability which can be separated from the details necessary to collect the tax — that is the tax base. If one can separate the tax base from imposing taxation, one should also be able to separate the tax rate, which is similar in effect to the tax base. They both define the tax to be paid, either by identifying where the tax falls, or the amount of tax which falls.

9.6.4 On a 'common sense' view[380], it would seem more difficult to conceive of the tax base as separate from the imposition of the tax, than it would to separate the tax rate from the imposition. It would seem reasonable, for example, to consider that a tax was imposed by the removal of an exemption in an amendment to an Assessment Act. In that case, people who did not pay a tax would become liable. This might well seem to them, on the common view of the word 'impose' that they had had a tax imposed on them. Nevertheless it is generally accepted that such is **not** the case (on the expressed view of the High Court). Increasing the rate of a tax already paid by a group of people, is, on the 'common sense' view, less a case of 'imposing taxation' than expanding the tax base.

9.6.5 Despite the above arguments the Committee notes that the proponents of the view that increasing tax rates does **not** impose taxation are not absolutely firm on the matter. Mr Rose, who was Chief General Counsel at the time, told the Senate inquiry on section 55 matters:

> [The High Court] simply would not go back on *Re Dymond*. We think the only area of possible real debate — and even there we are confident that there is no constitutional problem — is the area of provisions increasing rates.[381]

9.6.6 In his submission to the exposure draft Mr Rose again referred to a possible interpretation of section 53 in which it could be argued that rate increases could be regarded as an imposition of taxation[382]. Mr Rose mentions this as a possible interpretation but he remains firmly of the view that the fixing of rates is **not** essential to the act of imposing taxation.

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380 See 9.3.7 above.

381 Senate Standing Committee on Legal and Constitutional Affairs, inquiry into Taxation (Deficit Reduction) Bills Nos. 1 and 2 1993, *Transcript*, p. 154.

382 *Submissions to the exposure draft*, pp. S71 and S77.

9.6.7 The Office of Parliamentary Counsel is also sensitive to the fact that tax rate matters are not as stable as tax base matters, in relation to imposing taxation and section 55. Drafting Direction No. 9 of 1994 notes that

> The legal position [on tax rates imposing taxation] is thus still unresolved, although the Chief General Counsel's views (which are adopted by this Office) remain firm.

9.6.8 The OPC, offers its drafters guidance which would minimise possible problems relating to section 55. Bills expanding the tax base are to be treated as not imposing taxation. However, bills containing provisions increasing formal rates of tax should be structured as if they were laws imposing taxation for the purposes of section 55. The directions note that this applies whether the rates are set out in the imposition Act or in another Act.

9.7 Conclusion on the tax rate — tax base distinction

9.7.1 Despite the fact that the High Court has not had occasion to pronounce on whether bills dealing with the tax rate bear a similar relation to imposing taxation as bills dealing with the tax base, the Committee is persuaded by arguments that the two should be regarded as similar for the purposes of section 55. Whereas the latter class of bills does not impose taxation, it is most likely that the former would be in the same position.

9.7.2 While this section focuses on the meaning of imposing taxation for the purposes of section 55, a comment should be made in relation to section 53 and tax rates. In the case of new taxes, whether the rates are part of the imposing of the tax, will not be an issue. Where a new tax is to be imposed, the rates will continue to be included in the Taxing Act.[383] This would mean that the rates (because they are in a proposed law imposing taxation) could not be originated in the Senate or amended by the Senate under the first two paragraphs of section 53. In this case there would be no need to apply the third paragraph of section 53. The issue of the application of the third paragraph only arises where the tax is expressed to be imposed in another Act.

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383 O.P.C. Drafting Direction No. 9, 1994, section 20: '...schemes involving the imposition of a new tax should generally ensure that the rates of tax are set out in the imposition Act or, if appropriate, in a separate rates Act rather than in the assessment or collection Act.'

9.8 The connection between sections 53 and 55

9.8.1 A characteristic of section 55 is that it protects the Senate from possible adverse effects of the restrictions imposed on it in section 53. Whereas section 53 restricts the powers of the Senate in relation to origination and amendment, section 55 ensures that the House of Representatives does not use the restrictions to further (and unreasonably) erode the ability of the Senate to play its proper legislative role. It is because the sections are part of a unified scheme that the terms used in one should be applied consistently in the other.

9.8.2 In its exposure draft, the Committee declined to pronounce on whether the High Court's view of 'imposing taxation' in the section 55 cases should be applied absolutely to section 53. The Committee did not consider that a decision on the point was central to the terms of reference. The evidence revealed a diversity of opinion on the matter and the Committee considered the point could be avoided if bills dealing with the tax rate or the tax base (those which are unlikely to be 'imposing taxation' in the High Court's view) were not originated in the Senate. Recommendation 3 of the exposure draft proposed that a bill which increases the rate or incidence of taxation should not be originated in the Senate.[384] It was considered that this would satisfy those who considered such bills did in fact impose taxation, by not breaching the first paragraph of section 53. The bills then could either not be amended at all (second paragraph) or not be amended to increase a charge or burden on the people (third paragraph of section 53).

9.8.3 The Committee has reviewed this section of the exposure draft and is now inclined to take a firmer view of the connection between sections 53 and 55. The Committee's reluctance to make a pronouncement on the meaning of 'imposing taxation' in section 53 did not contribute to a greater understanding of the issues or to an acceptable compromise. It left unresolved the meaning of 'imposing taxation' in section 53. Further, Mr Evans was quite correct in implying that the Committee's ambivalence resulted in a double jeopardy situation for the Senate. The Senate would be unable to amend tax-related bills, because if they were treated as though they imposed tax the second paragraph would apply. But because the bills were not actually imposing tax in the High Court's view (relating to section 55) the Senate would not get the anti-tacking protection of that section.[385]

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384 *Exposure draft*, p. 85.

385 *Submissions on the exposure draft*, pp. S6-7.

9.8.4 A further complication of acting as though tax-related bills were necessarily imposing taxation, was that the Government would lose some flexibility regarding where it originated bills even though there was no expressed constitutional reason to impose the restriction.

9.8.5 The Government and Opposition were invited to inform the Committee of their views on restricting the origination of tax bills dealing with rates and the tax base, to the House of Representatives. A response was received from the Hon Kim Beazley MP and Senator the Hon John Faulkner, who are responsible for government business in the House and Senate. The joint submission noted that there were a number of possible interpretations of terms such as 'a bill which increases the rate or incidence of taxation'. It also considered that opening a new area of disputed interpretation should be avoided. The effect on the Government's flexibility was also noted:

> In terms of the effect of the proposed prohibition on the Government's legislative program, the impact numerically would not be great, but would remove some flexibility in the distribution of legislation between the two Houses.[386]

9.8.6 Nor did the Committee's reluctance to pronounce on the exact status of bills dealing with tax rates or the tax base have any effect on those who had already determined that such bills impose taxation. Mr Evans argued that the High Court's views of imposing taxation need not be adhered to in relation to section 53.[387]

9.9 Relevance of the High Court's views

9.9.1 The Committee has taken note of the High Court's own views of the relation between sections 53 to 55, even though it recognises that these views are probably not binding on the Houses. Ms Penfold suggested that there would need to be a reason to justify departing from the proposition that the phrase 'imposing taxation' in

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386 Hon. K. Beazley and Senator J. Faulkner, *Submissions on the exposure draft,* p. S79.

387 Mr H. Evans, *Submissions on the exposure draft,* pp. S6—7: 'My recommendation that such bills [those increasing the rate or incidence of taxation] be introduced in the House of Representatives was based on the view that they are indeed bills imposing taxation **even if the High Court should hold otherwise for the purpose of determining validity under section 55.**' [bold added]. In an earlier submission Mr Evans designated the distinction between bills imposing taxation and bills otherwise dealing with taxation as 'a new and highly artificial classification of tax bills', *Submissions,* p. S60.

section 53 has the same meaning as it does in section 55.[388] The Committee agrees. The High Court should be respected in matters of constitutional interpretation. The Committee also agrees with the logic that lies behind the Court's view.

9.9.2 The view can be found in dicta in *Air Caledonie International v The Commonwealth*[389]:

> Sections 53, 54 and 55 of the Constitution must be read together. When the sections are so read, it is apparent that references in sections 53 and 55 to a law or laws 'imposing taxation' must be given a constant meaning.[390]

9.9.3 This observation was also expressed by the majority in the *Second Fringe Benefits Tax case*:

> The first paragraph [of section 55] is related to s. 53 of the Constitution which provides that a proposed law imposing taxation shall not originate in the Senate or be amended by the Senate. Without some such provisions as contained in that paragraph the practice of tacking would have led to further inroads on the Senate's power of amendment of Bills.[391]

9.9.4 In the *Blank Tapes case* Dawson and Toohey JJ used section 53 to throw light on the meaning of section 55:

> Under s. 55 of the Constitution it is provided that '[l]aws imposing taxation shall deal only with the imposition of taxation ... Section 53 also refers to proposed laws imposing taxation ... Clearly, the phrase 'laws imposing taxation' must mean the same thing in s. 53 and s. 55 ... and for that reason, if for no other, a law requiring the payment of a royalty properly so-called is not a law imposing taxation.[392]

9.9.5 The Committee notes the fact that sections 53 to 55 of the Constitution are integral parts of a unified scheme and depend on each other for meaning. It concludes therefore that it is necessary to apply the High Court's interpretation of 'imposing taxation' for the purpose of section 55 to section 53. (The interpretation is the subject of 9.6 above).

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388 Ms H. Penfold and others, *Seminar Transcript,* pp. 24—27.

389 (1988) 165 CLR 462.

390 (1988) 165 CLR 462 at p. 468.

391 (1987) 163 CLR 329 at p. 341.

392 *Australian Tape Manufacturers Association Ltd. v. The Commonwealth,* (1993) 176 CLR 480 at p. 520.

9.10 Should non-imposing tax bills be originated only in the House of Representatives?

9.10.1 A consequence of applying the High Court's interpretation of 'imposing taxation' for section 55, to section 53, is that tax-related bills which do not themselves impose taxation (i.e. the tax is imposed in another Act) are **not** caught by the first two paragraphs of section 53. However, they are subject to the third paragraph of section 53 insofar as Senate amendments would increase a proposed charge or burden on the people. This is a relatively straightforward matter so long as tax-related bills are originated in the House of Representatives.

9.10.2 In the Committee's view all bills which deal with tax rates or the tax base ought to originate in the House of Representatives. The primary reason is that even though (on the prevailing interpretation of 'imposing taxation') there is no express constitutional prohibition on non-imposing tax bills being originated in the Senate, there is clearly an unexpressed assumption that this would not happen.[393] The policy underlying section 53 as a whole, is that the House of Representatives bears the responsibility for framing financial legislation. A secondary (and complementary) reason for originating non-imposing tax bills in the House of Representatives is that potential anomalies could arise if these bills originate in the Senate.

9.10.3 The consequences of originating these bills in the Senate are considerable because of the perceived connection between amendment and origination. The application of the fourth paragraph of section 53 (returning a bill which the Senate may not amend, to the House of Representatives with a request) is also a complication where the bill in question originated in the Senate. This matter is considered below.

9.10.4 Because of the complications which arise if non-imposing tax bills are originated in the Senate, and, above all, because of the principle of the financial initiative of the House of Representatives, the Committee considers that such bills should be originated in the House of Representatives.

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393 It is relevant in this context to note the distinction drawn in the *Australian Capital Television case* between an implication (a concept which inheres in and operates as part of the instrument) and an assumption (which stands outside the instrument and may or may not have effect). (1992) 108 ALR 577 at p. 591.

9.11 The flexibility argument

While the Committee advocates a practice whereby all tax-related bills are originated in the House of Representatives, it notes that governments of all persuasions are likely to suit their own convenience. The present government appears unwilling to be bound by a principle that is not an absolute obligation expressed by the Constitution. It is unlikely that any other government would take a different position on this matter. While the Government recognises that it is desirable to originate non-imposing tax bills in the House of Representatives, the managers of government business are (perhaps understandably) unwilling to forego the flexibility permitted by the Constitution.[394] They suggest a non-binding practice as an alternative to prohibition:

> ... [I]t would seem possible as an alternative to the prohibition recommended, that a non-binding practice, supported by advice from the Office of Parliamentary Counsel, could be adopted which might reduce the number of cases in which disputes between the Houses were likely to arise ...[395]

9.11.1 The Committee notes that parliamentary drafters also value the flexibility that is, at least, not expressly forbidden by the Constitution:

> ... [I]t could be convenient for the Government, and even for the Senate, to be able to introduce such Bills in the Senate. I can vouch from hard experience in struggling to meet Parliamentary deadlines that any flexibility can be immensely valuable.[396]

9.11.2 While it is not surprising that those responsible for managing legislative programs value flexibility, the Committee prefers a view more in keeping with the underlying principle of the financial initiative of the House of Representatives and its recommendation arises from this policy position. The Parliament should put the financial initiative of the House of Representatives ahead of merely practical matters.

Recommendation 7

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

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394 Hon. K. Beazley and Senator Faulkner, *Submissions on the exposure draft*, p. S79. The submission is at Appendix G of this report.

395 ibid.

396 Mr I. Turnbull, *Submissions*, p. S261.

9.12 Should the third paragraph of section 53 apply to bills that have originated in the Senate?

9.12.1 As outlined above, non-tax-imposing but nevertheless tax-related bills are not subject to the first paragraph of section 53. Therefore there is no constitutional imperative for originating them in the House of Representatives. While the Committee recommends otherwise, it recognises that there may be times when the legislative timetable is such that the Government takes the step of originating such bills in the Senate. In addition there may be other bills which can be originated in the Senate, to which a Senate amendment of the type prohibited by the third paragraph might be proposed. The possible consequences for the application of the third paragraph of section 53 in such cases are complex.

9.12.2 The exposure draft recommended that the third paragraph not be applied to bills which originated in the Senate. But this recommendation was framed in the expectation that bills dealing with tax rates and the tax base (as well as those dealing with expenditure under standing appropriations) would not be originated in the Senate. Under such a scenario it would be difficult to envisage many bills which would contain a proposed charge or burden on the people, but which could also be originated in the Senate. As it is now recognised that non-imposing tax bills may occasionally be originated in the Senate (though against this Committee's advice), the consequences, and possibly the Committee's conclusions, demand reconsideration.

9.13 Arguments for confining the application of the third paragraph of section 53 to bills which originate in the House of Representatives

9.13.1 The apparent implication of the fourth paragraph of section 53 is not the only argument raised for confining the application of the third paragraph to bills which originate in the House of Representatives. In his 1950 opinion, Sir Robert Garran invoked the argument that in the case of a difference between the Houses, the House of Representatives shall be responsible for the form of the bill, but the Senate will have a voice as to whether the bill shall become law.[397]

9.13.2 It has also been pointed out that if a bill was originated in the Senate, but the application of the third paragraph would prevent the Senate from amending the bill, the Senate could reject or withdraw that bill and simply originate another bill

397 *Opinion* 1950, p. 4 (see Appendix D)

which could include the desired amendment/s.[398] That is, the Senate could achieve by another means, that which it could not achieve by way of amendment.

9.13.3 It appears that most commentators, including Mr Morris, Sir Robert Garran (cited above), Ms Penfold[399] and Mr Evans, support the view that the third paragraph should not apply to bills which originate in the Senate. As previously noted, Mr Evans submitted that the third paragraph applies only to bills which the Senate may not initiate but may amend (that is, bills appropriating money other than for the ordinary annual services). He argues that it would be a nonsense if the third paragraph was interpreted as preventing the Senate from amending a bill which it may initiate.[400]

9.13.4 Mr Barlin was more cautious about the proposal (that the third paragraph did not apply to bills which originated in the Senate) but he did not oppose it;

> The third paragraph itself literally does not exclude its application to bills originated in the Senate. However, when read in conjunction with the fourth paragraph which refers to the Senate returning a bill to the House of Representatives, the Committee's recommendation is a reasonable interpretation of the third paragraph and House officers have no difficulty in supporting it.[401]

9.14 Exposure draft conclusion on the application of the third paragraph to bills which originated in the Senate

9.14.1 In the exposure draft the Committee was inclined to accept that the third paragraph did not apply to bills which originated in the Senate and made a recommendation to this effect.[402] The recommendation was tied to recommendation 3 (in the exposure draft) which, if accepted, would have prevented absolutely bills increasing the rate or incidence of taxation from being originated in the Senate.

9.14.2 While the Committee believes that such bills ought not, as a matter of upholding the financial initiative of the House of Representatives, be originated in the

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398 See Mr A. Morris, *Submissions*, p. S91 and Mr D. Rose, *Submissions*, p. S277 and *Seminar Transcript*, p. 57.

399 *Submissions*, pp. S352-353.

400 Mr H. Evans, *Submissions*, pp. S50-51. See also Mr Evan's comments on this topic in *Submissions on the exposure draft*, p. S13.

401 Mr L. Barlin, *Submissions on the exposure draft*, pp. S21-2.

402 *Exposure draft*, recommendation 12, p. 137.

Senate, it has accepted that its advice will not always be taken.[403] The demand for flexibility to meet exacting timetable requirements, will see some non-imposing tax bills being originated in the Senate.

9.14.3 In the light of this possibility the Committee has reconsidered the application of the third paragraph of section 53 to bills which originate in the Senate. The reconsideration has also encompassed the use of the word 'return' in the fourth paragraph of section 53.

9.15 Reconsideration of the application of the third paragraph of section 53 to bills originating in the Senate

9.15.1 Because of the application of the High Court's interpretation of 'imposing taxation' to section 53 (resulting in the acceptance that there is no explicit constitutional bar to originating non-imposing tax bills in the Senate), combined with the timetabling/flexibility issue, the Committee has had to consider the consequences if bills dealing with the tax rate or the tax base are originated in the Senate. This consideration does not detract from the fact that the Committee continues to assert that such bills should not be originated in the Senate for policy reasons.

9.15.2 The question of the application of the third paragraph in these cases must be reassessed. In the Committee's view, the argument that it would be illogical for the Senate to be prevented from amending 'its own bill' (meaning a bill which originated in the Senate) does not stand up to close scrutiny. It has been proposed that it would be absurd to prevent the Senate doing by amendment, that which it could accomplish by alternative means (withdrawing the bill and originating a new bill containing the desired amendment).

9.15.3 As a side issue it is worth considering that this line of argument avoids connecting the theory to the most likely practical scenario for the origination of non-imposing tax bills. Most bills dealing with the tax base or the tax rate (where the tax is imposed in another Act) are government bills. Withdrawing one of these bills and originating a different bill in its place in the Senate, is not an easily accomplished alternative means of amending the bill, at least from the viewpoint of judging how effective such a manoeuvre might be.

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403 This is implicit in the submission from Mr Beazley and Senator Faulkner, *Submissions on the exposure draft*, p. S79.

9.15.4 Nevertheless, the Committee accepts that whether a bill is brought forward by a private member or the Government, the option of withdrawal and replacement is available where the bill cannot be amended by the Senate. The issue of whether such an option results in an absurdity is another matter. In the Committee's view it is not nearly so absurd as ignoring the third paragraph of section 53. Mr Turnbull has suggested that there may be no anomaly at all in the fact that the Senate may not amend a House Bill so as to increase tax but it could initiate the same tax bill itself (and in Mr Turnbull's view — could also amend it). He considered it a possibility that this was what the drafters intended.[404]

9.15.5 In the Committee's view, the argument that the Senate could achieve the same result by withdrawal and originating a replacement bill, is not relevant to the application of the third paragraph. The third paragraph is expressed in very broad language. It is activated by an increase to **any proposed charge or burden on the people** in **any proposed law.** If almost all bills which could conceivably contain a charge or burden on the people are originated in the House of Representatives, there would be no need to apply the third paragraph to bills originating in the Senate. As this is unlikely to be the case, the third paragraph must be applied. The following recommendation arises from the Constitution itself.

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.

9.16 Application of the fourth paragraph of section 53 to bills originating in the Senate

9.16.1 While the Committee has rejected the view that the third paragraph of section 53 applies only to bills which originated in the House of Representatives, it is necessary to consider the application of the fourth paragraph of section 53 to bills which originate in the Senate. Paragraph four of section 53 states that the 'Senate

404 Mr I. Turnbull, *Submissions*, p. S261.

may at any stage return to the House of Representatives any proposed law which the Senate may not amend...'

9.16.2 The fourth paragraph applies quite clearly to the bills described in the second paragraph of section 53. These are, undoubtedly, 'proposed law[s] which the Senate may not amend'. The bills described in the second paragraph are also bills which may not be originated in the Senate because of the first paragraph of section 53. The use of the phrase 'return to the House of Representatives' in relation to these second paragraph bills is uncomplicated. The relationship between the fourth and third paragraphs of section 53 is less clear, even leaving aside the application of the word 'return' if the bill originates in the Senate.

9.16.3 Ms Penfold has raised issues relating to the fourth paragraph without attempting to provide solutions:

> The [fourth] paragraph refers to 'any proposed law which the Senate may not amend'. It does not refer to 'any proposed amendment' which the Senate may not make'. Arguably, the fourth paragraph only applies to the laws mentioned in the second paragraph. Perhaps there is no scope at all for the Senate to propose alterations of the kind covered by the third paragraph?
>
> The fourth paragraph provides that the Senate may request 'the omission or amendment of any items or provisions [in the relevant Bill]'. Arguably, a request is not available where it would require the insertion of completely new material, at least where the insertion cannot be structured as a genuine amendment of an existing provision.[405]

9.16.4 As Ms Penfold notes, these matters are arguable. However, the Committee is inclined to the view that the fourth paragraph does apply to amendments prohibited by the third paragraph, or at least it is open to the Houses to interpret the fourth paragraph in this way. Parliamentary precedent supports this interpretation. It is also relevant that the fourth paragraph follows the third. If the drafters had intended it to relate only to the second paragraph, it would surely have followed that paragraph immediately. In addition, it is unlikely that the drafters would have intended a more restrictive regime for the bills which the Senate is absolutely forbidden to amend, than for those which attract a prohibition only for certain amendments. Mr Rose submitted that the reference to the return of proposed laws the Senate may not amend, includes a bill that the Senate cannot amend in a particular way.[406]

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405 Ms H. Penfold, *Submissions*, p. S355.

406 Mr D. Rose, *Submissions*, p. S277.

9.16.5 A slightly different emphasis on the fourth paragraph of section 53 yields the same result in relation to the application of the third paragraph to bills which originated in the House of Representatives. Professor Carney points out:

> The [fourth] paragraph of s.53 might be used to confine the interpretation of the scope of the third paragraph to bills which have originated in the House of Representatives...
>
> If the third paragraph were interpreted consistently with this assumption, it might only prevent the Senate from *increasing* appropriation bills other than those for the ordinary annual services of the Government.
>
> It is submitted, however, that the [fourth] paragraph should not be used to confine the interpretation of the third paragraph. It is merely *enabling* the Senate in relation to bills which originated in the House of Representatives to return those bills which it cannot amend with a request for their amendment.[407]

9.16.6 If it is accepted then that the fourth paragraph provides an alternative to amendment in the case of bills which were originated in the House of Representatives, what is the situation in relation to bills which were originated in the Senate and which have never been in the House of Representatives? Clearly they cannot be 'returned' to the House with a request or anything else. The language of the fourth paragraph is not the only reason why requests (in the terms of the fourth paragraph) are inappropriate for bills which originated in the Senate. There is a more practical consideration. Where a bill has originated in the Senate, it is not possible for the Senate to request the House of Representatives to amend the bill because the request would be in a vacuum. It would not be attached to anything because the bill would not have been before the House.

9.16.7 Where the Senate is prevented from amending a bill which originated in the Senate because of the third paragraph of section 53, and where it cannot request the amendment because there is nothing to attach a request to, what options remain? First, the bill could be rejected altogether (leaving the Government the option of originating another bill in the House of Representatives which had a better chance of being passed by the Senate). Alternatively, if the timetabling imperative continued, the bill could be withdrawn and an alternative bill could be originated in the Senate.

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407 Associate Professor G. Carney, *Submissions*, p. S72.

9.17 Alternative to fourth paragraph 'requests' for bills which originate in the Senate

9.17.1 Where a bill has originated in the Senate, requests cannot be made in place of amendments for the reasons outlined above. That is, the **constitutional provisions** relating to requests as described in the fourth paragraph of section 53 cannot apply. But requests by the Senate to the House to act in a certain way need not be limited to requests arising from the fourth paragraph of section 53. Indeed, that paragraph itself was based on a negotiated practice in the former colonial legislature of South Australia.

9.17.2 The Committee suggests that a similar mechanism to that provided by the fourth paragraph of the Constitution be negotiated between the Houses, for use when the fourth paragraph is not available because the bill originated in the Senate. The mechanism would allow the Senate to request amendments that are prohibited by the third paragraph of section 53, when the bill originated in the Senate. A mechanism is recommended whereby a message from the Senate requesting an amendment could lie dormant until the bill to which it relates is introduced into the House of Representatives. The request could then be considered with the bill. The practice could be the subject of a compact between the Houses and/or it could be inserted into the Standing Orders of both Houses.

9.17.3 A compact providing for 'extra-constitutional' requests modelled on the constitutional requests described in the fourth paragraph of section 53, is a practical way of resolving difficulties which would arise when the third paragraph is applied to amendments to bills originating in the Senate. It allows the third paragraph of section 53 to be applied (without detriment to either House) to bills which originate in the Senate. Again, it is emphasised that the Committee considers that bills containing charges or burdens on the people (particularly non-imposing tax bills) should be originated in the House of Representatives. The issue of the application of the third paragraph to non-imposing tax bills is quite straightforward so long as the bills in question are originated in the House of Representatives.

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.

Chapter 10 Proposed charge or burden

The meaning of a 'proposed' charge or burden is considered in this chapter. On a literal interpretation, there could be a 'proposed' charge or burden, not only where a bill increases an existing charge or burden, but also where a bill decreases an existing charge or burden (that is, the charge or burden is greater than that proposed by the bill, but less than that under the existing law).

The chapter also examines whether the second occurrence of the word 'proposed' in the third paragraph should be ignored in certain circumstances. Where a bill does not propose a charge or burden, consideration is given to whether the third paragraph should preclude the Senate from increasing an existing charge or burden.

10.1 Introduction

10.1.1 This chapter examines what is meant by a 'proposed' charge or burden. It proceeds on the assumption that the third paragraph applies to both appropriation and taxation matters. For a detailed discussion of these issues, see chapters 6 and 8.

10.1.2 In particular, it examines whether a 'proposed' charge or burden should be interpreted literally. On a literal interpretation, there could be a 'proposed' charge or burden, not only where a bill increases an existing charge or burden but also where a bill decreases an existing charge or burden (that is, the charge or burden is greater than that proposed by the bill, but less than that under existing law). Consideration is also given to whether a literal interpretation is consistent with the underlying policy of section 53, namely, to preserve the financial initiative of the House of Representatives but otherwise give both Houses equal powers.

10.1.3 As part of this examination, the chapter considers whether, in order to determine if there is an increase to a proposed charge or burden, a Senate alteration to a bill should be compared to the existing level of the charge or burden or the level of the charge or burden proposed by the bill. Alternative tests for determining whether there has been an increase in the proposed charge or burden are discussed in chapter 11. The test which is adopted must be applied at one of these levels.

10.1.4 An examination will also be made of whether the word 'proposed' (where it appears a second time) should be ignored in certain circumstances. This issue relates directly to Senate amendments to bills that do not themselves propose a charge or burden (including bills which do not affect an existing charge or burden).

10.2 Should the word 'proposed' in the phrase 'proposed charge or burden' in the third paragraph be given a literal interpretation?

10.2.1 The third paragraph precludes a Senate amendment which would increase a proposed charge or burden. If it is accepted that the third paragraph applies to taxation and expenditure matters (see chapters 8 and 6), then clearly the third paragraph would apply to a House of Representatives bill that increases the existing rate or incidence of taxation or that appropriates money. The Senate would be precluded from amending the bill to further increase the rate or incidence of taxation or the amount of the appropriation proposed by the bill.

10.2.2 Mr Rose suggested that, on a literal interpretation, it would be open to the Houses to accept there is a proposed charge or burden, not only where the bill itself proposes to increase an existing charge or burden, but also where it proposes to decrease an existing charge or burden.[408] He stated:

> In any of these cases, there would literally be a 'proposed' charge or burden: the House of Representatives, in passing the bill, could be said to have 'proposed' a charge or burden at the level specified in the bill, whether or not it was greater than that under the existing law. A Senate amendment to increase the proposed amount would thus literally fall within paragraph 3.[409] ('the Rose argument')

10.2.3 Mr Rose also suggested that the substitution of a provision that simply reproduced the existing charge or burden could be a proposed charge or burden.[410] On the other hand a bill which proposes the total repeal of an existing charge or burden could not be said to propose a charge or burden of nil. Such a bill should be treated as a bill that does not propose a charge or burden.[411]

10.2.4 The Committee notes that if the third paragraph is to be interpreted in a strictly literal fashion, the Rose argument is logical. Indeed it is the only conclusion to be reached if the plain words are applied without consideration being given to other aids to interpretation such as the broad purpose of the section, the logic of the section as a whole and the likely intentions of the drafters. The steps in applying the third paragraph in a strictly literal way would be to identify a proposed charge or burden in a bill and then to prohibit any Senate amendment which would increase

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408 Mr D. Rose, *Submissions*, p. S248.

409 ibid., p. S248.

410 ibid.

411 *Seminar Transcript*, p. 35.

that charge. It would not matter if bill's aim was to decrease an existing charge. The amount in the bill would be a 'proposed charge or burden' in that the charge would be that proposed in the bill. On a literal interpretation the Senate would not be able to increase the amount, even if after the increase was applied the result would still be a decrease on the existing charge.

10.2.5 Mr Turnbull suggested that the Rose argument contradicted paragraph 31 of the Drafting Direction attached to Ms Penfold's submission and the advice from the Attorney-General's Department on which it was based.[412] While OPC practice has been to apply the 'bottom line' approach[413], Ms Penfold was attracted to the Rose argument because it was based on interpreting the third paragraph of section 53 according to its natural meaning.[414]

10.2.6 The following example illustrates the issue. If the existing tax rate in an Act is 20% (and the Act does not itself impose the tax) and a House of Representatives bill proposes to decrease the rate to 10%, can the Senate amend the bill to alter the rate to 15% or must it make a request? The Senate's altered rate of 15% is less than the existing rate of 20% but greater than the rate proposed by the bill. A number of witnesses commented on this example.

10.2.7 According to the Rose argument, there is a proposed burden because the bill is proposing that the tax burden be a rate of 10% The Senate alteration to 15% would be regarded as increasing the proposed burden. The Senate could not make the amendment and would have to proceed by way of request. On this interpretation, it is not relevant that the Senate's altered tax rate of 15% is lower than the existing tax rate of 20%.[415]

10.2.8 Mr Barlin indicated that the House of Representatives took a practical approach, that is, 'to determine what the bottom line would be with any amendment'.[416] In his view, because the existing tax rate would not be exceeded by the Senate alteration, the Senate could make the amendment.[417] Mr Barlin supported an agreement between the Houses, in relation to bills which increase tax rates, that recognised the primacy of the House of Representatives in initiating

412 Mr I. Turnbull, *Submissions*, p. S258.
413 Ms H. Penfold, *Seminar Transcript*, p. 43.
414 ibid., p. 36.
415 ibid., p. 34.
416 Mr Barlin, *Submissions*, p. S314.
417 *Seminar Transcript*, p.37.

financial matters. But he also thought that such an agreement should recognise the right of the Senate to proceed by way of amendment where the Senate alteration to a bill did not exceed the existing tax rate.[418]

10.2.9 In relation to the example, Mr Evans suggested that the Senate alteration to the bill is lowering the existing tax rate and therefore it is not a bill imposing taxation within the meaning of the first paragraph of section 53[419] and the Senate could make the amendment. Mr Evans outlined his approach, namely, to look at the effect of the change on the taxpayer and ask whether the taxpayer will have to pay an increased amount of tax. He indicated that it corresponds with the 'bottom line' approach taken by Mr Barlin.[420] Mr Evans submitted that there were precedents, accepted by the Government, which establish that if a bill reduces an existing tax rate, the Senate can amend the bill to increase the tax rate as proposed to be reduced by the bill, but not so as to exceed the existing tax rate or 'status quo'.[421]

10.2.10 Professor Saunders and Professor Blackshield appear to support the Rose argument. Professor Saunders argued that Mr Barlin's approach seemed to ignore the word 'proposed'. It also seemed to be inconsistent with preserving the financial initiative of the House of Representatives, that is, the House of Representatives is 'putting' a bill up to the Senate at a particular level of tax and the Senate is increasing it.[422] Professor Blackshield agreed with that view.[423]

10.2.11 In relation to the example, Dr Thomson suggested that the practical effect of the bill is to reduce a burden on the people and the Senate would be able to make the amendment. He acknowledged that under a literal interpretation the Senate would have to make the alteration by way of request.[424]

10.2.12 Similar issues arise in relation to a bill that decreases expenditure under a standing open-ended appropriation. Mr Rose submitted that, if there was an existing standing open-ended appropriation to meet pension entitlements and a government bill proposed a reduction in the existing pension rates, it could be said that the Government was proposing a charge or burden to the extent of the *'proposed*

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418 Mr Barlin, *Submissions*, p. S315.
419 Mr Evans, *Transcript*, p. 12.
420 *Seminar Transcript*, p.38.
421 *Seminar Transcript*, pp. 38-39.
422 *Seminar Transcript*, p. 38.
423 ibid.
424 Dr J. Thomson, *Transcript*, pp.108-109.

reduced' expenditure. This would be a proposed charge or burden within the meaning of the third paragraph. The Senate would be precluded from amending the bill so as to increase pension rates above the levels proposed in the bill.[425] For example, if the existing pension entitlement was $200 per week and a bill reduced it to $150, the Senate could not increase it to $175. He submitted that this seems to have been the approach taken by the House of Representatives to the Financial Emergency Bill in 1932.[426]

10.2.13 Mr Evans submitted it was an established and accepted interpretation that the Senate can make an amendment which provides for higher expenditure than that proposed by the House of Representatives bill, but which has the net effect of lowering the expenditure under an existing standing open-ended appropriation. He stated that:

> The basis of this interpretation is that the Senate amendment would not increase the actual expenditure out of the appropriation, in other words, it would not increase any proposed charge or burden contained in the bill.[427]

10.2.14 Mr Evans asserted that the Government amendments made in the Senate to *the Social Security Legislation Amendment Bill 1990 are evidence that this* interpretation is generally accepted. Mr Evans submitted that:

> Mr Rose's interpretation is based on a proposition that 'If it reduces we say there is a proposed charge or burden to the extent of the proposed reduced expenditure', a proposition that appears illogical on its face.[428]

10.2.15 In his submission on the exposure draft Mr Evans said that the view, where a bill which decreases a charge or burden may be regarded as proposing a charge or burden, overlooks the fact that the third paragraph refers to a proposed charge or burden *on the people*, not a charge or burden which is only a charge or burden in some procedural or abstract sense.[429] He suggested that there was

> no reason to introduce this truly Alice-in-Wonderland concept into the interpretation of the constitutional provisions, particularly as it is contrary

425 Mr D. Rose, *Submissions*, p. S278.
426 ibid.
427 Mr Evans, *Submissions*, pp. S299-300.
428 ibid.
429 *Submissions on the exposure draft*, p. S8.

> to the existing practice of the Houses as reflected in government amendments moved in the Senate in the past.[430]

10.2.16 In response Mr Rose described Mr Evans' stance as curious. He suggested that on the one hand, Mr Evans insists on section 53 being construed in a literal manner and confined to amendments to a '**proposed** charge or burden' (ie proposed in the bill that is being amended). However, on the other hand, he argues that extra words should be read into section 53, that is, it should be read as if it only prevents a Senate alteration 'to increase [a] proposed charge or burden on the people *to a level higher than in the existing legislation*'.[431]

10.2.17 Mr Rose also noted that Mr Evans' view based on his view on 'real' people. Mr Rose commented that:

> In so far as the interests of 'real' people are concerned, there would be a bill proposing that 'real' people be subjected to a burden less than that under the existing law. The Senate amendment would subject 'real' people to a greater burden than that proposed - hence the argument that it comes within the third paragraph.[432]

10.2.18 Mr Rose also noted that there is a more fundamental objection to the argument that the appropriate level for comparison is the existing law. The purpose of section 53 is to maintain House of Representatives/Crown control of expenditure and appropriation measures and the target of the third paragraph is any Senate amendment that seeks to frustrate the financial proposals from the House of Representatives/Crown.[433]

10.2.19 However, Mr Rose then went on to say that, the view whereby the alteration is compared to the **existing** law for the purposes of the third paragraph, can be supported by an argument of some merit (though he does not prefer it to the contrary one). The argument is that a bill proposing a reduction in an existing charge or burden is not aptly described as proposing a charge or burden and a 'proposed burden' means a wholly new burden or an altered burden greater than that under the existing law. The problem with this argument is that the third paragraph would not

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430 ibid., p. S8.

431 *Submissions on the exposure draft*, p. S70.

432 *Submissions on the exposure draft*, p. S70.

433 ibid., p. S71.

preclude the Senate from amending such a bill by increasing the burden above the existing level.[434]

10.3 Comments

10.3.1 Both Mr Evans and Mr Barlin, appear to adopt a similar approach on this issue, *focusing on the 'status quo' or the 'bottom line'. The approaches are consistent* with parliamentary practice. Under these approaches, where a bill decreases an existing charge or burden, the Senate can increase the charge or burden but not above the existing level. This approach prevents the Senate increasing an *existing* or proposed charge or burden on the people. Ms Penfold noted that the circumstances were increasing where it was 'virtually impossible to apply the 'bottom line' approach'.[435]

10.3.2 Mr Rose suggested that the third paragraph of section 53 could apply where the Senate alters a bill to decrease an existing charge or burden (but the charge or burden is greater than that proposed in the bill by the House of Representatives). According to this approach, the Senate could not amend the bill so as to increase the level of the charge or burden above that proposed by the bill. Evidently the Senate *alteration is compared to the level of the charge or burden proposed by the bill and* the existing level of the charge or burden is not relevant. In the informal meeting between the two Committees on 29 June 1995, Mr Rose said that he did not have a strong view on these issues.

10.3.3 In its exposure draft the Committee recommended that the term 'proposed charge or burden' should be interpreted as including not only an increase in an existing charge or burden, but also a decrease in an existing charge or burden. The Committee also recommended that, for the purposes of determining whether a proposed Senate alteration increases a proposed charge or burden, the alteration should be compared to the level of the charge or burden proposed by the bill and not the existing level of the charge or burden. This was contrary to the current practice[436] and attracted some criticism.[437]

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434 ibid.

435 *Seminar Transcript*, p.38.

436 Noted in Mr L. Barlin, *Submissions on the exposure draft*, pp. S19-20 and Mr S. Martin, *Submissions on the exposure draft*, p. S33.

437 Mr H. Evans, *Submissions on the exposure draft*, pp. S7-8.

10.3.4 The Committee recognises that interpreting 'proposed charge or burden' as including a decrease in an existing charge or burden (where the charge or burden is greater than that proposed by the bill but less than the existing law) is consistent with the literal meaning of the third paragraph of section 53. Comparing the proposed alteration with the charge or burden in the bill (as opposed to the existing level of the charge or burden) is consistent with the natural meaning of the third paragraph, as the level in the bill is the charge or burden being proposed.

10.3.5 The 'natural' or 'literal meaning' approach also had support among some commentators and may be seen as being in keeping with the purpose of section 53 (that is, to preserve the financial initiative of the House of Representatives but otherwise give the two Houses equal powers). However, given that the current practice is to compare the proposed Senate alteration with the existing charge or burden, the Committee now considers it unwise to disrupt that practice.

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 level of the charge or burden proposed by the bill.

10.3.6 It follows that if a bill increases an existing charge or burden, and the Senate wishes to decrease the level of the charge or burden proposed by the bill (to a level that is still greater than the existing charge), the Senate is precluded from doing this by the third paragraph of section 53. If the Senate decrease results in a charge that is less than the existing charge or burden, then the third paragraph does not apply. Amendments are compared to the existing level of the charge or burden and not the charge or burden proposed in the bill. An example is outlined below.

10.3.7 If the existing tax rate in an Act is 20% (and the Act does not itself impose the tax) and a House of Representatives bill proposes to increase the rate to 30%, can the Senate amend the bill to change the rate to 25% or should it make a request? The rate proposed by the Senate is greater than the existing rate, but less than the rate proposed by the bill.

10.3.8 Mr Evans' view is that the Senate could not amend the bill to provide for a tax rate that exceeded the existing rate.[438] As has already been stated his approach focuses on the 'status quo' and whether the taxpayer actually has to pay an increased amount of tax.

10.3.9 Mr Barlin gave evidence in relation to a similar example that dealt with expenditure under a standing open-ended appropriation. If pension payments are $100 per week under an Act that contains a standing open-ended appropriation for such payments and a bill proposes to increase them to $150 per week, can the Senate amend the payments to $125 per week?

10.3.10 Mr Barlin indicated that in such a case the Senate alteration would reduce the total of the additional funds that would have been required for the amendment proposed by the bill itself. Consequently, on the 'bottom line' approach the alteration would not increase the charge or burden on the people and the Senate could amend the bill.[439]

10.3.11 Mr Jones, of the Office of Parliamentary Counsel, submitted that the Attorney-General's Department had recently advised the Office that the Senate alteration should be compared with the proposed charge in the bill.[440]

10.4 Should the word 'proposed' (second occurrence) be ignored?

10.4.1 If the second 'proposed' were ignored in the third paragraph, it would prevent the Senate from amending *any* bill so as to increase an existing charge or burden, that is, the bill would not necessarily have to propose a charge or burden for the third paragraph of section 53 to apply.

10.4.2 Mr Turnbull submitted that the second 'proposed' should be ignored. He asserted that there would be a gap in the scheme of the section if the Senate could indirectly increase taxation or appropriations by amending bills from the House of Representatives that did not propose a charge or burden. He argued that ignoring the word 'proposed' would give effect to the intention of the third paragraph and prevent the Senate from amending a bill from the House of Representatives to raise taxation,

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438 Mr Evans, *Transcript*, p.13.

439 *Seminar Transcript*, p. 37.

440 *Submission*, p. S309.

whatever the form of the bill when it is received by the Senate.[441] He pointed out that it was a 'well-established' rule of statutory construction that a word could be disregarded if it is contrary to the intention of the statute.[442] Mr Turnbull indicated that the same effect could be achieved by changing 'proposed charge or burden' in the third paragraph to 'existing or proposed charge or burden'.[443] However, no historical support was given for disregarding the second 'proposed'.[444]

10.4.3 As previously discussed, the Committee does not consider that the word 'proposed' can be ignored in relation to bills that affect existing charges or burdens. If Mr Turnbull's argument were accepted, it would impinge more on taxation matters than appropriation matters.

10.4.4 Appropriation matters are discussed in detail in chapters 6 and 7. It is sufficient for the purposes of this chapter to note that a bill which does not itself contain an appropriation does not contain a proposed charge or burden. The Senate could not amend such a bill to include an appropriation because of the first paragraph of section 53.[445] (The first paragraph would apply on the basis that 'proposed law' includes a provision in a bill as well as the bill itself. Alternatively, it would apply on the basis that, once a provision originating an appropriation is added, the bill becomes a proposed law originating an appropriation).[446]

10.4.5 Furthermore, a parliamentary practice has developed such that the Senate may not amend a bill which does not contain an appropriation if the effect of the amendment would be to increase expenditure under a standing open-ended appropriation. This practice is consistent with ignoring the word 'proposed', and may also be justified on views put forward by Mr Rose. For a detailed discussion of this matter see chapter 7.

10.4.6 So far as taxation matters are concerned, a bill that does not itself affect the existing tax rate nor affect the incidence of taxation is a bill that does not propose a charge or burden. An example of such a bill would be a bill that deals only with taxation administration matters. On a literal interpretation of the third paragraph, there is nothing to prevent the Senate amending a taxation administration bill so as to

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441 Mr I. Turnbull, *Submissions*, p. 258.

442 ibid.

443 *Transcript*, p. 74.

444 ibid.

445 Mr D. Rose, *Seminar Transcript*, p.41 ; Mr H. Evans, *Seminar Transcript*, p. 40.

446 Mr D. Rose, *Submissions*, p. S249; p. S287.

increase the existing rate or incidence of taxation in another Act (if that is regarded as not imposing taxation). It should be noted that chapter 9 discusses in detail whether imposing a tax includes increasing the rate or incidence of taxation.

10.4.7 In relation to the example of a bill which deals with taxation administration, it could be suggested that even though the bill does not propose a charge or burden, it is unlikely that the founding fathers would have thought it appropriate that the Senate could amend such a bill to increase the rate or incidence of taxation.

10.4.8 Mr Rose argued that the power of the Senate to amend a bill that does not propose a charge or burden so as to increase the rate of tax or expand the tax base is no more anomalous than the power of the Senate to originate a bill containing such provisions. He submitted that judges who had enunciated the narrow view of imposing taxation must have foreseen such consequences. His view is that it would be difficult to ignore the word 'proposed'.[447] Ms Penfold agreed with Mr Rose that the third paragraph should be interpreted according to the natural meaning of the language used, regardless of whether this leads to 'anomalies'.[448]

10.4.9 Mr Barlin submitted that based on his 'bottom line approach' the third paragraph could apply to a bill that did not propose a charge or burden. However, he acknowledged the application of the first paragraph to Senate amendments that impose a tax or include an appropriation.[449] Mr Evans' view is that the third paragraph has no application to a bill unless it contains a proposed charge or burden.[450] However, he does appear to agree in substance that the Senate should not amend a bill which does not a contain a proposed charge or burden to increase the rate or incidence of taxation[451] on the grounds that such an amendment would be a proposed law imposing taxation (which the Senate could not amend because of the second paragraph of section 53). In his submission on the exposure draft, Mr Evans noted that his suggestion for agreement that an amendment of this type should be put as a request

> ... was a gesture to a fear that, even after all bills and provisions increasing taxation are treated as bills and provisions imposing taxation,

447 Mr D. Rose, *Seminar Transcript*, p.35.
448 Ms H. Penfold, *Seminar Transcript*, p.37.
449 Mr L Barlin, *Seminar Transcript*, p.37.
450 Mr H. Evans, *Submissions*, p. S58.
451 See Mr H. Evans, *Submissions*, pp. S63-64.

> there may be a gap through which a Senate amendment might have that effect.[452]

10.4.10 Professor Blackshield argued that if the High Court were to interpret the third paragraph it could not ignore the word 'proposed'. However, he suggested that it was open to the Parliament to ignore 'proposed' if it was consistent with its underlying objectives.[453]

10.4.11 It is interesting to note in this context that in *Mabo (No.3)*[454] the High Court, when commenting on the merit of an argument that suggested certain Senate amendments contravened the third paragraph of section 53, the High Court stated:

> None of the Senate amendments appears to increase a 'charge or burden on the people'.[455]

The second 'proposed' was omitted from this statement. The Committee has not drawn any conclusions from that statement.

10.5 Comments

10.5.1 The Committee considers that it is inappropriate for the Senate to alter a bill (that itself does not propose a charge or burden) so as to increase an existing charge or burden by increasing the rate or incidence of taxation. Such an amendment would be inconsistent with the broad policy of section 53, that is, to preserve the financial initiative of the House of Representatives but otherwise to provide that both Houses have equal powers. This Senate alteration would also be incompatible with the purpose of the third paragraph of section 53 (refer to chapter 2) as it would result in the Senate levying increased charges or burdens on the people.

10.5.2 The Committee therefore recommends that the Houses adopt a practice whereby the Senate will not amend a House of Representatives bill, which itself does not propose a charge or burden, so as to increase the rate or incidence of taxation, (even if such an increase is not regarded as imposing taxation). Notwithstanding the absence of a proposed charge or burden, the application of the third paragraph to

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452 *Submissions on the exposure draft*, pp. S8-9.

453 *Seminar Transcript*, p. 35.

454 *The State of Western Australia* v. *Commonwealth of Australia* [*Mabo (No.3)*] 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. See also paras 4.4.16-4.4.24.

455 ibid., p. 92.

such bills is in keeping with the broad policy of section 53. The recommendation sits naturally alongside, and is concomitant with, the Committee's earlier recommendation that bills increasing the rate or incidence of taxation should not originate in the Senate.

10.5.3 This recommendation reflects current parliamentary practice and is supported by officers of the House of Representatives.[456] The Clerk of the Senate is critical of the reasons underlying the recommendation and suggests that it involves ignoring the words of the third paragraph.[457] However, he does appear to agree with the end result of the recommendation.

10.5.4 The recommendation is a reasonable practice which is not precluded by the words of section 53. The Committee believes that it is open to both Houses to adopt the practice recommended by the Committee in relation to bills and amendments, the effect of which would be to increase the rate or incidence of taxation. Such a practice upholds the spirit of this section of the Constitution.

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.

456 Mr L. Barlin, *Submissions on the exposure draft*, p. S20.

457 See Mr H. Evans, *Submissions on the exposure draft*, pp. 8-9.

Chapter 11 Determining whether an amendment will increase the 'proposed charge or burden'

This chapter considers the test that should be applied to determine whether an alteration desired by the Senate increases the proposed charge or burden on the people. The test to be applied in this situation appears to be the most serious area of contention between the Houses. The Clerk of the House of Representatives favours a test whereby the third paragraph of section 53 applies if the 'probable, expected or intended' effect of the amendment will increase expenditure. 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.

An alternative test of 'availability' is also discussed. This test involves considering whether the amendment will increase the amount available for expenditure, regardless of whether any of the extra amount available is likely to be spent. A variant of this test which would apply to appropriations, taxes and other charges has also been advanced. Under this test, a request is required where an alteration makes an increase, in the expenditure available under an appropriation or the total tax or charge payable, legally possible.

11.1 Introduction

11.1.1 In the discussion of expenditure under standing appropriations in chapter 7, it was assumed that an increase in expenditure had occurred. The current chapter considers how to determine whether an alteration will increase expenditure, and more generally, how to determine whether an alteration will increase the proposed charge or burden on the people (including expenditure, tax and other charges).

11.1.2 When discussing the test that should be applied to determine which amendments are prohibited by the third paragraph of section 53, Mr Rose suggested that the matter could be usefully divided into two issues, namely:

(a) is there an actual proposed charge or burden on the people, and

(b) the test for deciding whether the Senate amendment increases the charge or burden.[458]

The Committee has adopted this division in its discussion of whether an increase will amount to a proposed charge or burden.

11.1.3 If there is, in fact, a charge or burden on the people and if a Senate amendment will increase that charge or burden, the third paragraph of section 53 applies and the Senate is precluded from amending the bill to increase that charge or burden.

11.2 Is there a charge or burden?

11.2.1 Mr Rose submitted that it is reasonably arguable that any provision appropriating moneys is a provision imposing a charge or burden on the people, even though no actual expenditure may result. On this view, a charge or burden would include the making of moneys *available* for expenditure, whether or not the money will actually be spent (as it could be spent by the Government).[459] The Committee accepts this proposition.

11.2.2 It should also be noted, in this context, Mr Rose's view that it is open to the Houses to accept that there is a proposed charge or burden even where a bill proposes a decrease in the charge or burden. [see 10.2.2]

11.2.3 Mr Rose suggested that a possible distinction could be drawn between a bill which, say, increases pension rates (and therefore deals with money) and a provision requiring the doing of things other than the payment of money (for example, the construction of a building).[460] If such a view were adopted, it could be argued that a provision requiring or authorising 'the doing of things other than the payment of money' does not impose a charge or burden even if the expenditure for the action is covered by a standing appropriation. On this view, the third paragraph would have no application. Consequently, the third paragraph does not apply to a provision merely by reason that it will or may lead to expenditure.[461] It should be noted that Mr Rose

458 *Submissions*, p. S285.
459 ibid., p. S285.
460 ibid., pp. S285, S343, *Transcript*, p. 35 and *Seminar Transcript*, p. 80.
461 ibid., p. S285.

did not advance this argument as his view, but rather he advanced it as a *possible* argument.

11.2.4 Mr Turnbull did not agree with the argument that a provision authorising action other than the payment of money is not subject to the third paragraph. His view was that any amendment which has the effect of increasing expenditure under a standing appropriation falls within the ambit of the third paragraph.[462] During the seminar, Mr Evans stated that he did not think that the distinction - between a bill which deals with money and a provision requiring the doing of things other than the payment of money - was viable. Mr Rose said that he was strongly inclined to agree with Mr Evans on this issue.[463]

11.3 Test for determining whether the Senate amendment increases the proposed charge or burden

11.3.1 The test to be applied in determining whether the Senate amendment increases the proposed charge or burden appears to be a serious area of contention between the Clerks of each House. The Clerk of the House of Representatives believes that the third paragraph applies where the 'probable, expected or intended effect' of the amendment is to impose a greater financial imposition on the people than would be the case if the amendment were not passed. The view of the Clerk of the Senate is that the third paragraph of section 53 applies where the effect of the amendment 'necessarily, clearly and directly' increases expenditure under a standing appropriation.

11.3.2 The Committee notes that whether the effect of a Senate alteration should be compared to the existing charge or burden, or the charge or burden proposed by the bill, is relevant to the application of a test for determining whether there has been an increase in the proposed charge or burden. The level that the Senate alteration must be measured against is considered in chapter 10 and recommendation 9. The Committee recommends that the alteration be compared to the existing charge or burden and not the charge or burden proposed in the bill.

462 Mr I. Turnbull, *Transcript*, p. 68.

463 *Seminar Transcript*, p. 80.

11.4 The view of the Clerk of the House of Representatives

11.4.1 According to Mr Barlin's view, the limitation imposed by the third paragraph of section 53 applies whether the imposition is either direct or indirect.[464] It suggests that the only satisfactory approach is for each case to be considered on its merits. The view considers that a charge or burden will result, whether it is funded by an appropriation in the bill which is subject to the amendment or by a consequential automatic extension of an appropriation located elsewhere — that is, in another bill or in an existing Act.[465]

11.4.2 It has been submitted that the 'probable, expected or intended effect' test has the advantage of being relatively easy to apply and allows for the application of certain common sense assumptions about human behaviour in general, and the state of Australian society in particular.[466]

11.4.3 In relation to this approach, Mr Rose noted that while it would be workable in many cases, it would create difficulties in others. For example, if an amendment increased an appropriation for drought relief when it was not known whether there would be a drought, increased expenditure is not probable, expected or intended (except contingently). However, a proposed appropriation of $100 million for drought relief would be a 'proposed charge or burden on the people' and a Senate amendment increasing it to $200 million ought to be subject to the third paragraph of section 53.[467]

11.4.4 Mr Evans criticised the approach of the House of Representatives in a 1992 paper. He stated that, adopting the approach of the House of Representatives and deciding each case on its merits, '... is a recipe for ... confusion, inconsistencies and disputes' and '... the lack of any principle to determine difficult cases simply results in ad hoc decisions ...'.[468]

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464 Mr L. Barlin, *Submissions*, p. S196.

465 ibid., p.S197-201.

466 Ms H. Penfold, *Submissions*, p. S119.

467 *Submissions on the exposure draft*, p. S38.

468 'Amendments and Requests', p. 3 in House of Representatives Standing Committee on Legal and Constitutional Affairs, *The third paragraph of section 53: Inquiry Information*, April 1994. Also published in Papers on Parliament No. 19, Papers presented to the Senate and the House of Representatives, *Constitution, Section 53 Financial Legislation and the Houses of the Commonwealth Parliament*, Department of the Senate: Canberra, May 1993.

11.4.5 The approach of the House of Representative has been further criticised as unsatisfactory because it injects uncertainty into the parliamentary process. It has also been suggested that the application of the test will result in disagreement between the Houses[469] and may amount to an unjustified hindrance on the Senate. However, it should be noted in this context that, in Mr Barlin's view, the third paragraph should not be interpreted as preventing the Senate making an amendment which may result indirectly in a relatively minor and possibly incidental increased expenditure in the administration of a program or scheme.[470]

11.5 The view of the Clerk of the Senate

11.5.1 In his paper, Mr Evans set out three general conditions which should be satisfied before the Senate should be required to make a request rather than amend the bill itself. Those conditions are that:

(a) there is an appropriation proposed in relation to the provisions **in the bill** which is the subject of the amendment;

(b) an increase in actual expenditure under an appropriation must be involved, not merely an increase in the amount authorised to be spent without any indication of an increase in expenditure; and

(c) the amendment must have the effect of necessarily, clearly and directly increasing expenditure under the appropriation.[471]

11.5.2 From the evidence, it is clear that Mr Evans still subscribes to the view that a clear and direct impact on expenditure should be the test of whether a request is required.[472] According to Mr Evans, there are a number of factors which may lead to a conclusion that the effect of an amendment on expenditure is not sufficiently direct, clear and necessary to warrant a request. He noted that one of those factors may be the specification of a class of persons which is probably an empty class, but

469 Professor G. Carney, *Submissions*, p. S69.

470 *Submissions*, p. S198.

471 Cited in 'The Legislative process in the Parliament of the Commonwealth: Amendments and Requests', p. 9 in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry Information*, op. cit. Also published in Papers on Parliament No. 19, op. cit.

472 *Submissions*, p. S303.

he does not view ignorance and non-application by beneficiaries as one of those factors.[473]

11.5.3 Support for the view of the Clerk of the Senate can be found in the requirement 'so as to increase'. It has been suggested that the phrase requires a motive and an effect. In order for the Senate to have the requisite motive, the proposed amendment must directly have the effect of increasing the charge or burden on the people.[474] However, a majority of the judges in *Chew* v. *The Queen* suggested that 'so as to' may sometimes signify purpose rather than result.[475] This interpretation would appear to conflict with the 'necessary, clear and direct' test which requires a direct link with the resultant expenditure before the third paragraph of section 53 is invoked.

11.5.4 The 'necessary, clear and direct' approach has been criticised as a very narrow view[476] and as inappropriate where there is a potential increase in appropriation and where the expenditure in question is subject to ministerial or some other element of discretion.[477] It has also been suggested that the narrow test of necessity gives the Senate considerably more scope for amendment. At the time an amendment is being considered, it may not be possible to prove that it will 'necessarily, clearly and directly' increase expenditure, and thereby require a request if the Senate wants to make an alteration. Reasons that may make it impossible to satisfy the test include that intended beneficiaries may be unaware of their eligibility and therefore may not apply for the relevant benefits, or claimants may not satisfy the eligibility requirements for payment of the benefit.[478]

11.5.5 Mr Rose noted some further criticisms of the 'necessary, clear and direct' test. The word 'necessarily' may mean that there must be a categorical duty to expend the increased amount. But such a duty will arise only in specified circumstances (for example, upon fulfilment of eligibility criteria). Regardless of how

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473 *Submissions on the exposure draft*, p. S15.

474 Professor G. Carney, *Submissions*, p. S68.

475 (1991) 173 CLR 626 at 630 per Mason CJ, Brennan, Gaudron and McHugh JJ.

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

477 See Mr L. Barlin, *Submissions*, p. S200.

478 Office of the Clerk of the House of Representatives, 'The legislative process in the Parliament of the Commonwealth: A Background Paper,' p.3 in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry information*, op. cit. See also paragraph 2.14.5 ff of the Committee's Issues Paper. Mr Evans considers that this comment is a distortion of the argument - see *Submissions on the exposure draft*, pp. S14-15.

expected these circumstances may be, they may never occur necessarily. Mr Rose submitted that there seems to be no reason why section 53 should not apply to a Senate amendment that increases to a specified maximum a monetary amount available to the Government under a standing appropriation.[479]

11.5.6 Mr Rose suggested that the word 'directly' is notorious for its legal difficulties and that the word 'clearly' does not seem to be an independent factor but merely to require that an amendment is only subject to the third paragraph if an increase in expenditure under the appropriation is clearly a necessary and direct effect of the amendment.[480] Mr Rose also noted that even if Mr Evans' criteria were accepted, there would be a need to exclude minor increases.[481]

11.5.7 Mr Rose suggested that the approaches of both Clerks involve speculation as to the likelihood that expenditure will occur and the exercise of administrative discretions.[482] Mr Rose suggested that rules could not be drafted which can determine whether an expenditure increase amounts to a charge or burden in every conceivable situation, but he suggested that this does not mean some useful rules could not, or should not, be laid down.[483]

11.6 Areas of agreement

11.6.1 Despite the conflicting views outlined above there do appear to be some areas of agreement. Mr Rose submits that it appears to be generally accepted that:

(a) the third paragraph precludes any amendment that would increase an appropriation by a quantifiable amount; and

(b) the third paragraph applies where the appropriation is standing and open-ended, and it will necessarily result in a greater amount being expended (whether the appropriation is in the Bill itself, in an Act being amended by the Bill or in some other Act).[484]

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479 *Submissions on the exposure draft*, p. S38.
480 ibid., p. S38.
481 ibid.
482 *Transcript*, p. 36 and *Submissions*, p. S341.
483 *Transcript*, p. 38.
484 *Submissions*, p. S341.

11.6.2 The Committee notes that, in relation to (b), Mr Evans' view is that the third paragraph should only apply where a standing appropriation is in the bill itself or in the Act being amended by the bill.

11.6.3 The Committee agrees that the area of controversy concerns those bills that will not 'necessarily, clearly and directly' result in increased expenditure.[485] Mr Barlin appears to agree that the third paragraph applies to bills that will necessarily *or probably* cause an increase in expenditure under an appropriation because the nature of the amendment is such that it is reasonable to conclude that it will result in an increase in expenditure.[486]

11.7 The 'availability' test

11.7.1 Mr Rose proposed a test whereby increases in expenditure could be determined by considering whether the amendment would increase the amount *available* for expenditure, whether or not any of the extra amount is likely to be spent.[487] Where Parliament makes more money available to the Executive, that is a burden on the people, regardless of whether the money is actually spent.[488]

11.7.2 During the seminar, Ms Penfold suggested that the 'availability' test would be relatively easy to apply[489] and it would enable identification of the purpose for which the bill was being drafted[490]. If an amendment added a class of people to those eligible to receive a benefit, the amount available under the appropriation would be increased by the amount needed to pay the increased benefits.[491] The effect of the application of this test is that while increased expenditure is authorised, it is not obligatory that the authorised moneys be spent.

11.7.3 However, Mr Evans was critical of the test and stated that it does not accord with the third paragraph which refers to actualities and not intentions.[492] He also argued that the question of whether the amendment authorises more expenditure, often becomes the same question as whether any expenditure is going to occur. He

485 ibid., p. S341.
486 See Mr L. Barlin, *Submissions*, p. S204 and Mr D. Rose, *Submissions*, p. S341.
487 *Submissions*, pp. S286, S341.
488 Mr D. Rose, *Transcript*, p. 36.
489 *Seminar Transcript*, p. 71
490 ibid., p. 74.
491 Mr D. Rose, *Submissions*, p. S341.
492 *Submissions*, p. S350.

suggested that the application of entitlements to an empty class does not authorise any expenditure.[493] Ms Penfold disagreed and said that an application of entitlements to an empty class would clearly authorise expenditure.[494]

11.7.4 Mr Evans' view was that the 'availability' test may not be helpful in relation to standing appropriations. He suggested that it is often difficult to determine whether a particular appropriation in a bill or a particular amendment increases the maximum amount of money available under the appropriation. As the amount of the appropriation is indefinite, and the effect of the amendment is uncertain, it is not possible to say whether the provision or amendment increases the maximum amount available under the appropriation.[495]

11.7.5 Mr Rose suggested there was another possible option to determine whether expenditure has been increased. Wherever the Senate wants to amend a bill and is precluded from doing so by the third paragraph because of the connection with an appropriation, the Senate could include an amendment that would break the link with that appropriation.[496] Mr Rose cites a standing appropriation for the cost of buildings of a certain description, as an example. If a bill provided for a building to be constructed, the Senate may want to amend the bill to increase the size of the building. In order to do this, it could include a provision stating that the cost of the increase would be met from moneys to be appropriated.[497] Mr Evans notes that this approach has been used in the Senate and it could also be applied to taxation bills.[498]

11.8 The 'legally possible' test

11.8.1 Ms Penfold put forward the proposition that a request could be required where an alteration makes an increase **legally possible** in the expenditure available under the appropriation or the total tax or charge payable.[499] According to this proposition, to determine whether there has been an increase in the proposed charge or burden, the effect of a charge or burden on any class of people is relevant, not the

493 *Seminar Transcript*, p. 72.
494 ibid., p. 72.
495 *Submissions*, p. S300.
496 *Submissions*, p. S342.
497 ibid.
498 *Submissions*, p. S350.
499 *Submissions*, p. S354, p. S362.

net effect on the revenue or on the people as a whole.[500] (This is in keeping with the focus of the third paragraph on 'the people'.) Ms Penfold thought that this proposition appeared to have been accepted by Professor Blackshield.[501]

11.8.2 As previously noted, Ms Penfold suggested that this proposition could be applicable to appropriations, taxes and other charges. Generally, whether there has been an increase in the proposed charge or burden on the people has been discussed only in relation to expenditure as that is where the problems have arisen in the past. However, the Committee perceives some benefit in a test which covers all types of charges as Ms Penfold's test does. Such a test would cover issues concerning taxation which may arise in the future. For example, there may be a proposed amendment in the Senate which would result in some taxpayers being liable to pay more tax and other taxpayers being liable to pay less tax. Ms Penfold's test would be applicable to such a case. Ms Penfold stated that she did not think her test was inconsistent with Mr Rose's specific views, but he had not seen this formulation at that time and Ms Penfold noted that he may not agree with the formulation or with the suggested approach to provisions relating to tax.[502] Mr Rose later noted that his views are consistent with the result of Ms Penfold's approach. Ms Penfold's legal possibility test yields similar results to his legal availability test.[503]

11.8.3 Mr Evans criticised this test on a number of grounds. First, he suggested that the legally possible test is a 'legal fiction' when considered from the point of view of an 'ordinary citizen'.[504] Secondly, Mr Evans argues that the third paragraph does not refer to legal possibilities but to real charges or burdens on real people.[505] Mr Evans concludes that the test will

> ... simply shift the field for potential dispute from the actual effect of amendments to legal possibilities. It will often be no easier to determine whether an amendment makes an increase legally possible than it is to determine whether it actually effects an increase.[506]

11.8.4 The Committee is attracted, in principle, to Ms Penfold's variant of the 'availability test'. It notes the advantages, particularly for drafting, in using a test

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500 *Submissions*, p. S362.
501 *Submissions*, pp. S361-2, *Seminar Transcript*, p. 45.
502 *Submissions*, p. S354.
503 *Submissions on the exposure draft*, p. S76.
504 *Submissions on the exposure draft*, p. S10.
505 ibid.
506 ibid.

which is relatively easy to apply. But the Committee is also aware of Mr Evans' concerns in relation to a test of this kind. However, such a test will assist in preserving the financial initiative of the House of Representatives.

11.8.5 Given the increasing number of disputes prompted by this issue it is evident that there is no established parliamentary practice on which the Committee can rely as a criterion for making a decision on this issue. The Committee considers that the current approaches do not appear to be operating satisfactorily because the Houses do not apply the same test. The tests applied by each Clerk are interpretations of the third paragraph of section 53. The test which the Committee proposes as an alternative is yet another interpretation of the third paragraph.

11.8.6 Because the Constitution is not explicit on how to test if an increase is proposed, the Houses must decide on the most sensible test which does not offend the spirit of section 53. Accordingly, the Committee considers that a request should be required where an alteration to a bill is moved in the Senate which will make an increase legally possible. The Committee considers that the House of Representatives should not object to a proposed Senate amendment if the alteration would result in a minor or incidental increase in expenditure. The Committee notes that this appears to be 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.

Chapter 12 Further issues

Some issues that are not central to the interpretation of the third paragraph and which have not been dealt with in earlier chapters, are discussed in this chapter. Those issues include whether the Senate can press a request for an amendment; whether it is within the Senate's power to request an amendment to a bill which it could amend itself; whether the term 'charge or burden' refers only to financial burdens; and whether note should be taken of the distinction between the House, the Government and the executive when interpreting section 53.

12.1 Introduction

12.1.1 There are several issues associated with the third paragraph of section 53 that have not been dealt with in earlier chapters. This report does not purport to provide an exhaustive account of all issues. Rather it focuses on the major issues raised in evidence and debated during the inquiry. Some of the other issues, which have not been the subject of detailed consideration during the inquiry, will be briefly discussed here.

12.2 Can the Senate press a request for an amendment to a bill?

12.2.1 The pressing of requests is a controversial issue. The fourth paragraph of section 53 details the only way by which the Senate may alter a bill if the prohibitions in the second and third paragraphs are invoked. (See 9.16 above). The ability to amend is perceived as more significant than the ability to make requests. Therefore, the fourth paragraph of section 53 is significant in relation to the powers of the respective Houses.

12.2.2 The House of Representatives has never conceded the Senate's right to repeat and thereby press or insist on a request for an amendment in a bill which the Senate may not amend. The Clerk of the Senate argues that the Senate has successfully pressed requests on many occasions since 1901 and suggests that if the

framers of the Constitution had intended that the Senate be prevented from pressing its requests, such a prohibition would have been included in the Constitution.[507]

12.2.3 Proponents of the argument that the pressing of requests by the Senate is unconstitutional cite Quick and Garran in support of their view. Quick and Garran stated that:

> ... in the case of a bill which the Senate may not amend, the House of Representatives alone is responsible for the form of the measure; the Senate cannot strike out or alter a word of it, but can only **suggest** that the House of Representatives should do so. If that House declines to make the suggested amendment, the Senate is face to face with the responsibility of either passing the bill as it stands or rejecting it as it stands. **It cannot shelve that responsibility by insisting on its suggestion, because there is nothing on which to insist ...** If its request is not complied with, it can reject the bill, or shelve it; but it must take the full responsibility of its action ... .[508] [emphasis added]

The implication of the view expressed by Quick and Garran is that the Senate can make a given request only once at any particular stage of a bill.

12.2.4 Other arguments that support the view that the pressing of requests is unconstitutional include:

(a) the words 'at any stage' in the fourth paragraph of section 53 do not mean the same thing as 'at any time and from time to time', but rather they refer to the recognised stages in the passage of a bill through the chamber[509];

(b) in 1902 Sir Isaac Isaacs stated that once the Senate had made a request, its power of suggestion was exhausted as far as that stage was concerned; it has no right to challenge a decision of the House of Representatives in matters where it has made requests and received a definite answer[510];

(c) Sir John Latham's statement that the only practical way a distinction may be drawn between a request and an amendment is by taking the view that a request can only be made once and having made the request, the Senate

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507 *Submissions*, p. S233.

508 Quick and Garran, op. cit., pp. 671-2.

509 Garran R. et al, *Constitutional opinion on whether the Senate has a right to press a request for the amendment of a money bill* cited in Browning, op. cit., p.448.

510 House of Representatives *Debates*, 3 September 1902, p. 15691 cited in Browning, op. cit., p. 448.

has exercised all the rights and privileges allowed by the Constitution[511]; and

(d) in relation to a request, the form of the bill rests solely with the House; to press a request is to insist on it and that is a contradiction in terms and unconstitutional.[512]

12.2.5 Some of the arguments in support of those who advocate the constitutionality of pressed requests include:

(a) the use of the term 'at any stage' in the fourth paragraph of section 53 suggests that the sending of requests is not limited to one occasion;

(b) at the Constitutional Convention of 1898 an amendment to insert the word 'once' in the fourth paragraph, to prevent the Senate repeating a request, was defeated[513]; and

(c) even if the Senate cannot press a request, it could easily circumvent the restriction by slightly modifying a request when it was repeated. (It has been suggested that it cannot be supposed that the framers of the Constitution intended to impose a prohibition that could be so easily avoided)[514].

12.2.6 The fourth paragraph of section 53 permits the Senate to make a request by message for the omission or amendment of an item or provision at any stage. The Committee agrees with the view expressed by 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. The Committee considers that the term 'stage' is a reference 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.

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511 House of Representatives *Debates*, 30 September 1933, p. 5249 cited in Browning, op. cit., p. 448.

512 ibid., p. 449.

513 Mr H. Evans, *Submissions*, p. S233 citing Convention Debates, pp. 1996-9.

514 ibid., p. S233.

12.2.7 In response to this, Mr Evans suggested that the stages of the passage of a bill are matters which can be altered by the internal procedures of the Senate.[515] He noted that the Senate could, by altering its own procedures, require each relevant bill to pass through a hundred stages in the Senate.[516] He concluded that the Constitution would not impose a prohibition on the Senate which the Senate could defeat simply by changing its own procedures.[517]

12.2.8 The conclusion that pressing requests is unconstitutional (and was not intended to be the practice when the Constitution was drafted) is supported by the literal meaning of the word 'request'. 'Request' can be defined as 'the act of asking for something to be given, or done, especially as a favour or courtesy'.[518] To press and therefore insist on an amendment is to demand and this is not in keeping with the words of the fourth paragraph. The Committee suggests that the fact requests have been pressed in the past does not give the practice validity.

12.2.9 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. At some point, for the purposes of section 57, the Senate must fail to pass the proposed law. If the Senate twice rejects or fails to pass the proposed law within the prescribed time frame, or passes it with amendments to which the House of Representatives will not agree, this may provide the 'trigger' for a dissolution of both Houses of Parliament.

12.3 Is it within the Senate's power to request an amendment to a bill which it could amend itself?

12.3.1 In 9.16 above the Committee proposes a compact between the Houses to permit requests in relation to bills which originated in the Senate. These requests would not be those required by the fourth paragraph of section 53. They would be a type of extra-constitutional request. In particular, they would not be requests made in circumstances where the Senate could arguably make the amendments itself. These circumstances are considered here.

12.3.2 It has been suggested that if the Senate agreed to request the House to amend bills which the Senate believes it could amend itself, the problems surrounding

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515 *Submissions on the exposure draft*, p. S14.

516 ibid.

517 ibid.

518 *The Macquarie Dictionary* second revision, The Macquarie Library Pty Ltd, 1988, p. 1445.

the application of the third paragraph of section 53 may be solved. However, there is a threshold question as to whether the Senate can request amendments in situations where the Constitution does not require requests to be made.

12.3.3 One view of the issue is that it is within the Senate's power to request the House to amend a bill which it could amend itself. If the Senate requested an amendment to a bill it could amend, it is not seeking to exercise its full powers and consequently, such a request should not be considered unconstitutional.

12.3.4 The alternative view is that the Senate cannot request the House to amend a bill it may already amend itself. The fourth paragraph of section 53 states that the Senate may return a 'proposed law which the Senate may not amend'. On a literal interpretation of that paragraph, if the Senate can amend a bill itself, it is prevented from returning it to the House of Representatives with a request for an amendment.

12.3.5 As previously noted, where a Senate request is not complied with, the Senate bears the responsibility of determining the fate of the bill. It may drop the request or veto the whole bill.[519] 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 that it would be open to the House to refuse to consider the request and return the bill to the Senate.[520] Alternatively, the House may accept the request even if it is of the view that the Senate could have amended the bill.

12.3.6 There may also be implications in relation to section 57 of the Constitution if the Senate made a request when it could amend the bill itself. If the Senate made a request when it could amend the proposed law, that may be considered a failure to pass the proposed law. As noted above, a failure to pass may invoke the double dissolution procedure in certain circumstances.

12.3.7 These complications might make it attractive or otherwise for the Senate to make requests when it could amend, but they do not help to determine the acceptability of the practice. The Committee is inclined to consider that in situations where there is uncertainty about whether a request is required, it would be acceptable for a request to be made. The fact that the section is not justiciable and it is therefore

519 Refer to paragraphs 1.4.1-1.4.4.

520 However, it appears unlikely that the House of Representatives would take that course of action.

possible for the Houses to develop their own approaches, creates flexibility in this area. This outcome is relevant to the next section.

12.4 Where the Senate proposes to make alterations that would involve both amendments and requests, how should those alterations be drafted?

12.4.1 Mr Turnbull submitted that where the Senate proposes to make alterations that would be a combination of requests and amendments, it would be desirable to treat all of the alterations as requests. The rationale for this view is that the Constitution bars the Senate from making amendments in certain circumstances, but there are no restrictions on the Senate making any sort of request.[521]

12.4.2 This issue involves a question of constitutional power. It also raises the possibility that where the Senate makes a request when it could amend the bill, the House of Representatives may return the bill and ask that the Senate make the amendment.

12.4.3 Where an alteration could be drafted as an amendment, but it is consequential on a request, the Office of Parliamentary Counsel takes the view that the alteration should also take the form of a request.[522]

12.4.4 The Committee considers that, in both of these circumstances, the safest and most efficient course would be for the alterations to take the form of requests (noting that the House of Representatives may want the Senate to amend a bill rather than request the amendment where the Senate has the power to do so).

12.4.5 The same conclusion was reached in the exposure draft. Mr Evans commented that:

> ... this suggestion would involve an improper distortion of section 53 and would enormously expand the number of requests. .. Such a rule would also radically tilt the parliamentary balance against the Senate and in favour of the Government. Where there are amendments and requests to a bill, the Government would be able to deal with the amendments and requests together, and the Senate would not have the opportunity

521 Mr I. Turnbull, *Submissions*, p. S262.

522 Ms H. Penfold, *Submissions*, p. S353.

> to consider the response to its requests before finally determining its amendments.[523]

12.4.6 While the Committee recognises Mr Evans' concerns, it is obvious that the simplest option for parliamentary officers and the Office of Parliamentary Counsel would be to treat all alterations as requests where there would otherwise be a combination of amendments and requests. The Committee recognises, however, that this view will not have widespread acceptance within the Parliament.

12.5 Does the term 'charge or burden' in the third paragraph of section 53 refer only to financial burdens or to financial and administrative burdens?

12.5.1 The issue was raised in submissions by Mr Jones[524] and Ms Penfold. Ms Penfold noted that:

> The concept of 'financial' charges and burdens has not been raised expressly but is ... inherent in some of the discussions about how far the expression 'charge or burden' can extend.[525]

12.5.2 The Committee did not receive evidence on the meaning of charge or burden, but it appears to be implicit that the phrase refers to financial charges or burdens. There are two lines of argument that support the view whereby 'burdens' is restricted to burdens in the financial rather than the administrative sense. First, the context of 'burden' in section 53 supports the view that the third paragraph refers to financial burdens.[526] The first two paragraphs of section 53 deal specifically with financial matters and it appears logical that the third would also deal with that type of matter rather than administrative matters. The Committee concludes that the third paragraph of section 53 should only apply to charges or burdens of a financial character.

12.5.3 Secondly, support for this view may be found in the recent decision in *Western Australia* v. *The Commonwealth*.[527] A Senate amendment to the Native Title Bill 1993 provided for the establishment of a joint parliamentary committee on

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523 *Submissions to the exposure draft*, p. S11.

524 *Submissions*, p. S310.

525 *Submissions*, p. S353.

526 Dr J. Thomson, *Submissions on the exposure draft*, p. S32.

527 (1995) 69 ALJR 309 at . See Dr J. Thomson, *Submissions on the exposure draft*, p. S32.

Native Title and establishing this committee would have incurred various administrative costs and other expenses. While the High Court declared section 53 not justiciable, it commented that the submission that the amendment contravened the third paragraph was without merit.[528] This supports the view that the term refers to financial charges. Further, it has been suggested that it was never intended that such an amendment would constitute a charge or burden within the meaning of section 53. One consequence of such a view would be that the House of Representatives would have control over the formation of Senate committees.[529]

12.5.4 The Committee has not attempted to define what is meant by charges or burdens of a financial character. This will generally be clear, but there are borderline cases. The Taxation Laws Amendment Bill (No. 4) 1993, which was a stimulus to this inquiry, is one of those cases. The bill advanced the dates by which company tax was to be paid. The consequence was that taxpayers had to pay in more frequent instalments and thereby lose interest, or pay interest on moneys required to make payments earlier than required under the existing law.[530] The Senate amendment would have resulted in a similar interest burden being incurred by another class of taxpayer.

12.6 Does 'the people' in the third paragraph of section 53 refer to natural persons only?

12.6.1 It has been submitted that the third paragraph of section 53 refers only to *'a charge or burden **on the people**' and that it does not refer to either a charge or* burden on the Consolidated Revenue Fund or on the States.[531]

12.6.2 It has also been suggested that the third paragraph may not apply to an increase in a 'proposed charge or burden' to be imposed on legal entities, such as companies, corporations and trade unions.[532] While the word 'person' generally includes a corporation[533], the word 'people' is consistently used in the Constitution

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528 Refer to paragraph 4.4.19.

529 Refer to paragraph 4.4.21.

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

531 Mr A. Morris, p.S12. This obviously ties in with the argument that the third paragraph *does not apply to appropriations.*

532 ibid., pp. S12-13.

533 *Royal Mail Steam Packet Co.* v. *Braham* (1877) 2 App Cas 381 and subsequent cases. The principle is found in statute in section 22(a) of the *Acts Interpretation Act 1901* and section 161 of *The Corporations Law.* The principle has also been referred to in recent High Court decisions (e.g. *Koowarta* v. *Bjelke-Petersen* (1982) 153 CLR 168 at 236.)

to refer to natural persons. The preamble and sections 7, 24 and 127 (before it was repealed) of the Constitution are cited in support of that proposition.[534]

12.6.3 Furthermore, the High Court has held that the term 'residents' in section 75(iv) of the Constitution refers to natural persons and not corporations.[535] Mr Morris argued that the third paragraph has no application where a proposed law is amended by the Senate to increase any proposed charge or burden on non-human entities.[536]

12.6.4 However, while Mr Morris noted that ordinarily 'people' would almost certainly refer to natural persons, it has been suggested that 'charge or burden on the people' may have been intended to have a less literal meaning that is wide enough to cover charges where legal entities bear the direct impact. Such entities are, after all, legal entities by which people are organised.[537] Furthermore, in some cases, the imposition of a charge or burden on non-human entities (eg. corporations) will be passed on to natural persons (eg. shareholders) by increased prices or membership fees.[538]

12.6.5 The Committee is inclined to the view that charge or burden on the people should be interpreted broadly to encompass the 'flow-on' effects of charges or burdens in a general sense, as well as charges or burdens placed directly on the people.

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534 ibid., p.S13. The preamble states that:
'Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania ... have agreed to unite in one indissoluble Federal Commonwealth under the Crown ...'.

Section 7 provides that members of the Senate will be 'directly chosen by the people of the State'; section 24 provides that members of the House of Representatives will be 'directly chosen by the people of the Commonwealth' and section 127 provided (before it was repealed in 1967) that, 'In reckoning the number of people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal natives shall not be *counted*.'

535 *Australasian Temperance and General Mutual Life Assurance Society* v. *Howe* (1922) 31 CLR 290.

536 Mr A. Morris, *Submissions*, p. S13.

537 Mr D. Rose, *Submissions*, p. S280.

538 ibid., p.S280. See also Mr A. Morris, *Submissions*, p.S27.

12.7 Does 'the people' in the third paragraph of section 53 refer to Australian residents only?

12.7.1 Mr Morris suggested that the third paragraph of section 53 may not apply to a 'proposed charge or burden' which is to be imposed on persons who are not residents of Australia. The use of the word 'people' elsewhere in the Constitution supports the argument as the 'people' referred to in the Constitution are residents of the Commonwealth.[539] Mr Morris concluded that it is an open question whether charges levied on non-residents (for example, arrival and departure taxes or payments for visas) are subject to the third paragraph of section 53.[540] The Committee agrees that this is an open question.

12.8 Distinction between House, Government and executive in interpreting section 53

12.8.1 Mr Evans commented that the exposure draft slid over the distinction between the financial initiative of the House and that of the government and/or the executive.[541] He noted that the financial initiative of the House provided for by section 53 is exercised, in effect, by the executive because of its influence over the House. The Committee has considered whether this is an important distinction in the interpretation of section 53 of the Constitution.

12.8.2 Mr Evans considers the distinction is significant on the grounds that:

> Tipping the balance against the Senate does not favour the House of Representatives but simply delivers more power to the already almost all-powerful executive.[542]

12.8.3 The problem with this view is that it proposes an interpretation of the Constitution which takes account of current political styles to the detriment of the actual content of the document. The Constitution embodies enduring principles which remain valid in all political circumstances and fashions. It is true that when a strong executive government controls the House of Representatives there is little practical difference in distinguishing the relationship between the House and Senate from that between the executive and Senate. But this would not be the case if there were a

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539 ibid., p.S28.

540 ibid., p.S28. Mr Rose agreed that this issue is an open question.

541 Mr H. Evans, *Submissions on the exposure draft*, p. S12.

542 ibid.

minority government. The Constitution must be equally applicable and bear the same interpretation whether the executive has a strong or minimal influence over the House of Representatives.

12.8.4 The significance of this for interpreting section 53 is that the section should be interpreted according to the terms in which it is expressed. The essential relationship being regulated by the section is between the Senate and the House of Representatives.

12.9 Other issues

12.9.1 A number of issues were brought to the Committee's attention by Mr Kerry Jones. The Committee received little or no evidence on these issues either prior to or after publication of the exposure draft. Consequently the Committee has not reached a concluded view on these issues. Nevertheless, the issues have been listed here to indicate the range of issues which may arise in a consideration of the third paragraph of section 53.

12.9.2 Mr Jones queried whether, in the case of a tax base increase, there will still be an increased charge or burden if the person is given a choice whether to accept the increase. Mr Jones gave the example of where a bill requires taxpayers to keep onerous records and assesses the taxpayer $100 whenever a transaction occurs. An alteration gives the taxpayer a choice of not keeping records but paying $150 tax instead.[543] Mr Evans responded that to define voluntary payments of this type as taxation would blur the distinction between taxation and other compulsions[544]. It appears that Mr Evans does not think a payment of this type should be classified as a charge or burden within the meaning of the third paragraph of section 53.

12.9.3 Some of the other issues raised by Mr Jones are listed below.

(a) How many people must have their charge or burden increased for the third paragraph of section 53 to apply? If the charge or burden must be increased on more than one person for the third paragraph to apply, how should the number of people be determined?[545]

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543 *Submissions*, p. S310.

544 *Submissions*, p. S349.

545 Note the Committee's recommendation in chapter 11 that a request should be required where an alteration to a bill is moved in the Senate which will make an increase legally possible and the accompanying text that a request should be required in those

(b) In relation to (a), if the charge or burden on other people is decreased, must the increase be a net increase in order to fall within the third paragraph? If so, is this to be done on the basis of the number of people or the quantum?[546]

(c) If there is more than one alteration to a bill, should the third paragraph of section 53 be applied:

(i) separately to each alteration;

(ii) to all alterations as if they were a single alteration; or

(iii) to each, taking into account only the alterations that preceded it?

(d) Can a proposed law propose more than one charge or burden?

There could be at least one thesis in these questions. It is clear that despite the attention paid to section 53 during the current inquiry, there is more work to be done on this part of the Constitution. While more work will probably be undertaken by future parliamentary committees, it is hoped that the academic community will also focus on parliamentary issues.

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circumstances even if the net effect of the alteration is a decrease. The Committee noted also that the 'legally possible' test should not generally apply to minor increases in expenditure.

546 Note Mr Evans' view that where the taxation payable by any group of taxpayers is increased, the bill should be regarded as a bill imposing taxation - see p. S348.

Chapter 13 Outcomes

In this chapter, the possibility of a compact between the Houses in relation to the interpretation and application of the third paragraph of section 53 is discussed. Most participants in the inquiry considered that a compact on the issue was desirable.

Reference is made to previous compacts within the Commonwealth Parliament. The possible statutory basis for a compact is outlined, as are the possible objectives of any compact. The primary objectives should be to assist in the practical workings of the parliamentary process and to define and limit the constitutional powers of both Houses. The structure and content of a compact are discussed and a draft statement of principles for inclusion in the proposed compact is outlined. The justiciability of such an agreement is also canvassed.

13.1 Desirability of a compact

13.1.1 Evidently there is no consensus in relation to the legal meaning of all aspects of the third paragraph of section 53 of the Constitution. Most witnesses and participants in the seminar thought that a compact — detailing the circumstances where the third paragraph of section 53 does or does not apply — would be a desirable means of dealing with the uncertainty arising from differing interpretations. However, there were varying levels of optimism concerning the likelihood of both Houses agreeing to such a compact.

13.2 Previous compacts

13.2.1 There have been previous compacts within the Australian Parliament. A compact was established in 1965 on the meaning of 'the ordinary annual services of the Government' (within the second paragraph of section 53). The compact was between the Government and the Senate. It provided that a number of items of expenditure were not appropriations for the ordinary annual services of the Government. Those items are outlined at paragraph 2.5.4.

13.2.2 The compact stated that proposed laws for the appropriation of revenue or monies for expenditure on those items shall be presented to the Senate in a separate Appropriation bill (that is Appropriation Bill [No. 2]) and that bill would be subject to amendment by the Senate.[547] It is interesting to note that this compact was

547 House of Representatives *Debates*, 13 May 1965, pp. 1484-1485.

between the Government and the Senate.[548] The compact was amended in 1988 and 1989 in correspondence between the Senate and the Government.

13.2.3 In 1982 a separate compact was completed. It was a subset of the ordinary annual services compact and it provided that appropriations for the Parliament were not ordinary annual services of government. The parties to this compact were again the Government and the Senate.[549]

13.2.4 The Committee considers that the parties to any compact on the interpretation of the third paragraph of section 53 should be the two Houses of Parliament. As the parties to both previous compacts have been the Government and the Senate, they are not precedents for a compact on this issue.

13.3 The basis for a compact

13.3.1 Section 50 of the Constitution provides that:

> Each House of the Parliament may make rules and orders with respect to-
>
> (i) The mode in which its powers, privileges, and immunities may be exercised and upheld:
>
> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

During the seminar, it was suggested that section 50 may provide a basis for the compact as an agreement of that type would assist in the way the business and proceedings of the Parliament were conducted.[550] On the other hand, it was suggested that section 50 may not only be a grant of power, but may also impose a limitation on the ability of the Houses to make such an agreement.[551]

13.3.2 As section 53 appears not to be justiciable, it may not be necessary to find a statutory basis for the compact as the Houses have a broad discretion to determine their own rules.

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548 Mr L. Barlin, *Seminar Transcript*, p. 47 and Mr H. Evans, *Submissions*, p. S304.

549 ibid.

550 Dr J. Thomson, *Seminar Transcript*, p. 53.

551 See Mr D. Williams, *Seminar Transcript*, p. 50 and Dr J. Thomson, *Seminar Transcript*, p. 53.

13.4 Parties to any compact

13.4.1 During discussions concerning the parties to a compact, Mr Evans suggested that a resolution of the two Houses may be preferable to an agreement between the Government and the Senate (who were the parties in the earlier compacts). It is probable that if the High Court did consider the Houses' interpretation of section 53, a resolution of the two Houses may carry more weight than an agreement between the Government and the Senate.[552]

13.4.2 It has also been suggested that if a compact were to be negotiated between the House of Representatives and the Senate, section 50 of the Constitution may provide some basis as it deals with the powers of each House of Parliament.[553] However, the section may not provide a statutory basis for a compact between the Government and the Senate. As previously mentioned, the Committee considers that any proposed compact on this issue should be between the Houses of Parliament. The managers of government and opposition business and the Clerks of the two Houses would need to be involved in the negotiations. The two Legal and Constitutional Affairs Committees and the Office of Parliamentary Counsel might be able to assist with the negotiations.

13.5 Objectives of a compact

13.5.1 The objectives of any compact would be to assist in the practical workings of the parliamentary process and to define and limit the constitutional powers of both Houses.[554] The Committee considers, as Ms Penfold suggests, that the Houses should be looking to develop an appropriate interpretation of the third paragraph of section 53, rather than ascertaining some pre-existing interpretation from what has happened previously.[555] However, the Committee notes that this interpretation should be based on a sensible and practical view of section 53 that is reasonably sustainable within the words of that section and generally consistent with history, parliamentary practice, and, where relevant, constitutional interpretation by the High Court.

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552 *Seminar Transcript*, p. 52.

553 Dr J. Thomson, *Seminar Transcript*, p. 53.

554 ibid., p. 52.

555 *Submissions*, p. S352.

13.5.2 Any interpretation of the third paragraph should also be consistent with the broad policy underlying section 53, that is, the preservation of the financial initiative of the House of Representatives (but otherwise to ensure that the two Houses have equal powers). All witnesses and participants appeared to agree that this principle should be upheld.

13.6 The justiciability of a compact

13.6.1 The issue of whether a compact would be justiciable was raised during the public hearings. It would seem logical that if section 53 was not considered justiciable, a compact on the interpretation of the third paragraph would not be justiciable either.

13.6.2 The general feeling appeared to be that if the Houses entered into a compact, it would be unlikely that the Court would intervene.[556] It was suggested that if the compact were a bona fide attempt to resolve interpretative and practical issues between the Houses, then the Court would probably approach it in the same way as it is anticipated the Court would approach section 53. However, if the Houses agreed to a compact that was in flagrant disregard of the Constitution, the High Court may be interested in considering the matter.[557] For example, the High Court may examine the compact if it provided that the Senate could originate laws imposing taxation[558] as that would be in direct contravention of the first paragraph of section 53.

13.7 Form of a compact

13.7.1 It was anticipated that a compact could take the form of an identical resolution passed in each chamber. A complication of this proposal is that the timing of the reports from the two Legal and Constitutional Affairs Committees is unlikely to proximate. This Committee will table its report in November 1995 but the Senate Committee is unlikely to table its report before 1996 because of its heavy workload.

13.7.2 An alternative basis for a 'compact' could be a declaratory resolution passed by the House of Representatives. The Senate could then consider passing a

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556 See discussion at *Transcript*, pp. 77-78.

557 Mr D. Williams, *Transcript*, p. 78.

558 Mr D. Rose, *Seminar Transcript*, p. 15.

declaratory resolution in similar terms, perhaps after its legal committee had tabled a report.

13.8 Structure and content of a compact

13.8.1 During the seminar, the prospect of devising a compact based on a wide-ranging view of the cases where Senate alterations ought to be requests was raised. Mr Evans suggested the compact could usefully contain a statement of general principles and an elaboration of some examples relating to previous cases.[559] Another approach (which could be combined with that suggested by Mr Evans) would be to list those examples which can be excluded from the third paragraph of section 53.[560]

13.8.2 The Committee notes that the boundary between amendments and requests needs to be clear otherwise the Houses will be

> ... sliding down that slippery slope that people have expressed concern about in the past, whereby every amendment will become a request.[561]

13.8.3 The Committee also notes that the Office of Parliamentary Counsel is willing to looking at proposals for a compact and to advise on the implementation of those proposals.[562] The Committee suggests that the compact should contain some initial statements of general principle. The circumstances in which Senate alterations should be in the form of requests could then be outlined and examples provided of situations where a request would be appropriate.

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.

559 *Seminar Transcript*, p. 51.
560 Ms H. Penfold, *Submissions*, p. S352.
561 *Seminar Transcript*, p. 52.
562 Ms H. Penfold, *Transcript*, p. 67.

13.8.4 The Committee's view is that the proposed compact should embody the recommendations set out in this report. This suggestion will obviously be considered in the context of negotiations relating to the proposed compact. The compact could also usefully contain certain safeguards. For example, it could provide that the Office of Parliamentary Counsel is authorised to draw the attention of the Clerks of both Houses to situations where the compact might be, or may have been, contravened.[563] The proposed compact could also contain a mechanism for resolving disputes between the Houses in this area.[564]

13.8.5 The compact could also embody further principles and suggestions considered by the Committee and made the subject of particular recommendations. One of these is the Committee's proposal that a mechanism similar to that provided by the fourth paragraph of section 53, be developed so that the Senate may request amendments to bills that have been originated in the Senate. [see 9.17 above]. Set out on the following page is a statement of principles which the Committee considers should be included in any proposed compact.

563 See, for example, clause 18 of Mr Morris' draft protocol, *Submissions*, p. S116.

564 See, for example, clause 20 of Mr Morris' draft protocol, ibid., p. S117.

Statement of principles for inclusion in the proposed compact

1. **The provisions of the third paragraph of section 53 of the Constitution apply if:**

   (a) an alteration proposed by the Senate to a bill would increase the proposed charge or burden; or

   (b) an alteration proposed by the Senate to a bill would insert (or propose) a charge or burden.

2. **It is accepted that:**

   (a) a 'charge or burden' includes a financial charge or burden, such as a tax, an appropriation or expenditure out of a standing appropriation, but does not include an administrative or other non-financial burden; and

   (b) a provision 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 is not a proposed charge or burden for the purposes of the third paragraph of section 53; and

   (c) to determine if a Senate alteration to a bill would increase a proposed charge or burden, the alteration must be compared to the existing level of the charge or burden.

3. **The following test should be applied to determine whether there is an 'increase' for the purposes of the third paragraph of section 53 of the Constitution:**

   If an alteration proposed by the Senate to makes an increase, whether in relation to taxes, appropriations or expenditure legally possible, the third paragraph of section 53 applies.

Statement of principles continued

4. An alteration proposed in the Senate to a bill should be expressed as a request in the following circumstances:

(a) the bill contains a standing appropriation and the alteration would increase expenditure out of the appropriation;

(b) the bill does not contain a standing appropriation, but affects expenditure out of a standing appropriation (whether or not the appropriation is contained in the Act that the bill is amending or in another Act or bill), and the alteration would further increase the level of expenditure proposed by the bill;

(c) the bill does not itself propose a charge or burden, but the alteration would increase the rate or incidence of taxation or increase expenditure out of a standing appropriation.

5. The following bills should not be originated in the Senate:

(a) a bill which increases the rate or incidence of taxation

(b) a bill which increases expenditure out of a standing appropriation.

13.9 Alternatives to a compact

13.9.1 To the extent that the two Legal and Constitutional Affairs Committees might be involved (or even facilitate) negotiations towards a section 53 compact, it does not appear that this will happen in the immediate future. Informal discussions were held with the Senate Legal and Constitutional Legislation Committee on 29 June 1995. It was clear at the meeting that it will not be possible to have constructive discussions on the proposed compact until the Senate Committee is further advanced in its consideration of the reference. This Committee hopes productive discussions can be held with the Senate Committee during 1996.

13.9.2 In the meantime, it might be the wish of the House of Representatives to consider its approach to section 53 in the light of the discussion of the issues in this report. The Office of Parliamentary Counsel raised alternative methods (to a compact) of addressing difficulties with the section in its submission. The Office suggested that the House of Representatives could pass a resolution setting out the view it takes of the third paragraph of section 53.[565] Alternatively, the Government could issue a statement outlining the view it takes of the third paragraph and declaring that it will apply that view in framing its own Senate alterations.[566] The Government could also detail its intentions about the types of bills it will introduce in the Senate in the future.[567]

13.9.3 The OPC noted that either of these alternative methods could be accompanied by a statement that the House, or the Government members in the House, will or may resist Senate alterations that do not conform with the expressed views. The OPC concluded that either of these methods would give the Senate and OPC a clear basis on which to act and:

> [T]he Senate, while it might not agree with the House or the Government's views, would at least know where it stood, and could decide from case to case whether to frame proposed alterations in accordance with the House or Government's view (if it wanted to focus debate on the content of the alterations) or on a different bases (if it wanted to focus debate on the operation of section 53 and dealings between the Houses).[568]

13.10 Conclusions

13.10.1 The provisions of section 53 of the Constitution were initially a political compromise brought about by the conflicting principles of the rights of the people in a democracy and the rights of the states in a federation. That compromise has resulted in perceived inconsistencies and anomalies in the interpretation and application of the third paragraph of section 53 since federation. In its proposals, the Committee has attempted to preserve the basic principle underlying section 53 - a principle which all witnesses and participants appeared to support. However, just as section 53 of the Constitution was originally drafted as a compromise, the Houses will also need to be prepared to make concessions to reach a workable agreement. The Committee is confident, however, that the statement of principles and

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565 *Submissions*, p. S354.

566 ibid., p. S355.

567 ibid.

568 ibid.

recommendations contained in this exposure draft can form the basis of a workable agreement.

13.10.2 It is hoped that this report will assist Members and parliamentary officers of both Houses and other interested parties, in determining the issues associated with the interpretation and application of the third paragraph of section 53 of the Constitution.

Daryl Melham
Chair

November 1995

List of Submissions

LIST OF SUBMISSIONS

Submission No.	Individual/Organisation
1	Mr George Novotny 3 Krait Street KARALEE QLD 4306
2	Mr Anthony Morris QC Level 13, MLC Centre 239 George Street BRISBANE QLD 4000
3	Mr Len Wakeman 5/6 Puntie Crescent MAYLANDS WA 6051
4	Professor John Goldring Dean, Faculty of Law University of Wollongong Northfields Avenue WOLLONGONG NSW 2522
5	Mr Harry Evans Clerk of the Senate Parliament House CANBERRA ACT 2600
6	Mr Kevin Fitzpatrick A/g First Assistant Commissioner Legislative Services Group Australian Taxation Office
7	Mr Gerard Carney Law School Bond University GOLD COAST QLD 4229
8	Mr Anthony Morris QC **Supplementary submission to No. 2**

9 Ms Hilary Penfold
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10 Mr Mark Leeming
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11 Mr Leonard John Matthews
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12 Miss M C Peake
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13 Dr Imtiaz Omar
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14 Mr Jerry Cleary
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16 Ms Nicolee Dixon
Lecturer in Law,
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Queensland University of Technology
GPO Box 2434
BRISBANE QLD 4001

17	Mr W H Vaughn *Secretary* Associated Men's Electoral Network Inc. PO Box 3058 INALA QLD 4077
18	Mr L M Barlin Clerk of the House of Representatives Parliament House CANBERRA ACT 2600
19	Mr Harry Evans Clerk of the Senate Supplementary submission to No. 5
20	Mr Harry Evans Clerk of the Senate Supplementary submission to Nos. 5 & 19
21	*Mr Peter Lahy & Mr Dennis Rose QC* Acting Senior & Chief General Counsel Office of General Counsel Attorney-General's Department *Robert Garran Offices* National Circuit BARTON ACT 2600
22	Mr Ian M L Turnbull QC 167 Belinda Street GERRINGONG NSW 2534
23	Mr Pat Brazil C/- Allen Allen & Hemsley GPO Box 1530 CANBERRA ACT 2601
24	Mr Dennis Rose QC Chief General Counsel Attorney-General's Department Supplementary submission to No. 21
25	Mr Harry Evans *Clerk of the Senate* Supplementary submission to Nos. 5, 19 & 20

26 Mr Harry Evans
Clerk of the Senate
Supplementary submission to
Nos. 5, 19, 20 & 25

27 Mr Harry Evans
Clerk of the Senate
Supplementary submission to
Nos. 5, 19, 20, 25 & 26

28 Mr Anthony Morris QC
Supplementary submission to
Nos. 2 & 8

29 Mr Kerry Jones
First Assistant Parliamentary Counsel
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MTA House
39 Brisbane Avenue
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30 Mr L M Barlin
Clerk of the House of Representatives
Supplementary submission to No. 18

31 Mr Harry Evans
Clerk of the Senate
Supplementary submission to
Nos. 5, 19, 20, 25, 26 & 27

32 Mr Dennis Rose QC
Acting Solicitor-General of Australia
Solicitor-General's Chambers
Supplementary submission to
Nos. 21 & 24

33 Mr Harry Evans
Clerk of the Senate
Supplementary submission to
Nos. 5, 19, 20, 25, 26, 27 & 31

34 Mr Harry Evans
Clerk of the Senate
Supplementary submission to
Nos. 5, 19, 20, 25, 26, 27, 31 & 33

35	Ms Hilary Penfold *First Parliamentary Counsel* Office of Parliamentary Counsel **Supplementary submission to No. 9**
36	Mr Dennis Rose QC Acting Solicitor-General of Australia Solicitor-General's Chambers **Supplementary submission to Nos. 21, 24 & 32**
37	Ms Hilary Penfold First Parliamentary Counsel Office of Parliamentary Counsel **Supplementary submission to Nos. 9 & 35**

SUBMISSIONS ON THE EXPOSURE DRAFT

Submission No.	Individual/Organisation
1	Mr Len Wakeman
2	Mr Harry Evans Clerk of the Senate
3	Mr L M Barlin Clerk of the House of Representatives
4	Dr James Thomson Crown Solicitor's Office Perth, Western Australia
5	Mr Stephen Martin MP Speaker of the House of Representatives
6	Mr Paul Schoff
7	Mr Dennis Rose QC

8	Hon K C Beazley MP Deputy Prime Minister Senator the Hon J P Faulkner Minister for the Environment, Sport and Territories
9	Mr Harry Evans Clerk of the Senate **Supplementary submission to No. 2**

APPENDIX B

List of Witnesses

LIST OF WITNESSES

Canberra, 11 October 1994

Mr Harry Evans
Clerk of the Senate

Mr Patrick Brazil AO
Allen Allen & Hemsley

Mr Peter Lahy
Counsel
Office of General Counsel
Attorney-General's Department

Mr Dennis Rose AM QC
Chief General Counsel
Attorney-General's Department

Canberra, 12 October 1994

Ms Hilary Penfold
First Parliamentary Counsel
Office of Parliamentary Counsel

Mr Kerry Jones
First Assistant Parliamentary Counsel
Office of Parliamentary Counsel

Mr Ian Turnbull QC
167 Belinda Street
GERRINGONG NSW 2534

Canberra, 19 October 1994

Mr Lyn Barlin
Clerk
Department of the House of Representatives

Mr Ian Harris
Deputy Clerk
Department of the House of Representatives

Mr Bernard Wright
First Clerk Assistant
Department of the House of Representatives

Perth, 26 October 1994

Dr James Thomson
44 Perina Way
CITY BEACH WA 6015

SEMINAR ON s53(3)

28 October 1994

Participants

Mr Lyn Barlin
Clerk of the House of Representatives
Department of the House of Representatives

Professor Anthony Blackshield
Professor of Law
Macquarie University

Professor Michael Coper
Consultant to the Committee

Mr Harry Evans
Clerk of the Senate
Department of the Senate

Ms Hilary Penfold
First Parliamentary Counsel
Office of Parliamentary Counsel

Mr Dennis Rose, QC
Chief General Counsel
Attorney-General's Department

Professor Cheryl Saunders
Director
Centre for Comparative Constitutional Studies

Dr James Thomson
University of Western Australia and Murdoch Law Schools

List of Exhibits

LIST OF EXHIBITS

Exhibit Number		Exhibit
1		Resumes
	(i)	Mr Harry Evans, Presented 11 October 1994.
	(ii)	Mr Dennis Rose AM QC, Presented 11 October 1994.
	(iii)	Mr Peter Lahy, Presented 11 October 1994.
	(iv)	Mr Patrick Brazil AO, Presented 11 October 1994.
	(v)	Mr Ian Turnbull QC, Presented 12 October 1994.
2		Select Committee on Tax Bills of the House of Commons - Part III **Presented by Mr Patrick Brazil AO, 11 October 1994.**
3		Letter from Hilary Penfold to the Secretary of the Senate Standing Committee on Legal and Constitutional Affairs. **Presented by Ms Hilary Penfold, 12 October 1994.**
4		Daryl Williams AM QC MP, 'Judicial Review of Legislative Action'. Paper presented to the 16th Annual Conference of the Australasian Study of Parliament Group 'The Courts and Parliament', Parliament House, Darwin, 6-7 October 1994.
5	(i)	Article 1, section 7 of the United States Constitution.
	(ii)	Sections 53 & 54 of the Canadian Constitution.
	(iii)	Excerpts from Hogg P., *Constitutional Law of Canada*, 3rd edition, 1992.
	(iv)	Statement by Speaker of the Legislative Assembly of Western Australia, 5 December 1989, *Hansard*, pp. 6004-5.
	(v)	Statement by the President of the Legislative Council of Western Australia, 7 December 1989.
	(vi)	Sections 45-47 of the *Constitution Acts Amendment Act*.
	(vii)	Western Australia's submissions in *The State of Western Australia* v *Commonwealth of Australia*, pp. 265-271.
	(viii)	Transcript in *The State of Western Australia* v *Commonwealth of Australia* (No. P4 of 1994), pp. 190-199. **Presented by Dr James Thomson, 26 October 1994.**

The exhibits are published in a separate volume.

APPENDIX D

Opinion by Sir Robert Garran GCMG EC

CONSTITUTION, Sec. 53

OPINION

In relation to the Social Services Consolidation Bill, introduced in the Senate, I am asked to advise -

(1) Whether, having regard to the third paragraph of sec. 53 of the Constitution, the Senate may amend the Bill so as to increase from 5/- to 10/- the weekly endowment for the first child;

(2) Whether, having regard to the first paragraph of sec. 53, the Bill is one which may properly originate in the Senate.

Proposed laws

To begin with, sec. 53 differs from sec. 55 in dealing throughout, not with "laws", but with "proposed laws". The avowed intention was that the requirements of the section should be regarded merely as matters between the two Houses, and that, when a proposed law had become a law, the fact of non-compliance with these requirements should not affect the validity of the law. There are a number of dicta of Justices of the High Court that this is the effect of the section: see Osborne v. Commonwealth, 12 C.L.R. at pp. 336, 351-3, 355-6, 373, Buchanan v. Commonwealth 15 C.L.R. 329; Comm'r of Taxation v. Munro, 38 C.L.R. at pp. 188, 210.

It seems clear that questions arising under sec. 53 are matters of Parliamentary procedure, argument as to which can be addressed only to the Houses.

Charges or burdens on the people

The words "charge or burden on the people" are apt words to describe the imposition of taxation. It has been suggested that they also cover appropriations of money; and also that they cover such matters as the relevant provisions of the Social Services Consolidation Bill - namely, provisions which, though they do not appropriate money, yet in combination with Appropriation Acts affect the amounts which will be expended.

All these questions raise difficulties of interpretation of sec. 53. Before discussing these difficulties, it is worth while to see whether any guidance as to the intended meaning can be had from the Debates of the Conventions of 1891 and 1897-8, seeing they are questions to be decided in the political arena, and not in courts of justice where such an examination would probably be considered irrelevant.

Proceedings in the 1891 Convention began with some general resolutions moved by Sir Henry Parkes, one of which was that the House of Representatives should possess the sole right of originating and amending all bills appropriating revenue or imposing taxation. (Deb. p.23). In the ensuing discussion there was much difference of opinion about the power of the Senate as to money bills. At p.449 Sir Henry Parkes strongly supported the resolution, and said:

> "All taxes levied must be burdens on the people of the country. The freest condition would be to have no tax; and every tax, let it take what form it may, is a burden upon a free people. Every expenditure derived from the revenues produced by these taxes must affect the people in the same way in which the imposition of burdens affects them."

He went on to say that the principle was that the popular chamber should alone be entitled to deal with measures "affecting the imposition of burdens and the distribution of revenue derived from the taxes so imposed"; and that it was not consistent with this that the Senate should have power to veto in whole or in detail "any bill introduced for the purpose of expending money ... or for increasing the burdens of the State.

Eventually it was agreed to limit the resolution to origination, as to which all were agreed, on the understanding that a Committee would work out an acceptable compromise to submit to the Convention (p. 463).

The clause brought up by the Constitutional Committee (of whose discussions there is, so far as I know, no available record was, except for minor matters of form, almost identical with secs. 53 and 55, of the Constitution (see p. 706). In introducing the Committee's draft bill to the Convention, Sir Samuel Griffith (p. 526) described the compromise as not allowing the Senate to amend the annual appropriation bill or bills imposing taxation, but giving it the power to suggest amendments on the lines of the South Australian practice. He made no mention at all of charges or burdens.

According to Mr. Dibbs (p. 752) the Committee had been "talked into" the compromise by Sir Henry; and the only further allusion I can find to "burdens", was by Sir Henry on p. 271, where he said that if an amendment upsetting the compromise were moved, he would submit another amendment restricting the Senate from amending or touching bills appropriating revenue "or imposing new burdens upon the people."

I cannot find that the phrase was mentioned at all in the convention of 1897-8, when after much debate - in which the talk was of "money bills" without further specification - the 1891 compromise, though fiercely attacked from both sides, was ultimately adhered to. And I cannot find anywhere any suggestion that the section was intended to apply to anything but appropriation and tax bills. On the contrary, in the 1891 Convention Sir Samuel Griffith (at pp. 714-5) said: "As to all laws, except two classes, the rights of the two Houses" (scil. as to amendment) "are absolutely co-ordinate." And he named the two classes - the annual appropriation bill and tax bills.

The above extracts suggest, for what they are worth, that the words were probably those of Parkes; that he regarded them as referring to taxes only; and that Griffith did not regard that provision as a particularly important part of the compromise.

In support of the proposition that the words are also apt words to apply to appropriations, it may be argued that an appropriation of moneys, if followed by expenditure, can only be met out of public moneys, and charged either against the Consolidated Revenue Fund or a Trust Fund; that it thus diminishes the public resources, and must in the end result in a reimbursement by taxation which would otherwise be unnecessary; and therefore that it is equivalent to, and so is in effect, an increased charge or burden on the people, that the public moneys belong in a sense to the people, and a charge or burden on them is to all intent and purposes a charge or burden on the people. Some such arguments, in the case of the Sugar Bounty Bill, were used in 1903 in opposition to the Senate's claim to a right to amend the Bill, and are summarised by Harrison Moore, in his book on the Constitution, p. 149. But the reasoning seems too remote from the text. A charge or burden on the revenue is not in the Parliamentary sense, a charge or burden on the people; it does not act on the people at all, but only on a Fund derived from past charges on the people. And the results suggested, of increased taxation, are altogether speculative. It does not follow from increased appropriation that there will be increased expenditure; nor does it follow from increased expenditure that there will be increased taxation. What the paragraph forbids is an increased charge on the people; a mere appropriation does not constitute such a charge.

Charge or burden in the Context

If that is the natural meaning of the words "charge or burden" read by themselves, is there any compelling reason in context to give them any other meaning?

If the paragraph refers only to proposed laws imposing taxation, why does it not say so straight out, without introducing a new phrase? Besides, there would be no point in forbidding the Senate to amend upwards a proposed law which it may not amend at all.

And even if it were meant to include proposed laws appropriating moneys for other than the ordinary annual services, why not say that plainly?

It seems that if the paragraph is to have any effect at all it must refer to proposed laws other than proposed laws imposing taxation or appropriating moneys. And the words are "any proposed laws", without qualification. The suggestion adverse the Senate's power is that the paragraph refers to proposed laws which, without appropriating money, affect the amount of expenditure.

But to give the paragraph an effect, there is no need to stretch the words "charge or burden". It could equally apply to proposed laws which, without imposing taxation, affect the amount of taxation.

A case the draftsmen may have had in mind is that of a bill not a money bill in any sense, into which the Senate might wish to insert a clause increasing a charge or burden, in the proper sense of the words. To give the paragraph an effect, it is quite unnecessary to stretch the words beyond their natural meaning.

I cannot see that there is anything in the context that requires that.

(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.)

Bill originating in Senate

Independently of the above reasoning, I think that sec. 53 does not apply to bills that originate in the Senate.

The fourth paragraph provides that the Senate may return to the House of Representatives any proposed law which the Senate may not amend. These words certainly suggest that the proposed law has come from the House of Representatives; that is, that the prohibition of amendment only applies to proposed laws that have come from the House of Representatives.

This is in accord with the purpose of the whole section: that in case of a difference between the two Houses, the House of Representatives shall be responsible for the form of the bill though the Senate has a voice as to whether, in that form, it shall become law.

It would be pointless to forbid the Senate to amend its own bill, when it can achieve the same result by withdrawing the bill and re-introducing it with the amendment.

Moreover, any amendment which the Senate may not make it may request the House of Representatives to make. It would be absurd for the Senate to send its own bill to the House of Representatives with a request for amendment.

My answer to the first question asked is, therefore, that in my opinion the Senate may make such an amendment:

(a) because the amendment does not increase a proposed charge or burden on the people; and

(b) because s. 53. does not apply to bills that originate in the Senate.

Does the Bill impose taxation or appropriate moneys?

It clearly does not impose taxation. The matter of appropriation needs further consideration.

Section 81 of the Constitution provides that:

"All revenues or moneys raised or received by the Executive *Government of the commonwealth shall form one* Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth ..."

The National Welfare Fund Act 1943-1945 establishes a Trust Fund (within the meaning of the Audit Act, s.62A) to be known as the National Welfare Fund, and provides that in each financial year there shall be paid out of the Consolidated Revenue Fund, which is appropriated accordingly, certain fixed sums, to be applied for the

purpose of the National Welfare Fund. Moneys standing to the credit of the Fund are to be applied in making such payments as are directed by any law of the Commonwealth to be made from the Fund, in relation to ... welfare or social services.

The Principal Act which the Social Services Consolidation proposes to amend makes detailed provision for different kinds of pensions and benefits. Section 136 of the Act directs that payment of benefits under the Act (except certain expenditure to be made out of moneys appropriated by Parliament for the purpose) shall be made out of the National Welfare Fund.

The Bill provides certain further benefits particularly an endowment of 5/- weekly in respect of a first child.

Neither the Principal Act nor the Bill contains any provision for any appropriation of money from the Consolidated Revenue Fund.

In my opinion, the appropriation, within the meaning of ss. 81 and 53, is by the National Welfare Fund Act, not the Social Services Consolidation Act. The former Act appropriates the money, for a purpose of the Commonwealth, subject to the condition of a further direction before expenditure; and the fact that the further direction is to be by a law of the Commonwealth does not affect the fact that the appropriation is effected by the former Act. See NSW v Commonwealth, (the Surplus Revenue case) 7 CLR 179; Pharmaceutical Benefits case, 71 CLR 237, and cf. Surplus Revenue Act 1908, s.5.

(sgd.) R.R. Garran

13 April 1950

[Re-keyed from original]

APPENDIX E

Letter to Sir Robert Garran from Sir Kenneth Bailey

APPENDIX E

CANBERRA. A.C.T

21 April, 1950.

My dear Sir Robert,

Social Services Consolidation Bill:
Constitution, Section 53
Vol 39, P 98

Many thanks for the Opinion the two questions which we asked about the position of the Senate in relation to the current amendment of the Social Services Consolidation Bill. I was naturally glad to find that you reached, by your own characteristically lucid and learned routes, the same conclusions as those which we ourselves had done.

I have myself always felt strongly that, as a mere matter of language and apart from authority, the phrase "charge or burden on the people" ought not to include even an appropriation, still less a provision for expenditure out of moneys already appropriated. Of course, as you say, the prohibition of upward amendment in the third paragraph must extend to laws which are not included in the prohibition against all amendment, as in the second paragraph. I have always supposed however that this objection can be admitted without having to concede that "charge or burden" includes appropriation. The fact is, or so it seems to me, that the concept of "charge or burden upon the people" is wider than the concept of "laws imposing taxation" in paragraph 2. This is expressly shown by the second sentence in the first paragraph. A provision for the imposition of a pecuniary penalty, or for the payment of fees for licences or services, should, I should think, be regarded as imposing a "charge or burden on the people"; but, as the section itself expressly says, a bill containing such a provision would not necessarily be a "proposed law imposing taxation".

If this analysis is correct, it supplies, in the language of the section itself, some answer to the question which you discuss as to the reason for inserting the third paragraph at all, and also as to the reason for the wide general expression "any proposed law".

Furthermore, if this analysis is correct, it would suggest that there is really nothing in the context of the expression to require the words "charge or burden on the people" to have any wider meaning than its ordinary natural denotation - ie. even to the extent of widening it so as to include appropriation bills.

I have passed on your opinion to the Attorney who was very glad indeed to have it.

With kind regards,

Yours sincerely,

(BAILEY)

Sir Robert Garran, G.C.M.G, K.C.,
22 Mugga Way,
RED HILL, ACT

[Re-keyed from original]

Letter to Senator the Hon R McMullan from the Hon M Duffy MP

21 November 1990

Attorney-General

The Hon. Michael Duffy MP
Parliament House
CANBERRA ACT 2600

90/15078

Senator the Hon Bob McMullan
Parliamentary Secretary
to the Treasurer
Parliament House
CANBERRA ACT 2600

Dear Senator McMullan

I refer to your letter dated 18 October 1990 concerning the recent proposed amendments to the Taxation Laws Amendment (Rates and Provisional Tax) Bill 1990 ('the Bill') moved in the Senate by the Australian Democrats to increase to 60% the marginal rate of income tax on incomes exceeding $100,000.

During debate, the Chairman of Committees was asked to rule whether the amendment should have been worded as a request to the House, on the basis that it dealt with a law 'imposing taxation' within the meaning of s.53 of the Constitution. The Chairman ruled that the amendment was in the appropriate form as it did not deal with the imposition of tax (Hansard, 17 October 1990, p.3231). You have sought my advice in order to clarify views expressed by the Clerk of the Senate on the matter.

The questions and my short answers are:

(a) Q. Was the proposed amendment a proposed law imposing taxation?

A. No.

(b) Q. Is s.53 of the Constitution justiciable?

A. No, except the last paragraph to the extent that the courts would not accept as law a bill that had not been passed by the Senate (unless it had been passed by a joint sitting under s.57).

(c) Q. Was the proposed amendment a proposed law increasing a charge or burden on the people?

A. Yes.

(d) Q. Does the third paragraph of s.53 only refer to appropriations or does it extend to taxes?

A. It extends to taxes.

Section 53 of the Constitution

Section 53 provides:

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

Question (a)

The proposed amendment in question was an amendment to the Income Tax Rates Act 1986. That Act is not an act 'imposing' taxation within the meaning of the first two paragraphs of s.53: it merely sets rates of tax that are imposed by the Income Tax Act 1986. Similarly, the proposed amendments to the Income Tax Assessment Act 1936 were not amendments to a proposed law 'imposing' taxation.

Question (b)

Section 53 is concerned with 'proposed laws' - that is, bills still under consideration by the Parliament. The first four paragraphs set out certain rules, obligations or limitations to be observed with respect to proposed laws and which are addressed to the Parliament. The view has been consistently taken since Federation that these rules, being concerned with parliamentary procedures, are not justiciable: see Osborne v The Commonwealth (1911) 12 CLR 321 at 336, 352, 355. The resolution of any disputes over the interpretation of these provisions is, therefore, in the final analysis, a matter for the Houses themselves.

The Clerk of the Senate states, on page 2 of his memorandum dated 18 October 1990, that s.53 'may be regarded as justiciable in part'. It is not entirely clear what is intended by that statement. If it is directed to the final paragraph of s.53, I agree with it 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 (see also s.58).

Questions (c) and (d)

There is some controversy as to the ambit of the third paragraph of s.53. The existing Senate practice (which is reflected in the memorandum from the Clerk) is based on the view that the paragraph is intended only to prevent the Senate increasing an appropriation and that it does not relate to bills dealing with taxation. The Clerk states that 'taxation bills ... are the subject of a different provision', by which he presumably means the second paragraph of s.53 (see p.2 of his memorandum). However, that is not an accurate statement unless the expression 'taxation bills' is limited to bills for imposing taxation. (A similar statement appears in Quick and Garran, Annotated Constitution of the Commonwealth (1900), p.671, who seem to assume that the second paragraph of s.53 applies to all bills that, as a matter of law, result in an increase in taxation. However, in 1950 Sir Robert Garran advised that the third paragraph of s.53 did apply to laws increasing rates of taxation imposed by another Act.)

As a matter both of ordinary language and constitutional principle, I see no reason why the third paragraph of s.53 should not apply to amendments of bills dealing with taxation (though not 'imposing' it) where the amendments would increase the rate of taxation that is imposed by another Act. As I have said, that view was expressed in 1950 by Sir Robert Garran. It was also supported by another eminent Solicitor-General, Sir Kenneth Bailey. Ultimately, as I have indicated above, the interpretation of the third paragraph is a matter to be determined by the Houses themselves.

Yours sincerely

MICHAEL DUFFY

[Re-keyed from original]

Letter to Mr Daryl Melham MP from Hon. K C Beazley MP and Senator the Hon. J Faulkner

APPENDIX G

RECEIVED
20 OCT 1995

DEPUTY PRIME MINISTER
MINISTER FOR FINANCE
LEADER OF THE HOUSE OF
REPRESENTATIVES

MINISTER FOR THE ENVIRONMENT,
SPORT AND TERRITORIES
MANAGER OF GOVERNMENT
BUSINESS IN THE SENATE

18 OCT 1995

Mr Daryl Melham, MP
Chair
House of Representatives Standing
Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Melham

You sought our response to a draft recommendation of the House of Representatives Standing Committee on Legal and Constitutional Affairs that bills which increase the rate or incidence of taxation should not be originated in the Senate.

At the outset, we would make the point that, as your inquiry has shown, there can be a number of possibly equally legitimate interpretations of terms such as "a bill which increases the rate or incidence of taxation". It is not clear what mechanism would be put in place to implement the prohibition on the introduction in the Senate of bills falling into that category, but we would not wish the result to be a new area of disputed interpretation.

In terms of the effect of the proposed prohibition on the Government's legislative program, the impact numerically would not be great, but would remove some flexibility in the distribution of legislation between the two Houses.

Without wishing to pre-empt a Government response to the Committee's final report, it would seem possible as an alternative to the prohibition recommended, that a non-binding practice, supported by advice from the Office of Parliamentary Counsel, could be adopted which might reduce the number of cases in which disputes between the Houses were likely to arise without providing a new source of conflict.

We understand that the Senate Legal and Constitutional References Committee is also conducting an inquiry into the interpretation and application of the third paragraph of section 53 of the Constitution and is expected to report in October. The Government

would like to be able to consider the recommendations from both committees before finally responding. It would be preferable, if thought appropriate, if the two committees could maximise areas of agreement before finalising their reports.

Yours sincerely

KIM C BEAZLEY MP

JOHN FAULKNER

APPENDIX H

Final report recommendations compared with those in the exposure draft

APPENDIX H

Final report recommendations compared with those in the exposure draft

Final report recommendations	Exposure draft recommendations (recommendations which have been altered in the final draft are in shaded boxes)
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). (rec.1)	*On balance, the Houses should continue to regard the third paragraph of section 53 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. (rec. 4)*
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. (rec. 2)	*The third paragraph should be regarded as applicable to a bill containing a standing appropriation, where a Senate alteration to the bill would increase expenditure under the appropriation. (rec. 8)*
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. (rec. 3)	*Even though 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 a standing appropriation. (rec. 9)*
A bill which increases expenditure under a standing appropriation should not be originated in the Senate. (rec. 4)	*A bill which increases expenditure under a standing appropriation should not be originated in the Senate. (rec. 10)*
The third paragraph of section 53 should be regarded as applicable to tax and tax-related measures. (rec. 5)	*The third paragraph of section 53 should be regarded as applicable to tax and tax-related measures. (rec. 1)*
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. (rec. 6)	*Fines, penalties, licence fees and fees for services should not be regarded as charges or burdens for the purposes of the third paragraph of section 53. (rec. 2)*
Bills which affect the tax base or tax rates should be originated in the House of Representatives. (rec. 7)	*A bill which increases the rate or incidence of taxation should not be originated in the Senate. (rec. 3)*
The third paragraph of section 53 applies 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. (rec. 8)	*The third paragraph of section 53 should be regarded as applicable only to bills that have originated in the House of Representatives. (rec. 12)*

The Houses should 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. (rec. 9)	
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. (rec. 10)	*For the purpose of determining whether an alteration to a bill moved in the Senate increases a proposed charge or burden, the alteration must be compared to the level of the charge or burden proposed by the bill and not the existing level of the charge or burden. (rec. 6)*
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. (rec. 11)	*Where a bill originated in the House of Representatives does not itself propose a charge or burden, the Senate should not amend the bill to increase the rate or incidence of taxation. (rec. 7)*
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. (rec. 12)	*In relation to appropriations, taxes and other charges, a request should be required where an alteration to a bill is moved in the Senate which will make an increase legally possible (even if the net effect of the alteration is a decrease). (rec. 11)*
	The term 'proposed charge or burden' should be interpreted to include not only an increase in an existing charge or burden, but also a decrease in an existing charge or burden. (rec. 5)
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. (rec. 13)	*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. The Committee further recommends that there should be consultation between the Senate Legal and Constitutional References Committee and this Committee in order to determine how negotiations in relation to the compact will proceed. (rec. 13)*