THE PARLIAMENT OF
THE COMMONWEALTH OF AUSTRALIA

The Third Paragraph of Section 53 of the Constitution

Exposure Draft

Circulated by the
House of Representatives Standing Committee on
Legal and Constitutional Affairs

MARCH 1995

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Foreword

The Committee is pleased to present this exposure draft of its report on the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution. Given the complexity and the number of issues raised, the Committee has decided to table an exposure draft before presenting a final report on the reference.

The Committee views the exposure draft as a means of further consultation before finalising its views. Further consultation can only increase the possibility of both Houses negotiating an acceptable mechanism for resolving future disputes in this area. The views in the exposure draft do not necessarily represent the Committee's final views. However, the Committee is confident that its recommendations can form the basis of a workable agreement.

A multitude of issues have been raised by the third paragraph of section 53 of the Constitution. The Committee published an issues paper on 1 September 1994. The paper detailed the issues the Committee intended to examine in its inquiry into the paragraph. Following publication of the issues paper, many additional issues were raised in submissions and during public hearings.

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

However, while keeping this ultimate objective in view, it became apparent that the various criteria cannot be accorded equal weight in relation to each issue. The Committee has focussed on upholding the broad policy of section 53 (that is, preserving the financial initiative of the House of Representatives) and preserving current parliamentary practices. This approach is not inconsistent, but rather it is a practical approach designed to arrive at a sensible and workable view of the third paragraph of section 53.

The Committee recognises that its recommendations may not avoid all problems concerning the application and interpretation of the paragraph, but it has attempted to deal with the issues raised by the issues paper and the issues raised in evidence.

In the exposure draft, the Committee recommends that the third paragraph of section 53 should be regarded as applicable to tax and tax-related measures. It also recommends that the Houses 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). The Committee also recommends that bills which increase the rate or incidence of taxation should always be originated in the House of Representatives. The Committee's recommendations are outlined in a flowchart in chapter 12.

The exposure draft proposes that a compact, concerning the interpretation and application of the third paragraph of section 53, be made between the Houses. A draft statement of principles for inclusion in the proposed compact is outlined in chapter 13. While the Committee suggests that its recommendations could from a useful basis for any compact between the Houses, it recognises that both Houses will need to be prepared to make concessions to reach a workable agreement.

The Committee welcomes any comments on its exposure draft. Comments should be forwarded to the Committee Secretariat, Parliament House, Canberra by 3 April 1995.

Daryl Melham
Chair

6 March 1995

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Appendices

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Section 53 of the Constitution

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

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

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

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Terms of reference

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

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

Summary and recommendations

The inquiry

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

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

The Senate Legal and Constitutional References Committee has a similar reference and the Senate has agreed to permit its committee to confer with the House Committee.

2. The reference was made as a result of a dispute between the Houses concerning whether Senate alterations to the Taxation Laws Amendment Bill (No. 4) 1993 should be made in the form of requests or amendments.

3. Section 53 of the Constitution was part of a political compromise negotiated at the Constitutional Conventions of the 1890s. Such a compromise was necessary due to the conflicting principles of responsible government and federalism. These conflicting requirements led to a political compromise whereby the Senate would not have the power to introduce or amend 'money bills', but could request the House of Representatives to amend those bills.

4. The broad purpose of section 53 is to preserve the financial initiative of the House of Representatives. The House of Representatives has an exclusive right of initiation in relation to money matters and the Senate has the power of veto. The financial initiative rule is regarded as a safeguard against unrestrained and politically competitive financial proposals by members of Parliament who do not have the responsibility of government. Preservation of the financial initiative of the House of Representatives is a principle which all witnesses and participants appeared to support.

Scope and structure of the report

5. The exposure draft begins by placing the third paragraph of section 53 in its historical context. This is followed by a discussion of whether section 53 is justiciable. The Committee then considers whether the third paragraph of section 53 applies to tax and tax-related burdens and determines how bills that increase the rate or incidence of taxation should be treated. A discussion of issues relating to whether the third paragraph applies to appropriation and expenditure bills then follows. The Committee also considers the meaning of the expression 'proposed charge or burden', and the relevance of that expression to bills that contain appropriation clauses and bills that do not contain such clauses. The Committee then details the tests that can be applied to determine whether an amendment will increase the proposed charge or burden. The exposure draft concludes by discussing the possibility of a compact between the Houses concerning the interpretation and application of the third paragraph of section 53.

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

7. The Committee recognises that, in order for a compact to be drafted, both Houses will need to be prepared to make concessions to reach a workable agreement. The Committee emphasises that the views expressed in the exposure draft do not represent its final views on the matter. Consequently, the Committee would welcome comments on the exposure draft.

Historical perspective (chapter 2)

8. The Committee considers the third paragraph of section 53 in its historical perspective by dividing the history of the paragraph into two stages: the development of the Constitution through the 1890s until the final draft of the Constitution bill and the post-1901 parliamentary history of the third paragraph. The first stage identifies two motives of the framers of the Constitution for promoting the financial initiative of the House of Representatives. First, it would have defied the principles of good government to give the Houses equal powers in

relation to money bills and secondly, the House representing the people should have some powers that are not available to the House representing the States.

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

Justiciability (chapter 3)

10. The Committee discusses the traditional view that section 53 is not justiciable and cites authorities in support of that view. The Committee also examines the factors that may support an alternative view, that is, that section 53 may be justiciable. Those factors include the declining persuasive value of relevant precedents, the interrelationship between sections 53, 54 and 57, the increasing emphasis on principles of responsible government and submissions and judgments in recent High Court cases. The Committee concludes that the third paragraph of section 53 is unlikely to be regarded as justiciable by the courts.

The Committee's approach (chapter 4)

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

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

Taxation (chapter 5)

13. The Committee traces the history of the third paragraph of section 53 in relation to taxation. A statement by Sir Henry Parkes during the Convention debates that all taxes are burdens on the people is the starting point. The indirect reference to taxes in relation to section 53 in Quick and Garran's treatise, *Annotated*

Constitution of the Australian Commonwealth, is noted. The 1950 opinion of Sir Robert Garran that the third paragraph applies to 'tax bills that do not impose taxation' is also outlined, as is the 1990 opinion of the then Attorney-General, the Hon Michael Duffy, which supports Sir Robert Garran's earlier opinion. Mr Duffy concluded that the third paragraph applied to amendments to bills dealing with taxation (though not 'imposing' it) where the amendments would increase the rate of taxation that is imposed by another Act.

Recommendation 1

The Committee recommends that the third paragraph of section 53 should be regarded as applicable to tax and tax-related measures. (p. 59)

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

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

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

Recommendation 2

The Committee recommends that 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. (p. 64)

Increases in the rate or incidence of taxation (chapter 6)

17. The Committee then examines bills which increase the rate or incidence of taxation. There has been considerable debate as to whether such bills impose taxation. It appears clear that a bill which increases the rate or incidence of taxation (and is expressed to impose the resulting, additional tax) is a proposed law imposing taxation for the purposes of section 53 of the Constitution. The central issue, therefore, is whether a bill that increases the rate or incidence of tax (where that tax is expressed to be imposed in another Act) is a proposed law imposing taxation, for the purposes of section 53.

18. If a bill which increases the rate or incidence of taxation is viewed as a law imposing taxation, then the first and second paragraphs of section 53 operate to prevent the Senate originating or amending the law at all. If a bill which increases the rate or incidence of taxation is not viewed as a law imposing taxation, then the law is subject to the third paragraph of section 53 and the Senate cannot amend it to increase any proposed charge or burden on the people.

19. The Committee identified a number of options that are open to it in dealing with this issue. These options include:

(a) adopting the High Court's view that a bill expanding a tax base is not a law imposing taxation under section 55 and applying that view to bills which increase the rate or incidence of taxation under section 53;

(b) disregarding the High Court's view in relation to section 55 and giving a wider meaning to the expression 'imposing taxation' in section 53;

(c) treating the expression 'imposing taxation' *as if* it had that wider meaning; and

(d) recommending that a practice be established whereby bills that increase the rate or incidence of taxation cannot be originated in the Senate.

20. If a bill which increases the rate or incidence of taxation is classified as a bill that does not impose taxation, it can be originated in the Senate. It would be illogical if that bill could not be amended in that chamber even if the Senate amended the bill so as to increase the proposed charge or burden on the people in apparent contravention of the third paragraph of section 53. However, a Senate amendment of that kind is inconsistent with the broad principle of section 53, that is, preserving the financial initiative of the House of Representatives. For that reason, the Committee declines to take a view on the meaning of the expression 'imposing taxation' and supports option (d).

Recommendation 3

The Committee recommends that a bill which increases the rate or incidence of taxation should not be originated in the Senate. (p. 81)

Note: See recommendation 7.

Appropriation and expenditure (chapter 7)

21. In *Annotated Constitution of the Australian Commonwealth*, Quick and Garran expressed the view that the third paragraph applied to appropriation bills. However, in his 1950 opinion, Garran appeared to change his mind and argued that the third paragraph did not apply to appropriation bills. Parliamentary practice treats the third paragraph as applying to appropriation bills. The Committee does, however, outline a number of arguments that can be in raised in support of the proposition that the third paragraph does not apply to appropriation and expenditure bills.

22. The Committee considers that the Houses should continue to adhere to existing parliamentary practice. However, the Committee would particularly welcome comment on whether appropriation and expenditure measures should be subject to the third paragraph of section 53.

Recommendation 4

The Committee recommends that, 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). (p. 88)

'Proposed charge or burden' (chapter 8)

23. The Committee discusses whether a 'proposed' charge or burden should be interpreted literally to include, not only a bill that increases an existing charge or burden, but also a bill that decreases an existing charge or burden. The Committee agrees with the literal interpretation whereby a reduction in an existing charge or burden is regarded as a proposed charge or burden.

Recommendation 5

The Committee recommends that 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. (p. 95)

24. The conflicting views on this issue arise from the use of differing benchmarks to determine whether there has been an increase in the proposed charge or burden. Some regard the benchmark as the existing level of the charge or burden, others the level of the charge or burden proposed by the bill.

Recommendation 6

The Committee recommends that, 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. (p. 95)

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

Recommendation 7

The Committee recommends that, 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. (p. 99)

Note: See recommendation 3.

Expenditure under standing appropriations (chapter 9)

26. Parliamentary practice regards the third paragraph as applicable to a bill containing a standing appropriation, if a Senate amendment to the bill would increase expenditure under the appropriation. The Committee considers that this practice should continue.

Recommendation 8

The Committee recommends that 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. (p. 105)

27. It is current practice to treat the third paragraph as applicable to a bill that does not itself contain an appropriation, if a Senate alteration to the bill would increase expenditure from a standing appropriation.

Recommendation 9

The Committee recommends that, 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. (p. 110)

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

Recommendation 10

The Committee recommends that a bill which increases expenditure under a standing appropriation should not be originated in the Senate. (p. 111)

Determining whether an amendment will increase the proposed charge or burden (chapter 10)

29. In this chapter, the Committee considers two issues: first, the determination of whether there is a proposed charge or burden in a bill and secondly, the test that should be applied to determine whether a Senate amendment increases the charge or burden.

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

Evidently, the area of controversy concerns those bills that will not 'necessarily, clearly and directly' result in increased expenditure.

31. A test of 'availability' has been proposed as an alternative to the tests discussed above. This test involves considering whether the alteration would increase the amount available for expenditure, regardless of whether any of the extra amount is likely to be spent. A variation of that test was suggested as a possible means of resolving the dispute. This test can be applied in relation to appropriations, taxes and other charges, and it involves considering whether an alteration makes an increase legally possible even if the net effect of the alteration is a decrease (in the expenditure available under an appropriation or the total tax or charge payable). The Committee favours this formulation.

Recommendation 11

The Committee recommends that, 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). (p. 124)

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

Further issues (chapter 11)

33. Some issues that were not the subject of a great deal of evidence and which have not been dealt with in earlier chapters are discussed in this chapter. Those issues include whether the third paragraph applies to bills originated in the Senate, whether the Senate can request an amendment to a bill that it can amend itself and whether the Senate can press a request for an amendment.

34. There is a widely held view that the third paragraph should not apply to bills that have originated in the Senate. This view is based on the word 'return' in the

fourth paragraph of section 53. The fourth paragraph provides that the Senate may return to the House of Representatives a proposed law which the Senate may not amend and request the omission or amendment of any provisions. It would be inappropriate to refer to the return of a bill to a particular House if the bill had never been in that chamber.

Recommendation 12

The Committee recommends that the third paragraph of section 53 should be regarded as applicable only to bills that have originated in the House of Representatives. (p. 128)

35. If the Senate agreed to request the House to amend bills whenever controversy as to whether a Senate alteration should be a request or an amendment arose (even when the Senate believes it could amend the bill itself), the problems surrounding the application of the third paragraph may be remedied. However, there is a threshold question as to whether the Senate can request amendments where the Constitution does not require that requests be made. It might be argued that if the Senate can amend a bill, it should not be able to opt instead to request an amendment in order to retain its ability to veto the bill altogether. It appears open to the House to refuse to consider the request and return the bill to the Senate. There may also be implications in relation to section 57 of the Constitution if the Senate makes a request when it could amend itself. If the Senate makes a request when it could amend the proposed law, that may be considered a failure to pass the proposed law and a failure to pass may invoke the double dissolution procedure in certain circumstances.

36. The House of Representatives has never conceded the Senate's right to press a request. The Clerk of the Senate argues that the Senate has successfully pressed requests on many occasions and suggests that if the framers of the Constitution had intended that the Senate be prevented from pressing its requests, a prohibition would have been included in the Constitution. The Committee agrees with the view of Sir Isaac Isaacs that once the Senate has made a request in relation to a particular issue, its power of suggestion is exhausted as far as that stage is concerned (where 'stage' refers to the recognised stages in the passage of a bill

through the chamber). Any subsequent request at the same stage must relate to a different substantive issue. A second request on the same issue can be made provided that the request is made at a different stage. The possibility that the pressing of requests may invoke the process outlined in section 57 of the Constitution should also be noted in this context.

Overview (chapter 12)

37. The criteria which the Committee has used in making decisions on the issues are further discussed in the overview. The Committee has sought to adhere to the purpose of section 53, that is, preserving the financial initiative fo the House of Representatives. The Committee has consistently referred to the financial initiative rule in framing its recommendations. The Committee has also often sought to preserve existing parliamentary practices.

38. While the Committee has relied on some criteria more frequently than others, this is not an inconsistent approach. Rather it is apparent there needs to be compromise of one or more of the relevant criteria to arrive at a sensible and practical interpretation of the third paragraph of section 53.

39. The Committee's recommendations are represented in a flowchart at the end of chapter 12. The flowchart is also reproduced at the end of the summary.

Compact (chapter 13)

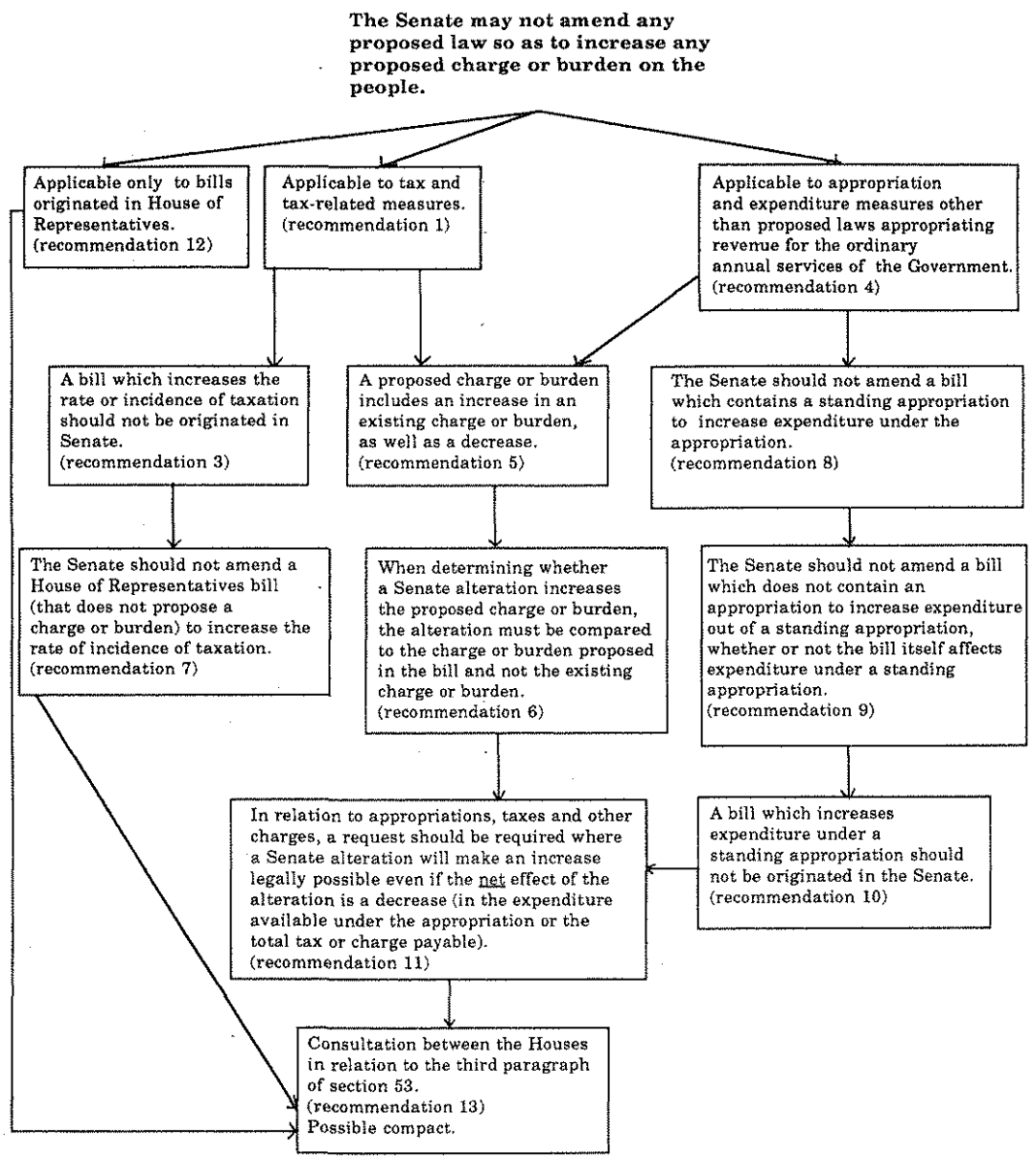
40. Most witnesses and participants in the seminar appeared to think that a compact between the Houses was desirable, although there were varying levels of optimism concerning the likelihood of both Houses agreeing to such a compact.

Recommendation 13

The Committee recommends that there should be a compact between the Houses in relation to the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution. 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. (p. 148)

41. Just as section 53 of the Constitution was originally drafted as a compromise, both Houses will need to be prepared to make concessions to reach a workable agreement. The Committee has decided to circulate its exposure draft, so that its recommendations can be debated by the Houses prior to the preparation of drafting instructions for the compact. The Committee is confident, however, that the recommendations contained in the exposure draft, and the draft statement of principles for inclusion in the proposed compact, can form the basis of a workable agreement.

Flowchart of the Committee's Recommendations



Note:
Recommendation 2 is not contained in the flowchart because the subject matter relevant to that recommendation are fees to which the third paragraph does not apply. Recommendation 2 provides that fines, penalties and fees for licences or services are not subject to the third paragraph.

Chapter 1 Introduction

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

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

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

1.1 Terms of reference

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

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

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

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

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

A similar reference had previously been made by the Senate to its committee on Legal and Constitutional Affairs, although the reference was limited to bills dealing with taxation. Those terms of reference were later amended to read the same as the terms of reference of the House Committee. The Senate has also agreed to permit its committee to confer with the House Committee.[2]

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

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

1.2 The Committee's inquiry

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

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

1.2.3 The Committee also held a seminar in Canberra on 28 October 1994. The participants in that seminar are also listed in Appendix B. A table outlining the views of the witnesses on various issues is at Appendix C.

1.3 Scope of the exposure draft

1.3.1 The key objectives of the Committee's exercise have been to promote discussion between the Houses and to provide a report which may form the basis of a compact to be settled between the two chambers. With these objectives in mind, the Committee has decided that it will initially table an exposure draft. This will allow the Parliament to consider the Committee's draft report and it will permit further contributions to be taken into account before the Committee tables its final report later in 1995.

1.3.2 The exposure draft begins by placing the third paragraph of section 53 in its historical context. In this regard, a comment by Sir Samuel Griffith during the Convention debates is useful to bear in mind. He stated that:

> ...[t]here must necessarily be clauses in a constitution which are ambiguous. Who can say what will be the development in the course of some thirty or fifty years of some of the clauses we are now passing? Who can tell what will be the precise manner in which these provisions will work out? Who can tell what will be the practical operation of them?[3]

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

In referring to the development and the practical operation of the provisions, the comment suggests that the clauses of a constitution may not necessarily be consistent and, when interpreting section 53 of the Constitution, particular weight may be accorded to any parliamentary practices that have evolved.

1.3.3 After considering the third paragraph in its historical context, the Committee goes on to discuss the issue of justiciability. If section 53 is justiciable, the High Court will be able to pronounce on issues relevant to the interpretation of the third paragraph. If, however, section 53 is not justiciable, the Houses are free to adopt their own interpretation. As the Committee considers that section 53 is not justiciable at this stage, the exposure draft then proceeds to outline the Committee's interpretation of the third paragraph of section 53.

1.3.4 In chapter 4 the Committee identifies the criteria it has used in analysing the evidence. These criteria include the plain meaning of the words of the third paragraph of section 53 and the policy underlying that paragraph, the drafting history of the section, Parliamentary practice, the opinions of respected lawyers and the workability of various interpretations. Using those criteria for guidelines, the Committee considers that it should endeavour to formulate a practical interpretation of the third paragraph of section 53 rather than attempt to discover some pre-existing interpretation of the section (refer to paragraph 4.4.1).

1.3.5 The Committee divided issues related particularly to taxation from issues related particularly to expenditure. Chapter 5 deals with whether the third paragraph applies to tax and tax-related burdens. The Committee answers this issue in the affirmative and then, in chapter 6, determines how bills that increase the rate or incidence of taxation should be treated.

1.3.6 The Committee then considers whether the third paragraph of section 53 applies to appropriation and expenditure bills. The exposure draft then moves on to a discussion of the meaning of the expression 'proposed charge or burden' - an issue that is relevant to both taxation and expenditure. Chapter 9 continues to examine that issue and its relevance to parliamentary practices concerning bills that contain appropriation clauses and bills that do not contain such clauses.

1.3.7 The exposure draft details the tests that can be applied to determine whether an amendment will increase the proposed charge or burden. Those tests include the 'necessary, clear and direct' test, the 'probable, expected, intended effect' test and the 'availability' test. The exposure draft concludes by discussing the

possibility of a compact between the Houses concerning the interpretation and application of the third paragraph of section 53.

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

- whether the third paragraph of section 53 applies to tax and tax-related measures;
- whether the third paragraph applies to proposed laws relating to expenditure and appropriation;
- the interpretation of the expression 'proposed charge or burden';
- the test which should be applied to determine whether an amendment will increase the proposed charge or burden; and
- the content of any proposed compact.

A multitude of issues were raised during the Committee's inquiry into the third paragraph of section 53. The report focuses on those issues debated during the public hearings. Other issues that are not dealt with so extensively in the report are referred to in chapter 11.

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

1.4 Conflicting principles and the purpose of section 53

1.4.1 Sections 53-55 of the Constitution were a political compromise negotiated at the Constitutional Conventions of the 1890s. Such a compromise was necessary due to the conflicting principles of the Westminster system of responsible government and American notions of federalism. The Westminster system of responsible government placed greater responsibility for financial matters with the House of Commons as opposed to the House of Lords because the latter was not an

elected body.[4] However, as the Australian system of government was also to be a federation, it would have an elected upper house to represent the interests of the States. The conflicting requirements of responsible government and federation led to a political compromise whereby, in summary, the Senate would not have the power to originate[5] or amend money bills, but could request amendments of such bills.

1.4.2 The broad purpose of section 53 is to preserve the financial initiative of the House of Representatives. The Clerk of the Senate, Mr Harry Evans, agrees that section 53 is designed to protect the financial initiative of the House of Representatives.[6] The House of Representatives has an exclusive right of initiation in relation to money matters and the Senate has the power of veto.[7] The financial initiative rule is regarded as a safeguard against unrestrained and politically competitive financial proposals by members of Parliament who do not have the responsibility of government.[8]

1.5 A non-contentious interpretation of section 53

1.5.1 The first paragraph of section 53 of the Constitution prohibits proposed laws appropriating revenue or moneys, or imposing taxation, from being originated in the Senate. An appropriation of revenue or money is an authorisation of government expenditure made by legislation. There are two types of appropriations - standing and fixed appropriations. Standing appropriations are open-ended and do not specify a monetary limit on expenditure. An example of a standing appropriation is in the *Social Security Act 1991*. As there is a standing appropriation in that Act, any benefits or allowances payable under that Act are automatically funded from the Consolidated Revenue Fund. A fixed appropriation, as the name suggests, specifies

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

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

6 *Submissions*, p. S65.

7 Odgers J.R., *Australian Senate Practice* (sixth edition), Royal Australian Institute of Public Administration, Canberra, 1991, p. 564.

8 ibid., p. 568.

the amount of expenditure authorised. Examples of fixed appropriations are the annual Appropriation bills passed in every budget. Terms relevant to appropriation and expenditure are further defined and discussed in chapters 7 and 9.

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

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

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

These issues are further discussed in chapter 6.

1.5.3 The effect of the second paragraph is that proposed laws imposing taxation or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government may not be amended in the Senate. The main Appropriation Bill (Appropriation Bill (No.1)) for the year provides for the ordinary annual services of the Government, and a second appropriation bill contains provision for expenditure not appropriately included in the main bill.[9] The second appropriation bill can be amended in the Senate. In 1965 a compact between the Government and the Senate provided that a number of items of expenditure were not appropriations for the ordinary annual services of the Government. Those items were the construction of public works and buildings, the acquisition of sites and buildings, items of plant and equipment which are clearly definable as capital expenditure, grants to the States under section 96 of the Constitution and new policies not previously authorised by special legislation.[10]

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9 Browning A. (ed.), *House of Representatives Practice*, Second edition, AGPS, Canberra, 1989, p.420.

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

1.5.4 As previously stated, the third paragraph prevents the Senate amending any proposed law to increase the proposed charge or burden on the people. Those classes of proposed laws to which the third paragraph applies are at issue in this inquiry. The Committee discusses whether the third paragraph applies to tax-related burdens in chapter 5 and whether the third paragraph applies to appropriation measures in chapter 7.

1.5.5 Tax-related burdens may include increases in the rate or incidence of taxation and variations in deductions. A bill that increases the rate of taxation is a bill which has the effect of increasing the amount of an existing tax that a taxpayer must pay. Bills that increase the incidence of taxation include bills that enlarge the tax base and bills that reduce deductions. A bill enlarges the tax base by, among other things, expanding the class of taxpayers subject to the tax or changing the circumstances under which the taxation is payable (for example, reducing the time in which tax is payable). Terms relevant to taxation are further defined and discussed in chapters 5 and 6.

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

1.6 The broader principles reflected in section 53

1.6.1 It has been suggested that the role of the Senate, particularly in relation to the House of Representatives and in relation to federation and the States, is central to the Committee's reference.[11] Dr Thomson submitted that the issue can be examined through the lens of the 'Territorial Senators' Case'.[12] That case considered the constitutionality of electing Senators from the territories. The *Senate (Representation of Territories) Act 1973* increased the number of Senators from 60 to 64, by adding two senators each from the Northern Territory and the Australian Capital Territory. The validity of the increase was based on section 122 of the Constitution which provides that the Parliament may allow the representation of a

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

12 *Western Australia* v. *The Commonwealth* (1975) 134 CLR 201.

territory in either House to the extent and on the terms which it thinks fit. Western Australia, New South Wales and Queensland challenged this Act, relying on section 7 of the Constitution which provides that the Senate shall be composed of senators from each State. The Act was one in a package of bills where section 57 of the Constitution was in issue.

1.6.2 The majority on the issue (McTiernan, Mason and Jacobs JJ) held that the creation of territorial senators (with full voting rights) was justified by the clear words of section 122 and that the *Senate (Representation of Territories) Act 1973* was valid. Murphy J agreed and argued that it would be contrary to the democratic theme of the Constitution if Parliament was not able to allow representation by membership in either House to territories at the time and on the terms which the Parliament considers appropriate.[13] The minority view was that in order to reconcile section 122 with preserving the Senate as a 'States' House', it would have to be read down to authorise representation with no voting rights.[14]

1.6.3 There is a number of possible broad policy principles, some of which are conflicting, that may underpin the third paragraph of section 53 of the Constitution. Dr Thomson suggested that the majority and minority judgments in the 'Territorial Senators' Case' can be interpreted as reflecting those contrasting principles. He submitted that the minority emphasised and gave primacy to the Senate as representing States and their interests. He made reference to the equal number of Senators from the original States and to the role of the State Parliaments in filling casual Senate vacancies.[15]

1.6.4 Dr Thomson went on to suggest that the majority gave primacy to section 122 of the Constitution and emphasised the democratic nature of the system of representative government embodied in the Constitution. Dr Thomson submitted that a majority of the judges in that case suggested that the role of the Senate as a States' house may have been the drafters' intention, but the Senate has not operated that way in practice. Rather it operates chiefly as a house of review and as a house of the national parliament.[16]

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

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

15 Dr J. Thomson, *Transcript*, p. 98.
Note that, following 1975, there was a Constitutional amendment which now requires State parliaments to appoint a person to a casual Senate vacancy who is of the same political persuasion as the previous incumbent.

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

1.6.5 Whether one takes a broad view or a narrow view, of the restriction on the powers of the Senate embodied in the third paragraph of section 53, may be influenced by one's perception of the role of the Senate in the Constitutional framework. Emphasis on the importance of the role of the Senate, whether as a States' House or a House of Review, may lend support to a relatively narrow view of the restriction. That would allow the Senate wider powers to check the powers of the House of Representatives.[17]

1.6.6 Emphasis on the role of the House of Representatives as the people's House where the Government is formed may lend support to a broader view of the restrictions on the Senate.[18] These generalities about the relative importance of the respective roles of the two Houses lie behind a consideration of the third paragraph of section 53. However, conclusions concerning the interpretation of the third paragraph require more detailed consideration.

1.7 Impetus for the current inquiry

1.7.1 There are diverse perspectives concerning the application of the provisions of section 53. One perspective, supported by Mr Evans, is that the provisions of section 53 are essentially procedural and simply determine whether alterations initiated by the Senate should take the form of Senate amendments or requests to the House of Representatives.[19] Another perspective is that the interpretation and application of the third paragraph of section 53 is a matter of fundamental substantive importance, as it preserves the financial initiative of the House of Representatives as intended by the framers of the Constitution. Proponents of this view suggest that to describe the provisions of section 53 as essentially procedural tends to downplay their importance, as they are requirements of the Constitution which must be respected.[20] Mr Evans responded that the characterisation of the provisions as procedural does not diminish the significance of the paragraph and a procedural rule is not necessarily an insignificant rule.[21]

17 See ibid., p. 100.

18 See ibid., p. 101.

19 Papers presented to The Senate and the House of Representatives, *Constitution, Section 53 Financial legislation and the Houses of the Commonwealth Parliament.* p.v.

20 Mr L. Barlin, *Submissions*, p. S185.

21 MR H. Evans, *Submissions*, p. S350.

1.7.2 There have been a number of instances since Federation where the third paragraph of section 53 has been in issue and a large number of disputes appear to have arisen since 1981 (refer to paragraph 2.12). In each case the Senate has made an amendment which the House considered should have taken the form of a request for an amendment.

1.7.3 A dispute concerning the Taxation Laws Amendment Bill (No. 4) 1993, was the catalyst for the current inquiry. The Senate proposed

> ... amendments to the income tax provisions that provide deductions for expenditure incurred by life insurance companies and registered organisations in obtaining premiums which are excluded from assessable income.[22]

The Senate also proposed an amendment that would require taxpayers to pay instalments earlier than before, or to pay larger amounts. This amendment would either reduce the interest a taxpayer earned on invested money used to meet the new instalment obligations, or would increase the interest payable on borrowed moneys used for that purpose.[23] The Attorney-General's Department advised that it could reasonably be argued that this amendment could fall within the third paragraph of section 53.[24]

1.7.4 The Clerk of the Senate submitted that the argument appeared to be that an increase in a proposed charge or burden is anything which is regarded as burdensome to the public in a broad sense and that this type of argument goes much too far.[25]

1.7.5 On 24 March 1994 the Senate sent the bill back to the House of Representatives with the attached message:

> ... and the Senate declares that its agreement, on the motion of the government, to make requests to the House of Representatives for amendments of the bill does not indicate that the Senate considers that requests are appropriate or that the Senate has formed a conclusive view on the application of section 53 or 55 to the bill.[26]

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

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

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

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

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

That message prompted referral of the interpretation of the third paragraph of *section 53 to this Committee.*

1.7.6 Recognition of the problems associated with the third paragraph of section 53 by Members and Senators is evident from the referral of the matter to the Standing Committees for Legal and Constitutional Affairs in both Houses. That referral and the disagreements that have occurred in relation to the paragraph suggest that there is a need for detailed study of the application and interpretation of the paragraph, possibly with a view, if agreement cannot be reached on the legal issues, to formulating a procedure for dealing with disputes as they arise.

1.7.7 The Taxation Laws Amendment Bill (No.3) 1994 is a recent example of a dispute concerning the application of the third paragraph of section 53. The Senate made amendments dealing with the definition of qualifying reductions in the *Income Tax Assessment Act 1936* (additional amendment No. 2) and with provisional tax on estimated income (additional amendment No. 3). The Attorney-General's Department took the view that the first amendment was subject to the third paragraph of section 53 and the Office of Parliamentary Counsel, referring to principles derived from previous advice of the Attorney-General's Department, considered that the second amendment was also subject to the third paragraph.[27]

1.7.8 The Speaker made a statement to the House of Representatives that there was doubt as to whether it was open to the Senate to propose the alterations (in additional amendments No. 2 and 3) as amendments. The Speaker also stated that additional amendment No. 7, which amended income tax regulations in respect of PAYE arrangements, may also be considered to increase a charge or burden on the people.[28] The House, having regard to the fact that the public interest demanded the early enactment of the legislation, refrained from insisting that the Senate alterations be cast in the form of requests and passed the amendments.[29]

1.7.9 The third paragraph of section 53 was again at issue during consideration of the Taxation Laws Amendment Bill (No.4) 1994. The Speaker made a statement that there was doubt as to whether it was open to the Senate to propose as amendments two of the alterations to which it had agreed. The Speaker noted that

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

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

29 Ibid.

two of the proposals were originally drafted as requests by the Office of Parliamentary Counsel. The Speaker concluded that he presumed that if the members dealt with the proposals as amendments, they would not want that action to be taken as acceptance by the House that they should have been proposed in that way.[30]

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

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

1.8.1 Whether the third paragraph applies to a bill is important because it determines whether the Senate can amend the proposed law itself or whether it must request the House of Representatives to make the amendments. The ability to amend a bill is viewed as more significant than the ability to request an amendment.[31]

1.8.2 It has been suggested that an important practical consequence of the distinction is that it can determine which House will have to take responsibility for the loss of a bill.[32] In a joint opinion in 1943, Sir Robert Garran and others stated that the essence of the difference between a request and an amendment is that in the case of a request, the Senate does not alter the form of the bill and the right of decision as to the form of the Bill rests with the House of Representatives while the fate of the bill lies with the Senate.[33]

1.8.3 When the Senate requests an amendment, it does not agree to the third reading of the bill. The bill is returned to the House with the request for the amendment. If the requested amendment is made, the bill then goes back to the Senate for agreement and third reading. The bill can only be prepared for Royal

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

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

32 Odgers, op. cit., p.563.

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

Assent after the Senate agrees to the third reading of the bill, as amended by the House at the request of the Senate.[34] Where a Senate request is not complied with, the Senate is faced with the choice of dropping the request or vetoing the whole bill. The Senate may be reluctant to veto a whole bill simply because it objected to one item.[35]

1.8.4 In the case of an amendment, the Senate actually alters the form of the Bill and the House of Representatives bears the onus of determining the fate of a bill as it must decide whether to accept the amended bill or lose the bill. Procedurally, when the Senate agrees to a bill that originated in the House of Representatives with an amendment, it agrees to the amendment and to the third reading of the bill before returning it to the House.[36] The fate of the amendment is unresolved. If the House agrees to the amendment, the parliamentary process is complete and the bill can be prepared for Royal Assent.[37]

1.8.5 Having identified the importance of whether the third paragraph applies to an amendment, the Committee now begins its substantive inquiry by considering the third paragraph in its historical context.

34 Ms H. Penfold, *Submissions*, p. S123.
35 Odgers, op. cit., p.563.
36 Ms H. Penfold, *Submissions*, p. S122.
37 ibid., p.S122.

Chapter 2 Historical perspective

The Committee reviews the history of the third paragraph of section 53 through the 1890's until the final draft of the Constitution Bill in an attempt to reveal the intentions of the drafters. The words of the third paragraph are analysed in the context of the Convention Debates. It is revealed that the text changed little between the first and last drafts of the Constitution.

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

2.1 Introduction

2.1.1 It is useful to divide the history of the third paragraph into two stages: the development of the Constitution through the 1890's until the final draft of the Constitution Bill and post-1901. An examination of the first stage may shed some light on the intentions of the drafters which, in turn, will suggest what the content of the paragraph was thought to convey at the time it was drafted. The purpose of considering the pre-federation history of section 53[38] is to illuminate one of the paths to interpreting the paragraph.[39] It cannot provide the ultimate or only definition of its interpretation and (proper) application.

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

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

39 The approach to the interpretation of the Constitution via the Convention Debates has not been favoured by Australian courts. See for example the comments of Sir Ninian Stephen in the foreword to Convention Debates, op. cit., Sydney 1986, p. viii. However, they are now referred to for limited purposes: see *Cole v Whitfield* (1988) 165 CLR 360 at 388.

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

> .. we should be looking to "create" an interpretation for the third paragraph ... rather than to extract or discover that interpretation from what has gone before. That interpretation should be sensible and defensible in the general context of constitutional and parliamentary history and practice, and it should pay proper respect to the Constitution, but it need not be absolutely consistent with every element of the relevant history and practice – indeed, the impossibility of finding an interpretation of the latter kind is one of the things that has led to the current situation.[40]

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

2.2 The federal idea and the development of the Constitution

2.2.1 The concept of a federation of the Australian colonies dates from at least the 1840s. The desire to initiate a federation of the colonies gained momentum during the 1880s. The Constitution was developed from resolutions considered at the 1891 Australasian Federal Convention, from drafts prepared by various delegates and from the debate at the Convention. These elements were developed by a drafting committee into a Constitution Bill which was considered at the 1897–98 Convention. The Bill was put to the people of the colonies in a series of referendums.[41]

2.2.2 The resolutions considered at the first Australasian Federal Convention held in Sydney between 2 March and 9 April 1891 were drafted by Sir Henry

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

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

Parkes.[42] At the meetings of the Convention, Sir Henry, who was President of the Convention, was vocal in his support for the financial initiative of the House of Representatives – the people's house. Parkes proposed that the House of Representatives should 'possess the sole power of originating and amending all bills appropriating revenue or imposing taxation'.[43]

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

> My object was simply to put before the Convention an embodiment of what may be called the cardinal principles, such, for example, as a legislature of two houses, and not of one; such for example, as the electoral basis of the house of representatives; such, for example, as the power of dealing with all bills imposing burdens on the people, or appropriating their money. These seemed to me to be the essential parts, forming in reality the very soul of any scheme to which we can agree.[44]

2.2.4 It is clear that not only did Sir Henry use phrases such as 'burdens on the people', but that he considered the power to deal with such bills to be one of the cornerstones of the proposed federation.

2.3 Insights from the 1891 Convention

2.3.1 The importance of the 1891 Convention in relation to interpreting the third paragraph of section 53 arises from the fact that Sir Henry Parkes was present at the 1891 meetings.[45] The resolutions drafted by him were part of the background philosophy of the draft Constitution Bill, which was compiled by a drafting committee at the end of the main debates. The Parkes resolutions were not the only influence on the drafting committee and Parkes himself was not one of the drafters. However, where other origins are to be found, they are often overlaid with 'Parkesian' language and philosophy. This is particularly so for the clauses which eventually became the third paragraph of section 53.[46]

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

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

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

45 He died before the 1897–98 Convention.

46 For example, one of the more significant bases of the Constitution Bill was the draft bill prepared by Inglis Clark. The Clark version relating to 'Money Votes' shows the origins of much of what later became section 53, but it does not contain the language of the

2.3.2 The origins of the limitations on the Senate in relation to money bills are found in Parkes' views concerning the importance of the people's house. The historical origin of this view is the resolution of the House of Commons of 3 July 1678:

> That all Aids and Supplies, and Aids to his Majesty in Parliament, are the sole Gift of the Commons: And all Bills for the Granting of any such Aids and Supplies ought to begin with the Commons: And that it is the undoubted and sole Right of the Commons, to direct, limit, and appoint, in such Bills, the Ends, Purposes, Considerations, Conditions, Limitations, and Qualifications of such Grants; which ought not to be changed, or altered by the House of Lords.[47]

The words of the current section 53 which reflect these views, survived more or less intact through all the official drafts of the Constitution Bill.[48]

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

> ... I do not see how two bodies can have equal power in dealing with matters, which, viewed however they may be viewed, are admitted to be the most vital questions of good civil government. There must be somebody to decide, and the great constitutional struggle in England, as I observed the other day, has been to see who shall decide, and they have decided that the people of England as represented in Parliament shall decide. With regard to the equally representative character of these two houses, I am at a loss to conceive how

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current third paragraph:

'**52** Every Bill for appropriating any part of the Public Revenue, or for imposing any tax or impost, shall originate in the House of Representatives, but may be amended or rejected by the Senate: Provided, that no amendment shall be made to any such Bill by the Senate which would have the effect of increasing any proposed expenditure, or tax, or impost.' (Inglis Clark, *Draft Bill*, 1891, reproduced in D. Eastman, *Foundation Documents*, Canberra 1994.)

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

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

> any hon. gentleman can calmly reason and come to the conclusion that their representative character will be equal. One will not represent the people at all, except indirectly; it will represent in fact the states...[49]

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

> I, for one, and those who think with me, are prepared to give to South Australia just the same representation in the senate as we ourselves have. We are quite prepared to give her equal power in the general legislation of the country; but we say, 'Some one authority must decide as to how the people are to be taxed, and as to how the product of the taxes is to be appropriated in the interest of the people.'[50]

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

> It is not proposed by the bill to enable either house to coerce the other. It is proposed, however, to give to the upper house, that is to say, the senate, that power of veto which must be enjoyed by any house if it is to be a house of legislature at all; but it is not proposed to give it the power to amend in detail bills for the annual appropriation of revenue and for the imposition of taxation. The senate is, of course, entitled to have its opinion upon such matters heard ... This they will have the opportunity to do, so that it may not be necessary for them to take the extreme course of rejecting a bill because they do not like something in it... They will at least be entitled to make known their opinion to the other branch of the legislature.[51]

2.3.6 Parkes was fond of the sort of language which is seen in the third paragraph:

> Because all taxes levied must be burdens on the people of the country ... these taxes must affect the people of the country in the very same way in which the imposition of burdens affect them.[52] (refer to paragraph 5.1.1).

2.3.7 The clause 'but the senate may not amend any proposed law in such a manner as to increase any proposed charge or burden on the people' was included

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

50 ibid., p. 381. The Wrixon amendment which was the topic of discussion read " (1.) The senate shall have equal power with the house of representatives in respect to all bills, except money bills, bills dealing with duties of customs and excise, and the annual appropriation bill, and these it shall be entitled to reject but not to amend. (2.) The act of union shall provide that it shall not be lawful to include in the annual appropriation bill any matter or thing other than the votes of supply for the ordinary service of the year". ibid.

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

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

in the first draft of the bill prepared by the committee appointed during the 1891 Convention.[53] So keen was Parkes on limiting the Senate's power in relation to tax and appropriation bills that when an amendment was proposed which would have allowed the Senate to amend appropriation and tax bills, Parkes declared:

> ... if an amendment of the character which is suggested is moved, I shall feel it my duty to submit another amendment restricting the senate from amending or touching in any way bills appropriating revenue, or imposing new burdens upon the people.[54]

2.3.8 The next day Mr McMillan proposed omitting the words

> which the senate may affirm or reject, but may not amend. But the senate may not amend any proposed law in such a manner as to increase any proposed charge or burden on the people.[55]

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

> My hon. friend ... assumes a very serious responsibility in proposing this amendment, because this subject after several days' debate in the Convention, received the anxious attention of the committee for several days and from every point of view; and they did not adopt this form of words without carefully choosing every word, and considering how the proposed scheme would work out in practice.[56]

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

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

2.3.10 In reply Sir Samuel Griffith said

> Most of the conflicts that have occurred between the two houses of legislature in Australia have arisen from the use of exactly that form of words – 'the sole power of originating all bills appropriating revenue or imposing taxation.' Those are the words in the Queensland Constitutions. We have always maintained there that notwithstanding the use of those words, with no expressed reference

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

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

55 ibid., p. 756.

56 ibid.

> to the power of amendment, our Legislative Council had no power of amendment, or that if they had the technical power, they had no right which they should be allowed to exercise. ... We all agree that only the house of representatives should have the power of originating money bills. ... Whether or not we come to the result of absolutely excluding any interference by the senate – and I do not think anybody insists upon the absolute exclusion of interference – we shall be in a position to frame the conditions, if any, upon which interference may be allowed with what may be technically termed money bills, although in substance they may be matters affecting great questions of public policy.[57]

2.3.11 The issue was whether limitations on the role of the Senate in relation to money bills should be modified by giving it the power of total or partial rejection. Sir John Downer wanted to add the words 'The senate to have the power of rejecting in whole or in part any of such last-mentioned bills'.[58] Sir Henry Parkes begged him not to press the amendment at that stage in order to allow more time to consider such an important issue.

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

2.4 The 1897–98 Convention

2.4.1 The work of drafting, debating and amending the Constitution Bill was completed (for the most part) during the Australasian Federal Convention of 1897–98. Meetings took place in Adelaide, Sydney and Melbourne. The development of the Constitution Bill which eventually became the Constitution Act is recorded in the reports of the Convention Debates. Parkes died before the 1897–98 Convention but his ghost lives on in the third paragraph of section 53 which were reported to be his words.[59]

2.4.2 The respective powers of the two Houses in relation to finance was one of the more important issues during the Convention Debates of 1891, 1897 and 1898

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57 Convention Debates, op. cit., 16 March 1891, pp. 377–378.

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

59 Mr I. Turnbull, *Submissions*, p. S255. Mr Turnbull is relying on Sir Robert Garran's 1950 opinion. The attribution of the paragraph to Parkes is also supported by the link between the language of the paragraph and Parkes' use of language. See 2.2.3 and 2.3.6 above.

and the Premiers' Conference of 1899.[60] Controversy over financial powers reflected the desire on the part of the smaller colonies to have a strong Upper House to protect the interests of the States.[61]

2.5 Robert Garran and John Quick

2.5.1 One of the 'players' in the federation movement was Robert (later Sir Robert) Randolph Garran who had an illustrious career as a lawyer and public servant. Garran was admitted to the Bar in 1891. He was one of the organisers of and a delegate to, the unofficial conferences supporting federation at Corowa (1893) and Bathurst (1896). He attended the 1897–98 official Federal Convention in his capacity as secretary to G.H. Reid, the premier of New South Wales. Here he became secretary to the drafting committee. He was the first Commonwealth public servant, the first secretary of the Attorney-General's Department (1901), the first parliamentary draftsman and the first solicitor-general (1916).[62]

2.5.2 (Sir) John Quick was a Victorian delegate to the Federal Convention. He and Garran worked together on *The Annotated Constitution of the Australian Commonwealth* (1901) which remains a classic reference on the history of federation and on the Constitution. Both authors had the opportunity (but from differing perspectives) to gain some insight into what the framers of the Constitution meant and the reasons for the adoption of the final version of the text. It is therefore worth quoting in full their comments on the third paragraph of section 53:

> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. This provision may be described as a limitation on the reserved power of the Senate to amend money bills, other than tax bills and annual appropriation bills. Seeing that the Senate cannot amend a bill imposing taxation, it may be naturally asked – how can the Senate possibly amend a proposed law so as to increase any proposed charge or burden on the people? The answer is that the Senate is only forbidden to amend tax bills and the annual appropriation bill; it may amend two kinds of expenditure bills, viz.: those for permanent and extraordinary appropriations. If the Senate could propose an increase in the amount of money to be spent in a public work bill

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

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

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

> – say from one million sterling to two millions sterling – that amendment would necessitate increased taxation in order to give effect to it, and consequently an addition to the burdens and charges on the people. The Senate may amend such money bills so as to reduce the total amount of expenditure or to change the method, object, and destination of the expenditure, but not to increase the total expenditure originated in the House of Representatives.[63]

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

> It cannot amend any proposed laws or bills such as Railway or Works Bills or Old Age Pension Bills so as to increase any proposed expenditure charge or burden on the people.[64]

2.6 Tracing the history of (present) section 53

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

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

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

Money Bills

54. Proposed laws ~~having for their main object the appropriation of~~ **appropriating** any part of the public revenue or moneys, or ~~the imposition of~~ **imposing** any tax or impost, shall originate in the House of Representatives.

But a proposed law shall not be taken to appropriate any part of the public revenue or moneys, or to impose any tax or impost, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for services under the proposed law.

55.(1) **Subject to the last section,** the Senate shall have equal power with the House of Representatives in respect of all proposed laws, except laws imposing taxation and laws appropriating ~~the necessary supplies~~ **revenue or moneys** for the ordinary annual services of the Government, which the Senate ~~may affirm or reject,~~ **may not amend.** But the Senate may not amend any proposed law in such a manner as to increase any proposed charge or burden on the people.

(2) Laws imposing taxation shall deal with the imposition of taxation only.[65]

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

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

2.6.3 The underlining on the margin note is taken from the original draft. Directly under this comment is the admonition "consider" written in pencil. (The

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

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

note itself is in black ink.) It is interesting that the apparent anomaly (that there could be bills which the Senate **may** initiate but **may not** amend) may have been noted in the drafting committee meetings.[66] It is also interesting to contemplate the fact that the opportunity was not taken to resolve this apparent anomaly.

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

> The Senate may not amend taxation bills nor the annual appropriation bill; and it may not amend any bill so as to increase any burden on the people.[67]

2.6.5 It is interesting to note that the single word 'burden' is considered by Garran to be sufficient explanation of 'proposed charge or burden'.[68]

2.7 Conclusions from history?

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

2.7.2 Having identified the limitations, one can focus on what can be learned from the information about the evolution of the words and the beliefs and philosophies of the writers. First, there was a clear intention to give the Senate the

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66 This anomaly or paradox has been commented on many times in the evidence to this inquiry. See for example Mr A. Morris *Submissions*, p. S7, Mr D. Rose *Submissions*, p. S276.

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

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

68 If one were relying on a rigid contextual analysis, this cavalier attitude to the second "proposed" in Garran's 'plain English' version would be a difficulty for interpretations such as those by Mr A Morris who suggests that 'The repetition of the word "proposed" cannot be ignored ...". *Submissions*, p. S11.

same legislative powers as the House of Representatives **except** in relation to appropriation and tax bills (however defined).

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

2.7.4 A careful reading of Sir Henry Parkes speeches during the 1891 meetings reveals that he was, in fact, talking about 'power' rather than procedure. The compromise that the Senate could suggest (request) where it could not amend arose towards the end of the 1891 proceedings and it does not appear to have been envisaged that requests might be pressed.

2.8 Parliamentary history of the third paragraph

2.8.1 A comprehensive parliamentary history of the third paragraph of section 53 would consist of a number of 'chapters'. It would include: the incidents in which there was disagreement over the application of the paragraph; the occasions on which the third paragraph was applied without disagreement; the times when there might have been discussion on the applicability of the paragraph but no such discussion took place; the departmental files recording correspondence between the Houses on the issue; records of private discussions involving parliamentary officers, parliamentary liaison officers, government and opposition managers of the business of the chambers and parliamentary draftsmen; Office of Parliamentary Counsel drafting directions; and the so-called 'compact' of 1965.

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

2.9 Disagreements relevant to section 53

2.9.1 The submission from the Clerk of the House of Representatives lists six instances of significant disagreement between the Houses on the interpretation and application of the third paragraph and analyses them in an appendix.[69] The particular nature of the disagreements related to whether the Senate could amend the bills or whether it should request the House to make the amendments in accordance with the fourth paragraph of section 53. The Clerk has selected six incidents but his submission does not imply that these were the only disagreements involving section 53.

2.9.2 Nor does this survey imply that the precedents mentioned were the most significant or that they can be grouped in a coherent way. They have been selected only to give a flavour of discussions on the issues over the years. Various examples of disagreements are mentioned throughout the report and, where possible, duplication of information has been avoided.[70]

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

2.9.4 The time scale over which the disagreements mentioned by the Clerk of the House of Representatives took place is enlightening, as are the different reasons for *disagreement. The first detailed discussion on the applicability of the third* paragraph of section 53 took place during debate on the Sugar Bonus Bill 1903[71]. The Clerk has selected as the next significant dispute the Financial Emergency Bill 1932. The matter caused further difficulty during consideration of the States Grants (Tertiary Education Assistance) Bill 1981. Since then disagreements have occurred in relation to many bills including the States Grants (Technical and Further Education Assistance) Bill 1988, the Social Security Legislation Amendment Bill (No.

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

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

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

4) 1991, the Local Government (Financial Assistance) Amendment Bill 1992 and the Social Security Legislation Amendment Bill (No. 4) 1991.[72] Dispute over the application of the third paragraph in relation to the Taxation Laws Amendment Bill (No 4) 1993 was the immediate cause of referring the matter to the two committees. The matter was raised recently in November 1994 in relation to the Taxation Laws Amendment Bill (No.3) 1994[73] (refer to paragraph 1.6.3 – 1.6.9).

2.9.5 In each of these cases the Senate made an 'amendment' which the House considered should have been in the form of a request.[74] The following brief survey reveals the types of issues raised.

2.10 The Sugar Bonus Bill 1903

2.10.1 The Sugar Bonus Bill 1903 authorised payment from the Consolidated Revenue Fund of a bounty for sugar cane grown under certain conditions.[75] The debate on the bill is hair-raising in its unabashed racism, but its relevance for section 53 is that while it appropriated money, the appropriation was not for the ordinary annual services of Government. The Senate was therefore not precluded from amending the bill under the second paragraph of section 53.

2.10.2 The Senate attempted to amend the Sugar Bonus Bill by reducing the stringency of the conditions under which the bounty could be paid.[76] The probable result would have been an increase in the number of successful applicants. In other words there would have been an increase in the appropriation of money.

2.10.3 The House of Representatives disagreed with the amendment. The Bill was returned to the Senate with a message stating that the Bill appropriated money, that the amendment would increase a proposed charge or burden on the people and that it was therefore disallowed under section 53.[77] On this occasion the Senate

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

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

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

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

76 ibid.

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

complied by sending a request to the House. The latter agreed to the request with a small change.[78]

2.10.4 The significance of the Sugar Bonus Bill is that it helped to define the sort of bill and the sort of clause within a bill, to which the third paragraph could apply. The fourth paragraph of section 53 allows the Senate to request an amendment to a bill which it 'may not amend'. The Sugar Bonus Bill established the Senate's right to request an amendment, which the Senate could not constitutionally make itself, in a bill for which it had a general power of amendment. (i.e. it was not a bill which the Senate may not amend.)[79]

2.10.5 Requests for amendments were made to two bills in 1908. In relation to the Surplus Revenue Bill the Senate sent a message requesting an extension of the period during which certain payments would be made.[80] In the Customs Tariff Bill 1908, the Senate requested amendments which would increase the rates of duty.[81] Neither occasion seems to have resulted in disagreements.

2.11 Financial Emergency Bill 1932

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

2.11.2 The Senate amendment dealt with the bill's intention to withhold the bounty payable under the *Gold Bounty Act 1930–31,* which provided for a bounty to be payable for a period of ten years from 1 January 1931. The House of Representatives returned the bill to the Senate with a message that it disagreed with

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

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

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

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

81 *Parliamentary Debates,* vol XLV, pp. 10484–10487.

a Senate amendment and asked that it be reconsidered because the amendment increased a proposed charge or burden on the people. The Senate's view was that it was not clear that the amendment would increase the charge or burden. In the end the Senate did not insist on a determination of its rights and did not insist on the amendments disagreed to by the House of Representatives.[82]

2.12 States Grants (Tertiary Education Assistance) Bill 1981

2.12.1 The bill provided for grants of financial assistance to the States and the Northern Territory for tertiary education in accordance with schedules attached to the bill. The Consolidated Revenue Fund and the Loan Fund were appropriated by the bill.[83] Clause 6 proposed the partial reintroduction of tertiary fees (at the Minister's discretion). Under provisions elsewhere in the bill, these fees, if imposed, could be offset against the appropriation required to pay the grants provided for in the bill.

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

2.12.3 A significant element in the debate in the Senate was the effect of the Minister's discretion. It was argued that clause 6 (the discretionary re-introduction of fees for some students) and the fact that offsetting the fees against the appropriation required to pay the grants provided for in the bill was also discretionary, resulted in uncertainty about whether the appropriation would be reduced. It was argued that section 53 implied that there must be a direct nexus between an amendment and an increased burden in order to require a request rather than an amendment.[84]

2.12.4 The point was made in this interchange:

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

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

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

> **Senator Button** – It is a very long time since I studied constitutional law, but I recall something about going straight to the essence of the particular instrument which one is examining.
>
> **Senator Chaney** – That was cooking, not constitutional law.
>
> **Senator Button** – Senator Chaney tells me that that was cooking. I learned cooking too, but I am asking Senator Chaney to refresh his memory on constitutional law. The essence of the constitutional provision is a prohibition on the Senate's amending any proposed law which seeks to increase a charge or burden on the people. This proposed law, clause 6 of this Bill, is not a matter which goes to that question at all. It is an enabling provision which would give the Minister a discretion which he may never exercise. It goes to the question of the Minister's power.[85]

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

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

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

2.13.2 The Deputy Speaker made a statement noting that the amendment could be increasing the proposed charge or burden. The amendment was rejected and the bill returned to the Senate. The Senate insisted on the amendment but the House disagreed. On 6 March 1989 the Senate resolved not to insist on the amendments.[86]

2.13.3 In the House the Minister cited an opinion from the Acting First Parliamentary Counsel that the amendment increased the proposed burden on the

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

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

people. The Committee of Reasons[87] said that the removal of an element from the calculation used to determine payment to the states removed a limitation on the grants that could be made and therefore increased the proposed charge or burden on the people.[88]

2.13.4 The arguments put forward in the Senate were reminiscent of those used in the 1981 case. Although the amendment increased the maximum size of the grant it did not increase directly the actual size of the grant, which was subject to the discretion of the Minister.[89]

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

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

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

2.14.3 When the bill was initially returned by the Senate the Deputy Speaker made a statement concerning the power of the House in respect of money bills and questioned whether the amendments should have been put as requests. Nevertheless, the House agreed to the amendments.[90]

2.14.4 Later the Speaker made a detailed statement to the effect that one of the Senate's amendments would increase the charge or burden on the people and that the First Parliamentary Counsel (FPC) agreed with the House's conclusion on this matter. He noted that the Clerk of the Senate had contested the FPC's reasons. The Speaker stated that the Clerk would ensure that messages from the Senate

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

88 Ibid.

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

90 *Votes and Proceedings*, 1990–91/1236–44.

returning bills would be examined to protect the interests of the House. A motion endorsing the Speaker's statement was carried, with support from both sides of the House.[91]

2.14.5 The matter was not discussed in the Senate but the Clerk of the Senate, in a paper on the issue, said that as it was not known whether any certificates would be issued or any benefits paid, the effect of the amendment on the total expenditure under the bill was uncertain.[92]

2.15 Local Government (Financial Assistance) Amendment Bill 1992

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

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

2.15.3 The bill was returned by the Senate with two amendments, the first of which was accepted by the House. The House sent a message to the Senate stating that the second amendment should have been put in the form of a request. The Senate did change the amendment to a request, but the message did not concede that it should have been a request.[93]

2.16 Social Security Amendment Bill 1993

2.16.1 The Bill for an Act to amend the *Social Security Act 1991* was returned by the Senate with an amendment. The Speaker noted that 'looked at from the view

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

92 Mr L. Barlin, *Submissions*, p. S213.

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

point of section 53 the matter is unclear'. Mr Sciacca (Parliamentary Secretary to the Minister for Social Security) acknowledged the statement and stated that 'the Government would not object on the grounds that the amendment should have been made as a request'.[94]

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

2.17 Conclusions from parliamentary precedents?

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

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

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

> [i]n relation to the prohibition on the Senate amending a bill so as to increase any proposed charge or burden on the people, it has long been accepted that this means that the Senate cannot amend any bill in such a way as to directly increase expenditure under an appropriation... The prohibition does not arise... unless an amendment related directly to an actual appropriation proposed in the bill in question or contained in an act proposed to be amended by the bill.[95]

2.17.4 It is debatable that the concept of directness has 'long been accepted'. The test has been rejected by the Clerk of the House of Representatives[96], by the

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

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

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

former First Parliamentary Counsel[97] and by the participants (other than the Clerk of the Senate) at the seminar organised by the Committee.[98]

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

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

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

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

Chapter 3 Justiciability

This chapter discusses the justiciability of section 53. The traditional view that section 53 is not justiciable is canvassed and authorities are cited in support of that view. The Committee also examines the factors that may support an alternative view, namely that section 53 is justiciable. Those factors include the declining persuasive value of relevant precedents, the interrelationship between sections 53, 54 and 57, increasing emphasis on principles of representative government and submissions and judgments in recent High Court cases.

3.1 Are issues arising under section 53 justiciable?

3.1.1 The traditional view is that section 53 is not justiciable, that is, a court cannot intervene in the legislative process if the requirements of section 53 are not being complied with and a law, which has been passed by both Houses and received Royal Assent is not invalid where it does not comply with section 53. However, there are arguments that can be raised in support of an alternative view.

3.2 Historical overview

3.2.1 During the Convention debates, delegates alluded to the justiciability of section 53. Mr Isaacs remarked, in relation to sections 53 and 54, that it would be a terrible calamity if, after a law were passed, it was disputed and the courts had to declare the law unconstitutional and void.[99] It was recognised that the possibility of money bills being held invalid could cause serious damage to the economy.[100] However, on the other hand, it was argued that the courts should have the power to enforce the provisions because the balance of power between the Houses was seen as a vital part of the federal compact.[101] As a compromise, delegates to the Conventions decided that sections 53 and 54 would refer to 'proposed laws' and section 55 to 'laws'. The term 'proposed laws' would be used to indicate that the matter was a question between the two Houses and merely a question of order.[102]

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

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

101 ibid., p. E38.

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

Use of the word 'laws' would indicate that the law must comply with certain conditions, otherwise it could be declared unconstitutional.[103]

3.3 The traditional view

3.3.1 The traditional view of section 53 is that the rules in it deal with parliamentary procedures, and accordingly, any issues arising from section 53 should be resolved by the Parliament rather than the courts.[104] That view was originally accepted by Quick and Garran. They stated that:

> It will be noticed that the phrase 'proposed laws' is used in section 54, in the same sense as in section 53 ... After the proposed law has been passed by both Houses, and has been assented to by the Crown, it becomes an Act, and it cannot then be impeached in the Federal Courts for any breach of section 54 which may then happen to appear on its face.[105]

It appears that the same comment would be relevant where an Act contravened section 53.[106]

3.3.2 The view that section 53 is not justiciable has been stated by members of the High Court in a range of decisions.[107] In *Osborne* v. *The Commonwealth*[108], Sir Samuel Griffith CJ commented that:

> Sections 53 and 54 deal with 'proposed laws' - that is, Bills or projects of laws still under consideration and not assented to - and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by those sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a court of law.[109]

Sir Edmund Barton J. stated that sections 53 and 54 were 'merely directory'[110] and O'Connor J. commented that:

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103 ibid, p. 471.

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

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

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

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

108 (1911)12 CLR 321.

109 (1911) 12 CLR 321 at 336.

110 (1911) 12 CLR 321 at 352-353.

> This Court can have no cognisance of proposed laws, nor can it in any way interfere in questions of parliamentary procedure. Its jurisdiction arises only when the proposed law becomes a law ...[111]

Similar views were expressed by Barton ACJ in *Buchanan* v. *The Commonwealth*[112] and Isaacs J. in *The Federal Commissioner of Taxation* v. *Monro* who stated that section 53 'is for parliamentary guidance only'.[113]

3.3.3 Sir Robert Garran's opinion of 1950 concurred with this view. He stated that it seems clear that questions arising under section 53 are matters of parliamentary procedure, argument as to which can be addressed only by the Houses.[114] Most of the evidence received by the Committee supports the conclusion that section 53 is not justiciable.

3.4 The alternative view

3.4.1 On the basis of the Convention debates and the High Court authority on the issue, the deliberate reference to 'proposed laws' in sections 53 and 54 has been cited as the major reason for the non-justiciability of those sections. However, in later cases some members of the High Court have either not accorded authority to the views expressed by judges in earlier cases as to the non-justiciability of sections 53 and 54, or have sought to limit the principle that issues arising out of parliamentary procedures are not justiciable.[115] The factors that may support an alternative view include:

(a) the declining persuasive value of relevant precedents;

(b) the interrelationship between sections 53, 54 and 57;

(c) increasing emphasis on principles of representative government; and

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111 (1911) 12 CLR 321 at 355-356.

112 (1913) 16 CLR 15.

113 (1926) 38 CLR 153 at 188.

114 *Opinion*, p. 1 (see Appendix D).

115 Mr D. Williams, *Exhibits*, p. E41.

(d) judgments and submissions in recent cases such as *Northern Suburbs General Cemetery Reserve Trust* v. *The Commonwealth* [116] and *The State of Western Australia* v. *Commonwealth of Australia*[117].

(a) Declining persuasive value of relevant precedents

3.4.2 In *Cormack* v. *Cope*[118] a declaration was sought that the Petroleum and Minerals Authority Bill 1973 was not a proposed law by reference to which the Governor-General could lawfully dissolve both Houses pursuant to section 57 of the Constitution.

3.4.3 The Commonwealth argued that the High Court had no jurisdiction to determine the regularity of any of the steps in the law-making process in section 57. McTiernan J. was the only judge who accepted that argument. Barwick CJ, Gibbs and Mason JJ held that the Court had jurisdiction to intervene at any stage in the process, described in section 57, to restrain a breach of the Constitution. However, each of those justices suggested that the court would not ordinarily interfere because consideration of the process after the law is passed would be sufficient to ensure that there had been compliance with the Constitution.[119]

3.4.4 Menzies and Stephen JJ held that the Court should not interfere in proceedings under section 57. But where section 57 has not been complied with, the Court may determine the validity of any law passed at a joint sitting. Menzies and Stephen cited *Osborne* v. *The Commonwealth* as authority for the proposition that the Court should not interfere in the law-making process.[120] However, Barwick CJ distinguished *Osborne* and stated that the principle in that case

> ... can .. be accepted if confined to the provisions of the Constitution with which the Court was then dealing. In my opinion, it is not acceptable as a statement of universal application, denying the Court jurisdiction to ensure observance of the conditions of the law-making process itself.[121]

3.4.5 The joint sitting at issue was held and the Petroleum Minerals and Authority Bill 1973 was passed by both Houses sitting together. The validity of the

116 (1992-1993) 176 CLR 555.
117 Case No. P4 of 1994.
118 (1974) 131 CLR 432.
119 (1974) 131 CLR 432 at 454 per Barwick CJ, at 466 per Gibbs J and at 474 per Mason J.
120 (1974) 131 CLR 432 at 465 per Menzies J and at 472 per Stephen J.
121 (1974) 131 CLR 432 at 453-454.

Act was then challenged in *Victoria* v. *The Commonwealth*[122] ('the PMA Case') on the ground that there had not been compliance with section 57 of the Constitution. The High Court held that the three month period, provided for by section 57, had not elapsed before the House passed the bill a second time. Hence it was not a proposed law that could be submitted to a joint sitting of the Houses and it was therefore invalid. The majority held that the question, whether section 57 had been complied with, is examinable by a court.[123] In relation to this issue, Barwick CJ stated:

> The Court, in my opinion, not only has the power but, when approached by a litigant with a proper interest so to do, has the duty to examine whether or not the law-making process prescribed by the Constitution has been followed and, if it has not, to declare that which has emerged with the appearance of an Act, though having received the Royal assent, is not a valid law of the Commonwealth.[124]

McTiernan J. dissented and held that whether the requirements of section 57 were complied with was a political question and not within the judicial power of the Commonwealth.[125]

3.4.6 In those two cases, the Court made it clear that the Australian Constitution is a controlled Constitution and the Court evinced a willingness to scrutinise the compliance of the parliamentary process with the Constitution and to intervene, at least once legislation was enacted.[126] Professor Saunders suggested that the earlier High Court precedents on sections 53 and 54 may be less persuasive following the decisions in *Cormack* v. *Cope* and the PMA Case.[127]

(b) Interrelationship between sections 53, 54 and 57 of the Constitution

3.4.7 The deliberate reference to proposed laws in section 53 and 54 is the traditional justification for the non-justiciability of sections 53 and 54. However, this justification can be criticised. Mr Williams AM QC MP suggested that it is hard to see why section 55 is justiciable and section 54 is not justiciable. Both sections

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122 (1975) 134 CLR 81.

123 (1975) 134 CLR 81 at pp. 117-120 per Barwick CJ, 161-164 per Gibbs J, 177-180 per Stephen J and 181-184 per Mason J.

124 (1975) 134 CLR 81 at 118.

125 (1975) 134 CLR 81 at 135.

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

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

appear to confer constitutional rights, that is, so far as they relate to the Senate, rights are conferred on the States and, so far as they relate to the House, rights are conferred on the people generally.[128]

3.4.8 A comment by Higgins J. in *Osborne* v. *The Commonwealth* may lend support to the argument that section 54 should be considered justiciable. He queried why an Act is invalid by reason of its substance under section 55 of the Constitution if it deals with matters other than the imposition of taxation, when a bill appropriating moneys for ordinary annual services is not invalid by reason of its substance under section 54.[129] This comment was referred to a number of times during the course of the public hearings.[130] There appeared to be some support for this proposition during the seminar. It was suggested that there may be '... some lack of logic in finding the rule in section 55 justiciable, but not that in section 54, whatever the textual justification for that may be'.[131] Evidently there is some historical support and some current thinking which supports the view that sections 54 and 55 should both be justiciable and '... if section 54 were found to be justiciable, that could open the door to judicial review of section 53 as well'.[132]

3.4.9 Higgins J also stated that sections 53, 54 and 56 - which deal with 'proposed laws' - do **not** deal only with directions to the Houses or directions as to the mode of handling bills.[133] These sections make specific prohibitions. For example, section 53 prohibits certain laws from being originated or amended in the Senate and section 54 provides that proposed laws appropriating moneys for the ordinary annual services shall only deal with such appropriation.

3.4.10 The term 'proposed laws' is used in section 57 of the Constitution in a similar way to sections 53 and 54. As section 57 has been held justiciable,[134] it could be argued that sections 53 and 54 may also be justiciable. However, sections 53 and 57 were distinguished by Mason J in the PMA Case. He stated that:

> The observations in *Osborne* v. *The Commonwealth* and *Buchanan* v. *The Commonwealth* to the effect that the provisions of s.53 of the Constitution are

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

129 (1911) 12 CLR 321 at 374.

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

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

132 ibid., p. 4.

133 (1911) 12 CLR 321 at 373.

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

> merely directory have no application to s.57. The functions of the two sections are entirely dissimilar and leave no scope for an analogous reading of s.57 deriving solely from the reference in each section to the words 'proposed laws'.[135]

3.4.11 It was suggested that if one adopts an approach to the interpretation of the Constitution that is not exclusively literalist, the differences between sections 53 and 57 can be explained. Such an approach involves focussing on the context of the words where they appear. Adopting this interpretation, the term 'proposed laws' in section 53 and 57 may be capable of different meanings. Furthermore, use of the term could result in the justiciability of one provision (ie. section 57) and the non-justiciability of the other provision (ie. section 53).[136]

(c) Increasing emphasis on principles of representative government

3.4.12 Dr Thomson discussed the activism of the present members of the High Court, the principle of judicial review and the role of the Court as the guardian of the Constitution. He went on to query why the principle of judicial review does not prevail in relation to some sections of the Constitution. Dr Thomson stated that while the Constitution does not give any guidance in relation to this matter, it is widely held that the principle of judicial review does not apply to section 53. Yet it is agreed that the principle applies to later sections of the Constitution, but is inapplicable to section 81.[137] During the seminar, Dr Thomson stated that he thought section 53 could be held justiciable within the next twenty years.[138] Mr Harris, Deputy Clerk of the House of Representatives, also considers that section 53 may be justiciable.[139]

3.4.13 Professor Blackshield suggested that the justiciability of section 53 has become more of an open question because the High Court is, to some extent, shifting ground in terms of basic constitutional theory.[140] The traditional British model of responsible government involves, among other things, judicial deference to parliament. Professor Blackshield suggests that when the High Court discusses representative government, it has in mind a strong conception that all major public office bearers and the legislature, the executive and the judiciary have their own direct fundamental responsibility to the Australian people. As a part of that

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135 (1975) 134 CLR 81 at 184.

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

137 *Transcript*, pp. 104-105.

138 *Seminar Transcript*, p. 12.

139 *Transcript*, p. 83.

140 *Seminar Transcript*, p. 10.

conception, he suggests that the High Court will be more willing to insist on adherence to the Constitution, even by the Parliament itself.[141] Professor Saunders also referred to the principles of responsible government and representative government as providing a possible basis for judicial intervention in this area.[142]

3.4.14 Despite the factors that may support the view that section 53 is justiciable, the majority of witnesses thought that the High Court would continue to consider section 53 not justiciable.[143] However, even if such questions were considered justiciable, it is probable that the Court would be reluctant to interfere with Parliament's understanding of the matter.[144]

(d) Recent cases

3.4.15 There are two recent cases where issues concerning the justiciability of certain constitutional provisions have arisen, namely *Northern Suburbs General Cemetery Reserve Trust* v. *The Commonwealth* ('the Northern Suburbs Case')[145] and *The State of Western Australia* v. *Commonwealth of Australia* ('the Native Title Case')[146].

3.4.16 The justiciability of section 54 arose in the Northern Suburbs Case and the matters raised may be relevant to section 53. One of the issues in that case was whether, in levying the training guarantee charge, there had been a failure to comply with section 54. It was held that there had been no failure to comply with section 54 because the relevant appropriation was a standing appropriation and not an appropriation for the ordinary annual services of the Government.[147] The joint judgment referred to the traditional view that a failure to comply with a procedural provision, such as section 54, was not justiciable and did not give rise to invalidity

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

142 *Seminar Transcript*, p. 5.

143 See, for example, Mr A. Morris, *Submissions*, p. S75; Mr P. Lahy, *Submissions*, p. S236; Mr D. Rose, *Submissions*, pp. S243, S289 and *Transcript*, p.38; Mr I. Turnbull, *Submissions*, p. S253; Professor C. Saunders, *Seminar Transcript*, p. 5; and Mr L. Barlin, *Transcript*, p. 83.

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

145 (1992-1993) 176 CLR 555.

146 Case No. P4 of 1994.

147 (1992-1993) 176 CLR 555 at 578-579.

of the resulting Act when it was passed by both Houses and had received Royal Assent.[148] However, as there had been compliance with section 54, the Court did not deal with whether the section was justiciable.

3.4.17 It has been suggested that the reference to the traditional view by the majority was cautious[149] and that the case hints that these matters may be justiciable. However, eminent counsel have not taken these hints very seriously.[150]

3.4.18 The application of section 53 of the Constitution, and particularly the third paragraph, is currently before the High Court. On 13 June 1994 Mason CJ indicated that certain questions arising in some actions might be appropriately determined in the Full Court. One of those cases was the Native Title Case. Two of the questions put by Mason CJ were:

> 13(a) Was the *Native Title Act 1993* passed in accordance with section 53 of the Constitution?
>
> 13(b) If no to 13(a), is the Act invalid?[151]

3.4.19 It was argued by Western Australia that three Senate amendments to the Native Title Bill contravened the third paragraph of section 53 of the Constitution.[152] One of the amendments concerned the insertion of a clause providing for the establishment of a Parliamentary Joint Committee on Native Title. It was submitted that the establishment of such a committee would involve a 'burden' on the people as it would involve various administrative costs and other expenses, the revenue for which would be raised by taxation.[153]

3.4.20 Counsel for Western Australia, Mr David Jackson QC, submitted that the approach which says section 53 orders business and is clearly directory, does not reflect the words of the section in terms of the ordinary meaning or the relationship between the two Houses and he suggested that it does not reflect the overall nature

148 ibid., p. 578.

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

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

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

152 ibid., pp. 270-271.

153 ibid., p. 471.

of the provisions contained in Part V of the Constitution.[154] He also submitted that section 53 is **not** concerned with intra-mural matters between the Houses or breaches of the Constitution which it is open to the Houses to waive. So to construe section 53 would be to equate it to standing orders and the provisions of section 53 should instead be viewed as limitations on the powers of the Senate.[155]

3.4.21 If the arguments of Western Australia are accepted, the powers of the Senate would be significantly restricted. It was suggested that Mr Jackson appeared to be arguing that anything which the Senate does that may involve increased expenditure 'somewhere along the line' is contrary to section 53.[156]

3.4.22 During a public hearing, it was suggested that if one looks at the consequences of Western Australia's argument, one may say that such a consequence could never have been intended as it would mean that the House of Representatives would have control over the formation of Senate committees.[157]

3.4.23 During the seminar there was discussion as to the extent to which the High Court may pronounce on the justiciability of section 53 in the Native Title Case. Professor Blackshield suggested that he would expect a similar outcome in the Native Title Case to that in the Northern Suburbs Case. In the Northern Suburbs Case, section 54 had been complied with, so no determination of the justiciability of that section was considered necessary. It was noted that in the Native Title Case, the Commonwealth Solicitor-General submitted that the Court should not pronounce on the issue (even to the extent that it answered the question in the Northern Suburbs Case) and that it should simply refuse to decide the matter.[158] It is anticipated that the High Court will deliver its judgment in the Native Title Case before mid-April.[159]

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

> The question of whether the High Court has power or jurisdiction to pronounce on issues ... is ... interlocked with the question of what the issues are. In order to have a justiciable question before it, the High Court must be able to identify

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

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

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

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

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

159 See comment by Mr D. Rose, *Transcript*, p. 38.

> fairly precise legal questions which are capable of reasonably objective black and white legal answers, and it must be able to formulate questions in an area like this on which the relevant factual evidence could be obtained without the court poking its nose too far into the intramural business of the parliament.[160]

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

> ... where there is a proposed law coming into the Senate, and contained within that proposed law is a proposed charge or burden on the people ... and I think the words 'charge' or 'burden on the people' also would have to receive a fairly limited meaning. And all of that would mean that the justiciable version of this paragraph, if there were one, would be reduced to some fairly limited questions.[161]

Evidently, any legal action involving the third paragraph of section 53 would probably be confined to very limited questions, if indeed it was justiciable at all. Despite the arguments advanced in favour of the view that section 53 may be justiciable, the Committee considers that the third paragraph of section 53 is not justiciable at this stage.

3.5 Consistency - the justiciability of all or none of the paragraphs of section 53

3.5.1 The issue of whether some paragraphs of section 53 could be justiciable, and whether others may not be justiciable, was raised during the seminar. It was suggested that the preferable answer would be that either all or none of the paragraphs are justiciable. However, it was also contended that such a result is not logically necessary.[162] Professor Blackshield noted that, at one stage, there was a possibility that the first paragraph of section 55 may have been justiciable and the second paragraph not justiciable.[163] The final view was that the second paragraph of section 55 was justiciable and the basis for such a view appears to have been consistency and commonsense.

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

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160 *Seminar Transcript*, p. 7.

161 ibid.

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

163 ibid., p. 11.

> 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.[164]

3.5.3 Intervention by a court in the parliamentary process appears most unlikely, and it is also unlikely that non-compliance with the third paragraph of section 53 would result in the invalidity of an enactment that has been passed by both Houses and received Royal Assent. The Committee declines to make a statement on the justiciability of the paragraphs in section 53, other than the third paragraph.

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

3.6.1 Professor Saunders suggested that, if section 53 were justiciable, the Court would have a number of options. It could restrain a House from acting in a particular way, for example, by granting an injunction to prevent repeated requests for amendment.[165] However, it was submitted that it would be most unlikely for the Court to intervene and restrain a House in that way.[166]

3.6.2 A second option for the Court would be to restrain presentation of a bill for assent, but it was submitted that restraint of a bill is an artificial device for achieving a purpose similar to that which would be achieved if the Court restrained a House. Invalidation after enactment is a further option. That course of action may be inconsistent with the application of section 53 to 'proposed laws' only. However, the reference to 'proposed laws' was not regarded as a major difficulty in the PMA case where the law was held invalid.[167]

3.6.3 Even if section 53 were considered justiciable, or at least partially justiciable, the Court may prefer to defer to Parliament's own approach to section 53, particularly if both Houses agree to the same approach. That agreement could take the form of a compact or it may be inferred from a decision to proceed with a bill by both Houses.[168]

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

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

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

167 ibid., p. 5.

168 ibid., p. 5.

3.6.4 Any exception to the non-justiciability principle is more likely to be in relation to determining the validity of a law after it has been passed. Any challenge to the validity of a law under section 53 would probably be made by an aggrieved taxpayer after the law has been passed.[169]

3.7 Conclusions

3.7.1 In summary, the Committee considers that, despite the arguments to the contrary, the third paragraph of section 53 is unlikely to be regarded as justiciable by the courts. The Committee would add only that it considers that this conclusion is an appropriate one. Whether or not non-intervention by the courts is regarded by the courts as a matter of jurisdiction or discretion, the issues raised by the third paragraph are, in the opinion of the Committee, better left for the Parliament to resolve.

3.7.2 The Parliament, like the courts, has a duty to uphold the Constitution, and in the next chapter the Committee explains how it views the way in which Parliament should discharge that duty in relation to section 53. The Parliament is the primary organ which should judge whether there has been compliance with the constitutional rules for the passage of money bills through the Parliament. This puts the onus on the Houses to reach agreement, in the light of the letter and spirit of section 53, and in that connection chapter 12 proposes a compact in relation to the more contentious aspects of the third paragraph. In the Committee's view, such a compact would show the Parliament's fidelity to the constitutional requirements of section 53.

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

Chapter 4 The Committee's approach

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

The chapter also outlines the Committee's opinion of Parliament's task in interpreting the third paragraph of section 53.

4.1 Consequences of non-justiciability: three possible approaches

4.1.1 The Committee concluded in chapter 3 that, on balance, the provisions of section 53 appear to be non-justiciable. That is, it is unlikely that a court would either intervene during the passage of a bill in order to compel compliance or restrain non-compliance with the requirements of section 53, or find an Act to be invalid, subsequent to its passage, by reason of non-compliance with those requirements.

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

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

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

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

4.2 Meaning of section 53 not 'at large'

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

4.2.2 Although it may be that there is no single, objectively correct meaning of section 53, it does not necessarily follow that the words of the section fail to provide any objective outer limits to the possible interpretations of its provisions. In the Committee's view, the Houses are bound by the provisions of section 53 at least to

the extent that those provisions are clear, or, in other words, to the extent that there is, in relation to their meaning, a reasonable consensus amongst those qualified to address, and who have in fact addressed, that question.

4.2.3 It is very evident, however, from the wide range and extreme diversity of views[170] put to the Committee in evidence, that the meaning of the third paragraph of section 53, and its interrelation with the other paragraphs of that section and with other sections, is anything but clear. So, the question that the Committee has posed for itself remains: must the Houses embark on the same kind of exercise as the High Court would undertake in order to ascertain the legal meaning of section 53, or do the Houses have more flexibility to interpret and apply section 53, given that it is likely to be non-justiciable?

4.3 Criteria for interpretation

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

- the plain meaning of the words of the paragraph;
- the structural interrelationship between the third paragraph and the other paragraphs of section 53, and between section 53 and related sections, ie, the coherence of the section and the Constitution as a whole;
- the drafting history of section 53 and related sections;
- the evident purpose or policy behind section 53 and related sections;
- the practice of the Parliament in interpreting and applying section 53 since Federation;

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

- the opinions of respected lawyers and other commentators; and

- the practicality and workability of particular interpretations.

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

4.4 The Committee's approach

4.4.1 In the Committee's view, the criteria noted above are all relevant to the interpretation and application of the third paragraph of section 53. Indeed, it would not be appropriate, in the Committee's view, to single out any one criterion and give it undue or disproportionate weight, although some witnesses occasionally tended to do so, either implicitly or explicitly. In the opinion of the Committee, **the task of the Parliament is: to arrive at the most sensible and practical view of the third paragraph of section 53 that is consistent with the broad policy of the section (that policy being to preserve the financial initiative of the government but otherwise to give the two Houses equal powers), harmonious with the drafting history of the paragraph and the subsequent course of parliamentary precedent, and can be reasonably sustained within the actual wording of section 53.**

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

4.5 Scope for flexibility in interpreting section 53

4.5.1 In the Committee's view, the task of the Parliament is not to ascertain the strict legal meaning of section 53, although the Committee would not want to characterise the approach of the High Court to this question, if the Court were ever

to adjudicate upon it, as necessarily a narrow one. In fact, the Court would be applying the very same criteria as the Committee has identified as the appropriate basis on which the Parliament should form a view. Moreover, if the High Court were to ascertain the legal meaning of section 53, it would, amongst other things, be very likely to take account of and give an appropriate measure of deference to parliamentary practice (refer to paragraph 3.3.3).

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

- it may be open to the Houses to take a broader view of what is encompassed by the 'imposition' of taxation, for the purposes of the first two paragraphs of section 53, than is currently taken by the High Court for the purposes of section 55 (refer to paragraphs 6.4.4 - 6.4.17);

- without ignoring the second use of the word 'proposed' in the third paragraph of section 53, it may be open to the Houses to agree that the Senate should not amend a proposed law so as to increase a charge or burden on the people, even where the proposed law does not itself contain a proposed charge or burden (refer to paragraph 8.5.4);

- it may be open to the Houses to agree that the fourth paragraph of section 53 does not prevent the Senate from requesting an amendment to a proposed law which it could nevertheless amend (or, alternatively, the House of Representatives may refuse to consider the request - refer to paragraphs 11.6.1-11.6.7).

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

only what is positively required by section 53 but also what is not precluded by section 53.

4.6 Compact

4.6.1 The previous discussion foreshadows that there may be scope for an agreement, or 'compact', between the Houses in relation to the third paragraph of section 53, to the extent that such agreement is not precluded by the requirements of the section. The question of a compact is considered later in the report. However, given that the section is unlikely to be justiciable, the Committee considers that the Houses have considerable flexibility both in framing an appropriate compact and in identifying the extent to which such a compact is not precluded by section 53.

4.7 Summary

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

- consistent with the broad policy of the section;
- harmonious with historical intention and parliamentary practice; and
- reasonably sustainable within the wording of the section.

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

4.7.3 While such a view does not constitute the legal meaning of section 53 in the sense of an authoritative judicial determination, the Committee would also reiterate that, given the universality of the identified criteria of constitutional interpretation, the difference between a (hypothetical) judicial approach and the recommended approach of the Houses should not be exaggerated. To be acceptable at the end of the day, both need to be persuasively supported by essentially the same criteria.

Chapter 5 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.

5.1 Convention debates and the views of Quick and Garran

5.1.1 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 the same power in dealing with what are sometimes erroneously termed money bills?[171]

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.[172]

5.1.2 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

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

172 ibid.

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 burdens on the State'.[173] It is clear that Sir Henry Parkes viewed the word 'burden' as including tax and tax-related burdens.[174]

5.1.3 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).[175] 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.[176]

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.[177]

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.[178]

5.1.4 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.[179] Mr Rose suggested that the

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

174 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.

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

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

177 ibid.

178 *Submissions*, p. S256.

179 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.[180] 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.[181] 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.[182]

5.1.5 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'[183] (that is, Sir Henry Parkes). He suggested that Parkes probably regarded the clause as referring to taxation only.[184] Garran argued that tax bills which do not impose taxation are subject to third paragraph.[185] 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.[186] It appears that Garran 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.[187]

5.1.6 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.[188]

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180 *Transcript*, p. 28.

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

182 ibid.

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

184 ibid., pp. 4-5.

185 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.

186 ibid., p. 1.

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

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

5.2 Pre-1990 practice

5.2.1 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.[189] 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 was covered by the second paragraph of section 53 (refer to paragraph 5.1.3)).

5.3 Post-1990 practice

5.3.1 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.[190] 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.[191]

5.3.2 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.[192]

5.3.3 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

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

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

191 ibid., p. 3.

192 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.

5.3.4 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 the Senate. 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.

5.4 Views of participants in the inquiry

5.4.1 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[193] (that is, that the third paragraph applies to tax-related bills). Mr Evans notes that if a bill to increase taxation is not a bill imposing taxation, such a bill can be introduced and amended in the Senate.[194]

5.4.2 Mr Evans' view that the third paragraph does not apply to taxation has been criticised for failing to take into account the words of Sir Henry Parkes and for ignoring the wide ambit of the words of that paragraph.[195] Mr Brazil, however, also suggested that the view that the third paragraph does not apply to tax bills that do not impose taxation is a *possible* view of that paragraph.[196] However, he recognised that the 'ordinary language approach', under which the third paragraph would apply to taxation measures, is a powerful argument.[197]

5.4.3 Mr Barlin and Mr Turnbull appeared to agree that the third paragraph does apply to taxation bills that do not impose taxation.[198] Mr Rose also appeared to support that view.[199] However, as he considered section 53 is not justiciable, he raised the issues but did not express concluded views because he suggested that is

193 *Transcript*, p. 8.
194 *Submissions*, p. S61.
195 Mr I. Turnbull, *Submissions*, p. S257.
196 *Submissions*, pp. S272-273 and *Transcript*, p. 50.
197 *Submissions*, p. S51.
198 See *Submissions*, p. S204 and *Submissions*, p. S256.
199 See *Submissions*, pp. S242, S283 and Appendix C.

a matter for the Houses to determine.[200] Professor Blackshield also thought that the third paragraph could only apply to bills that increase a tax or a charge in the nature of a tax.[201]

5.5 Conclusion on tax and tax-related measures

5.5.1 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 authoritative opinions of Sir Robert Garran (with whom Sir Kenneth Bailey agreed) and the Hon Michael Duffy, and recent practice.

5.5.2 The Committee does not comment at this stage on precisely what tax or tax-related measures are encompassed by the third paragraph. That is considered further in the next chapter. On the face of it, the third paragraph does not extend to proposed laws imposing taxation, as these laws encompassed by the first two paragraphs of section 53. However, the Committee is aware that different constitutional provisions can have an overlapping operation,[202] and refrains from expressing a concluded view on this issue. At the very least, the third paragraph applies to tax or tax-related measures other than those which actually impose taxation. Thus, if increases in the rate or incidence of taxation are not regarded as the imposition of taxation, such measures may nevertheless be examples of charges or burdens within the meaning of the third paragraph of section 53: see chapter 6.

Recommendation 1

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

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

201 *Seminar Transcript*, p. 7.

202 For example, sections 51(x) (legislative power over fisheries in Australian waters beyond territorial limits) and 51(xxix) (legislative power over external affairs), and also possibly sections 90 and 92 (in relation to taxes on goods coming into a State).

5.6 Fines, penalties, licence fees and fees for services

5.6.1 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.

Narrow view

5.6.2 Quick and Garran's discussion of the third paragraph does not include reference to fines, penalties and fees for licences or services.[203] Consequently, it has been suggested that Quick and Garran appear to take the view that those imposts are not subject to the third paragraph.[204] This view is the 'narrow view'.

5.6.3 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.[205]

5.6.4 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'.[206] 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'). This view supports the assertion that the Senate should be able to amend upwards these imposts if it is able to originate them.

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

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

205 *Submissions*, p. S218.

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

5.6.5 Mr Ian Turnbull submitted that the words of Henry Parkes (refer to paragraph 5.1.1) 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.[207] 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.[208]

Broad view

5.6.6 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'.[209]

5.6.7 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.[210] 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.[211]

5.6.8 Thirdly, the argument that the Senate should be able to amend those imposts excluded from the first paragraph 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.[212] If a bill originates in the Senate, the only situation where the third paragraph would apply is where the bill is returned to the Senate with House of Representatives amendments and the Senate wants to increase the original level of its charges. If the House of Representatives amendments alter the Senate's original level of charges and propose new charges, rejection of those amendments would not be a proposed amendment by the Senate within the operation of section 53.[213]

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207 *Submissions*, p. S257.
208 ibid., p. S257.
209 Letter to Sir Robert Garran, Canberra, 21 April 1950 (see Appendix E).
210 Mr G. Carney, *Submissions p. S70.*
211 ibid., p.S70.
212 ibid., p.S70.
213 ibid., p.S70.

5.6.9 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.[214] 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'.[215]

5.6.10 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.[216] 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.[217] 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.

5.6.11 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'?[218] 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.

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

215 ibid., p. S99.

216 ibid., p. S16.

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

218 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.

5.7 Conclusion on fines, penalties, licence fees and fees for services

5.7.1 The first paragraph of section 53 provides that a proposed law shall not be taken to appropriate revenue or moneys, 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.[219] If such an impost does amount to the imposition of taxation, then it cannot be originated in or amended by the Senate.

5.7.2 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.

5.7.3 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'.

5.7.4 If an impost in the form of a licence fee or fee for services does in fact amount to the imposition of taxation, it will be covered by the first two paragraphs of section 53 (however elusive that distinction might be in practice). If it does not amount to the imposition of taxation, then that is because of the above-mentioned characteristics take the impost out of the field of concern of section 53. Merely because a financial impost is involved does not mean that the impost is in the nature of a tax, tax and tax-related measures being the subject of concern of section 53. In this respect, fines, penalties, licence fees and fees for services are unlike tax-related measures in the nature of increases in the rate or incidence of taxation.

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219 See *Air Caledonie International* v. *The Commonwealth* (1988) 165 CLR 462 at 470-471 per Mason CJ and Wilson, Brennan, Deane, Dawson, Toohey and Gaudon 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.

5.7.5 *The Committee subscribes to the 'narrow view' on this issue. 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 taxation, but that will have consequences only for the first two paragraphs of section 53.

Recommendation 2

The Committee recommends that fines, penalties, licences fees and fees for services should not be regarded as charges or burdens for the purposes of the third paragraph of section 53.

Chapter 6 Increases in the rate or incidence of taxation

This chapter examines bills which increase the rate or incidence of taxation. There has been considerable debate as to whether these bills impose taxation. The central issue is whether a bill that increases the rate or incidence of taxation (where that tax is expressed to be 'imposed' in an existing Act) is a proposed law imposing taxation for the purposes of section 53 of the Constitution. The Committee has identified a number of options open to it in dealing with this issue.

If a bill which increases the rate or incidence of taxation is classified as bill that does not impose taxation, it can be originated in the Senate. It would be illogical if that bill could not be amended in the Senate, even if the Senate amended the bill to increase the proposed charge or burden on the people in apparent contravention of the third paragraph of section 53. The Committee considers that origination of bills of this type in the Senate is inconsistent with the broad policy of section 53, namely, to preserve the financial initiative of the House of Representatives. Consequently, the Committee recommends that a practice be established whereby bills that increase the rate or incidence of taxation cannot be originated in the Senate.

6.1 Introduction

6.1.1 To some extent, the differing views on the interpretation and application of the third paragraph of section 53 in relation to taxation turn on the definition of 'proposed laws imposing taxation', even though that phrase is not contained within the third paragraph. The central issue is whether, for the purposes of the third paragraph of section 53, a bill that increases the rate or incidence of taxation (that is not expressed in the bill to be 'imposed' by the bill, but is expressed in another Act to be 'imposed' by that Act) is a proposed law imposing taxation.[220]

6.1.2 If a proposed law which increases the rate or incidence of taxation is viewed as a law imposing taxation, then the first and second paragraphs of section 53 operate to prevent the Senate originating or amending such laws at all. If a proposed law which increases the rate or incidence of taxation is not viewed as a law

220 A reference in this chapter to a bill or proposed law which increases the rate or incidence of taxation is a reference to a bill which itself contains a proposed charge or burden.

imposing taxation, the law is subject to the third paragraph of section 53 and the Senate cannot amend it so as to increase any proposed charge or burden on the people.

6.1.3 For the purposes of this chapter, it is necessary to define a number of types of bills. A bill that increases the rate of taxation is a bill which has the effect of increasing the amount of an existing tax that a taxpayer must pay. Bills that increase the incidence of taxation include bills that enlarge the tax base and bills that reduce deductions. A bill enlarges the tax base by, among other things, expanding the class of taxpayers subject to the tax or changing the circumstances under which taxation is payable (for example, reducing the amount of time in which tax is payable).

6.1.4 The Senate Standing Committee on Legal and Constitutional Affairs (as it was then named) considered the expression 'law imposing taxation' in its inquiry into the Taxation (Deficit Reduction) Bill 1993[221]. The bill was then split into a package of eight bills to avoid the risk of the original bill being invalid under section 55 of the Constitution. In October 1993, the Committee held an inquiry into two of these bills, namely, the Taxation (Deficit Reduction) Bill (No.1) 1993 and the Taxation (Deficit Reduction) Bill (No.2) 1993.

6.1.5 The Committee acknowledges that the phrase 'laws imposing taxation' is not contained in the paragraph which is the subject of this inquiry. However, a brief discussion of that issue is required in this context as the meaning accorded to the phrase will partly determine the scope of the third paragraph of section 53 in relation to taxation.

6.2 Categories of taxation bills

6.2.1 There are three classes of laws that relate to taxation, namely, laws imposing taxation, laws dealing with the imposition of taxation and laws otherwise dealing with taxation. Laws dealing with taxation include (but are not limited to) laws dealing with the imposition of taxation and the latter includes (but is not limited to) laws imposing taxation.

6.2.2 The definition of a law imposing taxation is controversial. On one view, laws imposing taxation are a small class of bills which simply create an obligation

221 The report was presented to the Acting President of the Senate on 20 September 1993.

to pay tax, at a rate to be determined. On another view, the imposition of a tax and the rate of that tax are indistinguishable because the liability is indeterminate until the rate is defined.

6.2.3 Proponents of the former would support the view that a law establishing the rate of a tax is a law dealing with the imposition of taxation but not itself imposing taxation. The third class of laws are those laws consisting only of ancillary provisions otherwise dealing with taxation (for example, the *Taxation Administration Act 1983*).

6.3 The meaning of 'laws imposing taxation' in section 55

6.3.1 Mr Rose submits, on the authority of *Re Dymond*[222] and the *Second Fringe Benefits Tax Case*[223], that bills which enlarge a tax base (where the tax is imposed in another Act) are not laws imposing taxation *within the meaning of section 55 of the Constitution*[224].

6.3.2 Mr Rose has stated that there is no logical distinction between a bill that enlarges a tax base and a bill that increases the tax rate[225]. Consequently, the view of the Attorney-General's Department is that, based on High Court decisions, where a tax is expressed in an existing Act to be 'imposed' by that Act, a bill to increase that tax, and not itself expressed to 'impose' a tax, is not a bill 'imposing' taxation *within the meaning of section 55 of the Constitution.*[226] Mr Rose also submitted that a bill which lowers the rates of tax imposed by another Act would not itself impose the lower taxation (unless the bill was itself expressed to impose it).[227]

6.3.3 In relation to bills that enlarge the tax base, it has been suggested that the High Court may revisit the classification of such bills. Mr Morris submitted that the High Court has not had occasion to consider the matter in relation to tax bases since 1959 and he suggests that, if the matter were to be reargued (particularly in light

222 (1959) 101 CLR 11.

223 That is, *State Chamber of Commerce and Industry and Others* v. *Commonwealth of Australia, Attorney-General for the State of Queensland (at the relation of the Brisbane Chamber of Commerce)* v. *Commonwealth of Australia* (1987) 163 CLR 329.

224 *Submissions*, pp. S242, S359.

225 *Seminar Transcript*, p. 27.

226 See Mr D. Rose, *Submissions*, p. S242.

227 Mr D. Rose, *Submissions*, p. S359.

of the recent High Court trend which offers a more expansive view of the restrictions of section 55 of the Constitution), there is a strong probability that the High Court would adopt a wide view of 'imposing' a tax such that bills which increase the rate or incidence of taxation would be classed as bills imposing taxation[228].

6.3.4 However, Mr Rose stated that if the High Court were to depart from the reasoning where such bills are classified as bills that do not impose taxation, the result may be the retrospective invalidity of a large body of existing Commonwealth taxation legislation since 1901[229]. The original *Customs Act 1901* contains provisions that can only be upheld on the basis that amendments defining tax and creating exemptions and rebates do not impose taxation[230]. Other Acts, such as the *Land Tax Assessment Act 1910*, were also drafted on the basis that amendments enlarging the tax base did not impose taxation (refer to paragraphs 6.4.16 and 6.4.17 for further discussion).

6.3.5 To date, there has not been a decision from the High Court as to whether the reasoning that a bill which enlarges a tax base (where the tax is imposed by another Act) is not a law imposing taxation can be applied to bills which increase tax rates (where the tax is imposed by another Act). It has been suggested that treating bills that increase tax rates in the same way as bills that expand tax bases (that is, as bills that do not impose taxation) may be a 'strained' reading of the cases that have been decided in relation to section 55[231]. However, other witnesses suggested that rates are not an essential part of the imposition exercise and agreed with Mr Rose (refer paragraph 6.3.2) that there is a distinction between the imposition of a tax and other tax-related clauses[232].

6.3.6 Mr Rose conceded that, in relation to whether bills which increase tax rates 'impose' taxation, the position has not been authoritatively decided[233]. He went on to state that the position adopted concerning bills which increase tax rates for

228 Mr A. Morris, *Submissions*, p. S306.

229 *Seminar Transcript*, p. 27.

230 Mr D. Rose, *Transcript*, p.28.
Seminar Transcript, p. 27.

231 Mr H. Evans, *Transcript*, p. S22.

232 See for example, Mr I. Turnbull, *Transcript*, p.73.

233 *Seminar Transcript*, p.27.

section 53 purposes, may involve a different approach to bills increasing the tax base[234]. The Houses may be:

> ... free to reach an agreement about bills increasing tax rates. But, if we ask whether they are free to make a compact in relation to bills increasing the tax base, that would really require a departure from what I see as an established authority that is not likely to be moved away from.[235]

6.3.7 Some submissions argued that a bill that increases a tax rate is a bill imposing taxation. Mr Evans considers that any bill which increases tax is a bill 'imposing' taxation[236]. He believes this is a commonsense approach which accords with the broad policy underlying section 53[237] (that is, to preserve the financial initiative of the House of Representatives). In support of his view that a bill which increases the tax rate is a bill imposing taxation, he stated that:

> ... if you tell the mythical man on the Bondi bus that we have just passed a bill which jacks up your taxes from 20% to 30% ..., but it is not a bill imposing taxation, he would think you were mad.[238]

According to Mr Evans' view, where an amendment or a bill increases the tax rate, it would be unnecessary to invoke the third paragraph to prevent the Senate amending the bill in that way because the second paragraph would preclude such an amendment. Mr Morris and Mr Brazil also supported the view that a bill which increases the rate of a tax is a bill imposing taxation[239].

6.3.8 Mr Morris argued that if a House of Representatives bill involves the exaction of a charge or burden and the Senate wants to increase that charge or burden, the Senate would not be able to amend the bill so as to increase those rates. It was submitted that the Senate could circumvent the problem by simply rejecting the bill in the form in which it was introduced into the Senate and introducing another bill which included the desired amendments.[240]

6.3.9 Mr Rose claimed that the view that all proposed laws which increase tax 'impose' taxation is inconsistent with the interpretation since Federation in relation

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234 ibid., p. 27.

235 ibid., p. 27.

236 Mr H. Evans, *Submissions*, p. S62.

237 Mr H. Evans, *Transcript*, p.17.

238 ibid., p. 17.

239 Mr A. Morris, *Submissions*, p. S20.
Mr P. Brazil, *Transcript*, p. 54.

240 Mr A. Morris, *Submissions*, p. S24.

to bills expanding the tax base expressed to be 'imposed' by another Act[241] (refer to paragraph 6.3.4). In relation to the 'circumvention' argument, Mr Rose suggested that the Senate can be prevented from amending a 'tax rates bill' if the Government Bill includes words 'imposing' the tax so as to ensure the second paragraph of section 53 operates and prevents the Senate amending the bill[242].

6.4 The meaning of 'proposed laws imposing taxation' in section 53

6.4.1 In determining the meaning of 'proposed laws imposing taxation' in section 53 of the Constitution, one must consider the issues which are relevant to an examination of the expression within the meaning of section 55:

- Is there a distinction under section 55 between bills which expand the tax base (where the tax is imposed by another Act) and bills which increase the tax rate (where the tax is imposed by another Act)? and

- If there is no distinction and both those bills are viewed together as either imposing taxation or not imposing taxation within the meaning of section 55, can that same reasoning be applied to section 53?

6.4.2 Mr Rose submitted, and no other witness contested, that a bill increasing the rate of a tax, or expanding the tax base, and expressed to 'impose' the resulting additional tax, is a bill 'imposing' taxation within the meaning of section 53 of the Constitution[243].

6.4.3 If it is accepted that section 53 is not justiciable, the Houses have a number of options in determining how to treat a bill that increases the rate or incidence of taxation for the purposes of section 53, where that tax is expressed to be 'imposed' by another Act. Those options include:

(a) adopting the High Court's view that a bill expanding a tax base is not a law imposing taxation under section 55, and applying that view in relation to section 53 to bills that increase the rate of taxation (where the tax is not expressed in the bill to be 'imposed' by the bill); or

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241 Mr D. Rose, *Submissions*, p. S283.

242 ibid., p. S283.

243 Mr Rose, *Submissions*, p. S280.

(b) disregarding the decisions by the High Court on section 55 and giving a wider meaning to the expression 'imposing taxation' in section 53 (such that a bill increasing the rate or incidence of a tax, where the tax is not expressed in the bill to be 'imposed' by the bill, is a bill 'imposing taxation'); or

(c) treating the expression 'imposing taxation' *as if* it had that wider meaning (that is, for the purposes of section 53, treating bills that do not impose a tax but deal with the imposition of a tax, *as if* they impose a tax); or

(d) not determining whether a bill that increases the rate or incidence of taxation is or is not a bill imposing taxation, but recommending that a practice should be established whereby bills that increase the rate or incidence of taxation cannot be originated in the Senate.

Options (a) and (b)

6.4.4 Ms Penfold suggested that there would need to be a good reason before one could justify departing from the proposition that the phrase 'proposed laws imposing taxation' in section 53 has the same meaning as 'laws imposing taxation' in section 55[244]. This comment appears to support option (a). Support for this view can be found in dicta in *Air Caledonie International* v. *The Commonwealth*[245] that:

> 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.[246]

6.4.5 On one view, the Parliament should follow the edict of the High Court and attribute the same meaning to 'imposing taxation' in section 53 as the High Court has decreed in section 55. On the other view, it could be argued that Parliament does not have to adhere to the statement in the *Air Caledonie* because it is not bound by the High Court in relation to a section which is not justiciable. The

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244 Ms H. Penfold, *Transcript*, p. 24.

245 (1988) 165 CLR 462.

246 (1988) 165 CLR 462 at 468.

There is also more general dicta to the same effect in other case law. See, for example, the comment by Murphy J. in *Western Australia* v. *The Commonwealth* ('the Territorial Senators' Case') (1975) 134 CLR 201 at 282 where His Honour stated there is a presumption '... that when identical words are used in different parts of a statute their meaning is the same.'

legislature and the judiciary are two of three co-equal arms according to the separation of powers doctrine. Professor Saunders noted that the conclusion that section 53 is not justiciable raises difficulties for consistency in interpretation in sections 53 and 55 which the High Court said was necessary in *Air Caledonie*. The Court stated that:

> ... the provisions in s.53 that 'a proposed law shall not be taken .. to impose taxation, by reason only of its containing provisions ... for the demand or payment ... of ... fees for services under the ... law' must be treated as indirectly applicable to confine the content of the references to '[l]aws imposing taxation' and the 'imposition of taxation' in the first paragraph of s.55[247].

Professor Saunders noted that the difficulty is compounded as the High Court's interpretation of section 55 is regarded as relatively settled[248]. Professor Saunders also noted that the court is not the sole arbiter of the Constitution, as Parliament and the Executive also have responsibilities in this area[249].

6.4.6 In contrast to Ms Penfold's assertion, Dr Thomson suggested that one could start with an alternative assumption, that is, that the Constitution is not internally consistent because it is a document of checks, balances and compromises[250]. Dr Thomson suggested that one could begin from the premise that the desired result of an interpretation is to achieve a certain objective. He cites an example:

> ... if your object was to increase the power of the Senate you might, for that reason, if you are stuck with the High Court's view on [section] 55, say, 'We are not stuck with it on [section] 53; we are going to develop our own view and different interpretation for these reasons; the parliamentary process works better; it makes financial bills more accountable to the House of Representatives.[251]

247 (1988) 165 CLR 462 at 468.

248 Cf view of Mr Morris at para. 6.3.3.

249 *Seminar Transcript*, p. 6.

250 *Seminar Transcript*, p.24.

251 *Seminar Transcript*, p. 25.
Dr Thomson also suggested that one phrase, appearing in two sections of the Constitution, may have a different meaning in relation to discussion of sections 53 and 57 (see *Transcript*, p. 108 and paragraph 3.4.11). See also the statement of Knox CJ and Gavan Duffy J in *Australasian Temperance and General Mutual Life Assurance Society Ltd* v. *Howe* (1922) 31 CLR 290 at 299: 'We do not assent to the proposition that a particular word is *necessarily* to be given the same meaning wherever it is found in a given statute.'

6.4.7 It could also be suggested that if one provision (that is, section 55) is justiciable and the other is not (that is, section 53), then it may be unnecessary for the terms to have a constant meaning[252].

6.4.8 Mr Evans' comments may support option (b). Assuming section 53 is non-justiciable, Mr Evans does not see it as a problem if there is a difference between the High Court's view of imposing a tax under section 55 and the House's view of imposing a tax under section 53[253]. He stated that the ability of the Government to include a number of tax increases in one bill reduces the Senate's room to manoeuvre and any interpretation that allows the Government to engage in such a practice should be regarded with suspicion[254].

6.4.9 If Senate amendments to a tax bill will be subject to the third paragraph of section 53, the Senate can simply introduce a bill in the terms it desires to avoid the prohibition in the third paragraph (but obviously, the Senate bill would not be able to impose taxation or appropriate monies). This is a further argument in support of a wide interpretation of 'imposing taxation' as it would prevent such a bill from being introduced in the Senate, although one would then need to consider what is subject to the third paragraph of section 53.

6.4.10 However, it would not be a matter of such a bill simply being originated in the Senate. The Senate would have to reject or fail to pass the bill that had come from the House of Representatives and that would have implications in relation to section 57 (that is, it could provide the pre-conditions for a double dissolution).[255]

6.4.11 As a means of determining disputes between the Houses, section 57 provides for the mechanisms of double dissolution followed by a joint sitting of the Senate and the House of Representatives in certain circumstances. The section provides several distinct and successive stages in the procedure by which a disagreement may be determined. First, the House of Representatives passes a proposed law, and the Senate must reject or fail to pass the proposed law, or pass it with amendments unacceptable to House. If, after another three months, the Houses or Representatives again passes the proposed law (with or without any

252 See Mr D. Williams, *Transcript*, p. 107.

253 ibid., p. S11.

254 *Seminar Transcript*, p.28.

255 Mr D. Rose, *Seminar Transcript*, p. 58.

amendments which have been made or agreed to by the Senate) and the Senate again rejects or fails to pass it, or passes it with amendments unacceptable to the House of Representatives, the Governor-General may dissolve both Houses simultaneously. The Governor-General may convene a joint sitting if, after the dissolution, the House or Representatives again passes the proposed law (with or without amendments which have been agreed to by the Senate) and the Senate rejects or fails to pass it, or passes it with amendments unacceptable to the House. At the joint sitting if the bill and any amendments are affirmed by an absolute majority of the total number of members of both Houses, they are taken to have been duly passed by both Houses.[256]

6.4.12 It is also arguable that a wide view of 'imposing' may increase the Senate's powers. There are three reasons that suggest a wide interpretation may increase the powers of the Senate. First, when an omnibus bill is debated, the Senate may be reluctant to stall the passage of the bill simply because it wishes to reject one clause of the bill. But if the imposition of tax and other tax related clauses are in separate bills, the Senate is able to pick and choose which bills to reject rather than facing *the option of rejecting one large omnibus bill*[257]. *This practice has been termed* 'cherry-picking'[258]. (However, since the Taxation (Deficit Reduction) Bills (No.1 & 2) 1993 were in dispute, it may no longer be the Government's practice to introduce omnibus tax bills. So despite the Government's classification of 'tax rates bills' as bills not imposing taxation, it appears the Government has not continued the practice of drafting omnibus bills).

6.4.13 Secondly, under section 55 of the Constitution, where a law imposes a tax, it can deal only with the imposition of tax and with only one subject of taxation. The consequences of the provisions of section 55 are that the power of the House of Representatives is limited and the power of the Senate is increased. Under the wide view, a law increasing the rate of tax cannot be subject to tacking and therefore, the Government cannot put the Senate in a position of having to accept extraneous matters[259]. Thirdly, if a bill increasing the tax rate imposes a tax, this widens the matters upon which section 55 can operate, that is, it increases the restriction on

256 See Mr D. Williams, *Exhibits*, p. E41.

257 Professor M. Coper, *Seminar Transcript*, p. 28.

258 Mr A. Morris, *Submissions*, p.S306.

259 Dr J. Thomson, *Seminar Transcript*, p. 21.

the House of Representatives' power as more tax bills would be subject to section 55[260].

6.4.14 However, it should be noted that in analysing the varying interpretations and calculating the benefits and detriment to each House, the outcome of any assessment will depend on the bill in question and the politics in relation to a particular bill[261]. For example, there may be some occasions when it would benefit the Senate to be able to amend a bill and others when it would benefit it more to be only able to reject a bill[262].

6.4.15 Mr Rose's submission suggested that the Houses *could* take the view that section 53 of the Constitution was framed without any foresight of the interpretation of section 55 that would be adopted by the High Court.[263] Mr Rose referred to passages of Quick and Garran's *Annotated Constitution of the Australian Commonwealth* which support that view. He stated that Quick and Garran:

> ... seem to have thought that, in view of the absolute ban on Senate amendments of proposed laws for 'imposing' taxation, paragraph 3 was unnecessary in relation to 'tax bills', thus implying (it can be argued) that any bill increasing rates, or enlarging the tax base, where the tax is expressed by an existing Act to be 'imposed' by that Act, is a proposed law 'imposing' taxation within the meaning of section 53.[264]

However, Mr Rose went on to state that there are difficulties associated with this explanation at least in relation to amendments enlarging a tax base, if not also in relation to amendments increasing tax rates[265].

6.4.16 Mr Rose submitted that in the early parliamentary debates, there was some foresight of the approach endorsed by the High Court in relation to the imposition of a tax[266]. He referred to the speech by Senator Millen on the Sugar Bonus Bill 1903[267]. Senator Millen cited the practice in some State Parliaments of dividing a proposal for the imposition of tax so that one bill deals entirely with the

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260 ibid., p. 22.

261 Professor C. Saunders, *Seminar Transcript*, p.26.

262 ibid., p. 26.

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

264 *Submissions*, p.S243 citing the *Annotated Constitution of the Australian Commonwealth* at pp. 668, 671.

265 ibid., p.S243.

266 ibid.; p.S243.

267 *Parliamentary Debates*, Vol. XIV, 22 July 1903, p.2403.

machinery and another bill levies the tax itself[268]. He went on to suggest that it is possible to argue that the third paragraph of section 53 was intended to be a prohibition against the Senate widening the area of taxation under the machinery bill[269].

6.4.17 Secondly, Mr Rose suggested that if the Quick and Garran view did reflect that of the founding fathers, it would be hard to explain the form and content of 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[270]. Furthermore, in his observations for the purpose of argument in *Osborne* v. *The Commonwealth*[271], Sir Robert Garran stated that if the *Customs Act 1901* was an Act 'imposing' taxation, then an amendment of that Act - which involved a difference in the assessment or calculation of duties - would be an Act imposing taxation, and the Senate would have no power to amend it. Thus, the whole object of section 55 of the Constitution would be defeated and a long Customs Bill would be immune from amendment by the Senate[272].

6.4.18 Mr Rose also noted the form of legislation used in the *Customs Act 1901* was followed in 1914 and 1915, and then followed consistently, based on the view that provisions in Assessment Acts, and amendments to them (including amendments that enlarge tax bases), did not 'impose' taxation[273].

Option (c)

6.4.19 Mr Rose raised the possibility of the Houses treating section 53 *as if* it had a particular meaning, regardless of whatever may be the correct legal meaning of section 55[274]. Hence the Houses could decide to act *as if* the expression 'imposing taxation' had a different meaning in section 53 from that accorded to the expression by the High Court in relation to section 55[275].

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268 ibid., p.2403, 1st column.

269 ibid., p. S2403, 2nd column.

270 Mr Rose QC, *Submissions*, p.S243.

271 (1911) 12 CLR 321.

272 *Opinions of Attorney-General of the Commonwealth of Australia*, Volume 1, 1901-14, p. 532 cited in Mr D. Rose, *Submissions*, pp. S243-244.

273 ibid., p.S244.

274 Mr D. Rose, *Submissions*, pp. S243, S281 and *Transcript*, p.29.

275 ibid., *Submissions* p.S281 and *Transcript*, p.29.

6.4.20 Mr Rose provided an analogy as a basis for the *'as if* approach'. He stated that it seems to be accepted that a bill which does not itself appropriate moneys but increases expenditure under an existing appropriation is a bill appropriating moneys within the meaning of sections 53 and 56[276]. There is, therefore, an analogy in the taxation context for saying that a bill which increases the amount of taxation is a bill imposing taxation, even though (based on the High Court decisions) this would not be the result in proceedings under section 55, at least so far as exemptions and rebates are concerned[277]. However, this approach simply transfers the dispute as to the meaning of laws 'imposing' taxation to the second paragraph of section 53 and that paragraph would instead become the basis for requiring a request.

6.4.21 Mr Turnbull also suggested that the Houses could adopt a different view of 'imposing' taxation in section 53 from that of the High Court in section 55. He stated that:

> I think you can have a different view but I think that is something that you must *agree* to have ... I do not think it is what you derive from interpreting the Constitution in the strict statutory sense[278].

6.4.22 The inherent disadvantage of options (b) and (c), in relation to introducing certain bills in the Senate, is that both would remove the flexibility now available to Government. On the basis of the High Court decisions, a bill that increases the level of taxation may be treated as a bill not imposing taxation (unless a clause is included that is expressed to impose that increase)[279]. That classification allows 'tax rates bills' to be originated in the Senate and this is useful given the exigencies of parliamentary timetables[280]. Those bills can also be amended in the Senate before going to the House of Representatives (though subject to paragraph 3 if that paragraph applies despite the word 'return' in paragraph 4)[281].

6.4.23 It was submitted that while the practice of introducing 'tax rates bills' in the Senate may give some power to the Senate, the practice may give more power to the House of Representatives by removing a large number of tax bills from the

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276 *Submissions*, p.S281.
Transcript, p. 30.

277 ibid.

278 Mr I. Turnbull, *Transcript*, p.72.

279 Mr D. Rose, *Submissions*, p. S247.

280 ibid., p.S247.

281 Mr D. Rose, *Submissions*, p. S245.

ambit of the restriction in section 55. By lifting that restriction, the Senate becomes weaker as it is vulnerable to what would otherwise be tacking[282].

Option (d)

6.4.24 Option (d) would allow the Committee to recommend that bills which increase the rate or incidence of taxation should not be originated in the Senate, without pronouncing upon the meaning of 'proposed laws imposing taxation'. Such a recommendation would be within the terms of reference, which relate specifically to the third paragraph, and would preserve the financial initiative of the House of Representatives.

6.4.25 If a bill which increases the rate or incidence of taxation (where the tax is expressed to be 'imposed' by another Act), is regarded as a proposed law imposing taxation, then the first paragraph of section 53 will prohibit the origination of such a bill in the Senate and the second paragraph will prevent amendment of the bill. If a bill which increases the rate or incidence of taxation (where the tax is expressed to be 'imposed' by another Act) is regarded not as a proposed law imposing taxation, then the third paragraph of section 53 will prohibit the upward amendment of such a bill in the Senate. If these type of bills are regarded as bills that do not impose taxation, they can be originated in the Senate.

6.4.26 If a bill which increases the rate or incidence of taxation is originated in the Senate, it would be illogical if that bill could not be amended in that chamber even if the Senate amended the bill to increase the proposed charge or burden on the people in apparent contravention of the third paragraph of section 53. (The illogicality of the Senate originating the bill, but being prevented from amending the bill upwards stems from the nexus between origination and amendment - that is, a House should be able to amend, in any manner a bill which it has initiated.) Consequently, the Senate can currently originate bills which increase the rate or incidence of taxation and amend those bills (even upwards). The Committee suggests that this is inconsistent with the broad purpose of section 53, that is, to preserve the financial initiative of the House of Representatives.

6.4.27 Bills are originated in the Senate for two main reasons. First, given that certain bills **must** be originated in the House of Representatives, the origination of

282 Dr J. Thomson, *Seminar Transcript*, p. 23.

some bills in the Senate balances the workload between both Houses and ensures that the flow of legislation from one House to the other is relatively even. Secondly, the House in which the portfolio Minister is located is also a factor which determines where a bill is originated.

6.4.28 However, despite the practice of originating some bills in the Senate in an attempt to balance the workload of the chambers, there is often a disproportionate number of bills originated in the House of Representatives. If bills that increase the rate or incidence of taxation could only be originated in the House of Representatives, the number would become more disproportionate. This does not necessarily mean that there would be major ramifications in relation to parliamentary timetables, but there would be an impact on the flexibility the Government now has in relation to the origination of bills.

6.4.29 A drafting direction from the Office of Parliamentary Counsel states that bills containing provisions which increase rates of tax should not be originated in the Senate. However, if programming considerations make origination in the Senate desirable, drafters are requested to bring the bill to the attention of the First Parliamentary Counsel.[283] It appears that most government departments also try to avoid originating such bills in the Senate even though the Government view is that it is legally able to originate these bills in the Senate.

6.4.30 The Committee recognises that bills which increase the rate or incidence of taxation are rarely originated in the Senate. However, it is a possibility as was illustrated by the Customs Tariff Amendment Bill 1994. That bill was originated in the Senate and increased the rate of duty on aviation fuels.[284]

6.4.31 Despite their differing views on a number of issues, the Clerks of both Houses agree that bills which increase the taxation payable should only be originated in the House of Representatives[285]. However, while the Clerks appear to share the same view on this issue, they reach that view by different means. The Clerk of the Senate believes that such laws are laws imposing taxation and are therefore, prohibited from being originated in the Senate by the first paragraph of section 53 and prohibited from amendment in the Senate by the second paragraph.

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283 Office of Parliamentary Counsel, Drafting Direction No. 9 of 1994, 20 September 1994, p. 2.

284 See Mr H. Evans, *Submissions*, p. S65 for discussion concerning this bill.

285 Mr H. Evans, *Submissions*, pp. S61-62 and Mr L. Barlin, *Submissions*, p. S315.

On this view, the third paragraph is not relevant to bills that increase the rates of taxation as the second paragraph imposes an absolute prohibition on amendment. The Clerk of the House of Representatives believes the third paragraph covers bills that increase tax rates and prevents the Senate from amending those bills upwards.

6.5 Conclusions

6.5.1 The Committee has decided not to express a view on the difficult question of whether a bill that increases the rate or incidence of taxation is a bill imposing taxation for the purposes of section 53 of the Constitution, where the tax is 'imposed' in another Act. That issue is not central, in any event, to the Committee's terms of reference.

6.5.2 However, the question remains as to how the Houses should treat increases in the rate or incidence of taxation. If such increases are caught by the first two paragraphs of section 53, on the basis that they amount to the imposition of taxation, then the Senate can neither originate nor amend them. If they are caught only by the third paragraph, then the Senate cannot amend the rate or incidence of taxation so as to increase a proposed charge or burden on the people, but could originate such a measure.

6.5.3 The Committee considers that it is inconsistent with the broad principle of section 53, and the constitutional object of preserving the financial initiative of the House of Representatives, for the Senate to originate a measure that increases the rate or incidence of taxation. Whether or not the origination of such a measure amounts to the imposition of taxation within the first paragraph of section 53, which would preclude such origination (but on which the Committee refrains from expressing a view (refer to paragraph 6.5.1)), the Committee considers that origination of bills which increase the rate or incidence of taxation in the Senate is inconsistent with the broad policy of section 53. The Committee therefore considers that a practice be adopted whereby such measures are not originated in the Senate.

6.5.4 In the Committee's view, this approach has the merit of being based on the broad purpose and philosophy of section 53, but avoids taking section 53 literally and treating it as inclusive and exclusive of all aspects of relations between the Houses in relation to money bills. It is an example of a sensible practice being open to the Houses that is not precluded by section 53, and it avoids having to determine

the meaning of 'imposing taxation', which has been the subject of considerable discussion, uncertainty and diversity of opinion.

6.5.5 It should be noted that recommendation 3 relates to bills that contain a proposed charge or burden. A bill that does not itself affect the existing tax rate nor affect the incidence of taxation is a bill that does not contain a proposed charge or burden. On a literal interpretation of section 53, the Senate could amend a bill that does not contain a proposed charge or burden so as to increase the existing rate or incidence of taxation. Bills that do not contain a proposed charge or burden in the bill itself are discussed in paragraphs 8.5.1 – 8.5.4 and dealt with in recommendation 7.

Recommendation 3

The Committee recommends that a bill which increases the rate or incidence of taxation should not be originated in the Senate.

Note: See recommendation 7.

Chapter 7 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 that can be raised in support of the proposition that the third paragraph does not apply to appropriation and expenditure bills are outlined in this chapter. On balance the Committee considers that the Houses should continue to regard the third paragraph of section 53 as applicable to proposed laws relating to expenditure and appropriation.

7.1 Introduction

7.1.1 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 83 of the Constitution provides that public money can only be spent (drawn from Treasury) under an appropriation made by law. Section 81 of the Constitution establishes the Consolidated Revenue Fund. It comprises all revenues or moneys raised or received by the Government.

7.1.2 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.[286]

7.2 The views of Quick and Garran and early parliamentary debates

7.2.1 Mr Turnbull submitted that it is clear from Parkes' statement (refer to paragraph 5.1.1) that he had appropriations in mind.[287] Quick and Garran held

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

287 *Submissions*, p. S255.

a similar view in 1900 (refer to paragraph 5.1.3) as they argued that increasing an appropriation inevitably leads to an increase of taxation, and adds to the burden on the people. However, Quick and Garran's view appears to have been that the third paragraph applied *solely* to appropriations.

7.2.2 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, agreed that a request was necessary as an amendment would violate the right of the House (of Representatives) to originate appropriations.[288] He also stated that a bill must propose an appropriation in order to be subject to the third paragraph.[289] 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.[290]

7.2.3 In his 1950 opinion, Sir Robert Garran 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.[291]

Sir Kenneth Bailey agreed that the third paragraph did not apply to expenditure.[292]

7.2.4 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 opinion has been called unconvincing because he was aware of Parkes' intention[293] and it has also been suggested that this later view creates more difficulties than it solves[294] .

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

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

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

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

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

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

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

7.3 Views of participants in the inquiry

7.3.1 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.[295] 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.[296] 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.[297]

7.3.2 There are, however, a number of arguments that can be 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.[298] This view puts particular emphasis on the ordinary and natural meaning of the words used in the third paragraph of section 53.

7.3.3 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.[299]

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295 *Submissions*, p. S50.

296 *Transcript*, p. 48.

297 *Submissions*, p. S197.

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

299 ibid., p. S10.

7.3.4 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.[300] 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.[301]

7.3.5 Mr Morris suggested, in a similar vein to Garran's 1950 opinion, that it does not necessarily follow that an increased appropriation will always result in an 'increase [in] any proposed charge or burden on the people'. When a Senate amendment impacts on the level of appropriation or expenditure, there may be no direct impact on the people.[302] If the Senate proposed an increase in the amount of money to be spent pursuant to a public works bill, there would be less money in the Consolidated Revenue Fund. However, there would be no increase in the 'charge or burden' on the people, in the absence of a further measure increasing existing imposts, or introducing new imposts, to make up the shortfall.[303]

7.3.6 In support of the proposition that the third paragraph may not apply to expenditure bills, Mr Morris stated that the repetition of the word 'proposed' in the third paragraph cannot be ignored. It is submitted that, in referring to a 'proposed law' and a 'proposed charge or burden on the people', the paragraph means a proposed law which specifically proposes a charge or burden on the people.[304] It does not mean a law which imposes a charge or burden indirectly by, for example, appropriating monies which, if the appropriation is increased, will be made up by increasing the charge or burden on the people. It is argued that the proposed laws the third paragraph is concerned with are not proposed appropriation laws, but proposed laws which already contain a 'proposed charge or burden on the people'.[305]

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300 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, p.3.

301 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).

302 Mr A. Morris, *Submissions*, p.S9.

303 ibid., p.S9.

304 ibid., p.S11.

305 ibid., p.S9.

7.3.7 Mr 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.[306] 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.[307]

7.3.8 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.[308] 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[309] and thereby to preserve the financial initiative of the House of Representatives.

7.3.9 The view that the third paragraph does not apply to expenditure has been criticised as not giving sufficient emphasis to the historical background.[310] At the conclusion of the seminar, Professor Coper focused on the view that the third paragraph does not apply to appropriations. He asked whether that view was not open as a reasonable interpretation, notwithstanding the argument based on the natural meaning of the third paragraph, because it is outweighed by parliamentary practice and acceptance of the contrary point of view.[311] Mr Evans and Mr Rose

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

307 ibid., p.S69.

308 ibid., p.S69.

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

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

311 *Seminar Transcript*, p. 81.

agreed that those factors outweighed any alternative interpretation while Ms Penfold did not agree.[312]

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

7.4 Conclusions

7.4.1 The Committee has found it difficult to decide whether the third paragraph of section 53 applies to appropriation and expenditure. On the one hand, the Committee recognises the force of the argument, based essentially on 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 has no application to appropriation and expenditure. Moreover, this view would have the great merit of avoiding the problems discussed in chapters 8 and 10 relating to the determination of when an appropriation or expenditure measure does in fact increase a proposed charge or burden on the people.

7.4.2 On the other hand, the Committee also recognises the force of 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, notwithstanding their differences in relation to precisely how the paragraph applies, also lends support to this view.

7.4.3 On balance, 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. However, the Committee would welcome comment (particularly on this aspect of its exposure draft), as the public hearings and seminar discussions tended to concentrate on how the third paragraph applied to appropriation and expenditure, rather than on whether it applied at all.

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312 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.

Recommendation 4

The Committee recommends that, 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).

Chapter 8 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. A number of issues are discussed with reference to examples, including whether the effect of a Senate alteration should be compared to the existing level of the charge or burden or the level of the charge or burden proposed by the bill.

The chapter also examines whether the word 'proposed' (second occurring) in the third paragraph should be ignored in certain circumstances. If a bill does not propose a charge or burden, the third paragraph does not preclude the Senate from increasing an existing charge or burden.

8.1 Introduction

8.1.1 This chapter examines what is meant by a 'proposed' charge or burden. It proceeds on the assumption that the third paragraph applies to both taxation and appropriation matters. For a detailed discussion of these issues, see chapters 5 and 7.

8.1.2 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. Consideration is also given to whether a literal interpretation is consistent with the underlying objective of the third paragraph, namely, to preserve the financial initiative of the House of Representatives.

8.1.3 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. Regardless of what test is applied to determine if there has been an increase in a proposed charge or burden (chapter 10 discusses the tests for determining this), the test must be applied at one of these levels.

8.1.4 An examination will also be made as to 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 in any way themselves propose a charge or burden, that is, affect (either up or down) an existing charge or burden.

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

8.2.1 The third paragraph precludes a Senate amendment so as to increase a proposed charge or burden. If it is accepted that the third paragraph applies to taxation and expenditure matters (see chapters 5 and 7), 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.

8.2.2 Mr Rose has 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.[313] 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.[314]

8.2.3 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.[315] He took the view that 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 could be treated as a bill that does not propose a charge or burden.[316]

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

314 ibid., p. S248.

315 ibid.

316 *Seminar Transcript*, p. 35.

8.2.4 Ms Penfold was attracted to Mr Rose's argument because it was based on reading the third paragraph as it stands and interpreting it according to the natural meaning of the words.[317]

8.2.5 A number of witnesses gave evidence in relation to the following example that specifically dealt with this issue. If the existing tax rate in an Act is 20% (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.

8.2.6 According to Mr Rose's 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%.[318]

8.2.7 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'.[319] In his view, because the existing tax rate would not be exceeded by the Senate alteration, the Senate could make the amendment.[320] Mr Barlin supported an agreement between the Houses in relation to bills that increase tax rates that recognised the primacy of the House of Representatives in initiating financial matters, but also recognised the right of the Senate to proceed by way of amendment where the Senate change to a tax-increasing measure in a bill did not exceed the existing tax rate.[321]

8.2.8 Mr Evans submitted that, as a result of the Senate alteration, such a bill is still lowering the existing tax rate and, therefore, is not a bill imposing taxation within the meaning of the first paragraph of section 53.[322] On this view, the Senate could make such an amendment. Mr Evans outlined his approach, namely, to look at the effect of the change on the taxpayer and ask whether the taxpayer will

317 ibid., p. 36.
318 ibid., p. 34.
319 Mr Barlin, *Submissions*, p. S314.
320 *Seminar transcript*, p.37.
321 Mr Barlin, *Submissions*, p. S315.
322 Mr Evans, *Transcript*, p. 12.

have to pay an increased amount of tax. He indicated that it corresponds with the 'bottom line' approach taken by Mr Barlin.[323] Mr Evans submitted there were precedents, accepted by the Government, which established that if a bill reduces an existing tax rate, the Senate can amend the bill so as 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'.[324]

8.2.9 Mr Turnbull submitted that Mr Rose's argument conflicted with 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.[325] The practice of the Office of Parliamentary Counsel has been to apply the 'bottom line' approach.[326]

8.2.10 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.[327] Professor Blackshield agreed with this view.[328]

8.2.11 Dr Thomson suggested that, if the real purpose of the third paragraph was to protect the people against increased charges, 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.[329]

8.2.12 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 reduced'* expenditure. This would be a proposed charge or burden within the meaning of the third paragraph. The Senate would be precluded from amending

323 *Seminar transcript*, p.38.
324 *Seminar Transcript*, pp. 38-39.
325 Mr I. Turnbull, *Submissions*, p. S258.
326 Ms H. Penfold, *Seminar Transcript*, p. 43.
327 *Seminar transcript*, p. 38.
328 ibid.
329 Dr J. Thomson, *Transcript*, pp.108-109.

the bill so as to increase pension rates above the levels proposed in the bill.[330] 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.[331]

8.2.13 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.[332]

8.2.14 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.[333]

8.3 Comments

8.3.1 Both Mr Evans and Mr Barlin, appear to have a somewhat corresponding approach that focuses on the 'status quo' or the 'bottom line'. This approach is consistent with parliamentary practice. The Senate can amend a bill that itself decreases an existing charge or burden but not so as to increase the charge or burden above its existing level. This approach is consistent with the objective of preventing the Senate increasing an *existing* or proposed charge or burden on the

330 Mr D. Rose, *Submissions*, p. S278.

331 ibid.

332 Mr Evans, *Submissions*, pp. S299-300.

333 ibid.

people. Ms Penfold submitted that the circumstances were increasing where it was 'virtually impossible to apply the 'bottom line' approach'.[334]

8.3.2 Mr Rose has only recently 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 there is an increase to an existing charge or burden, but also a decrease. This interpretation is based on the natural meaning of the words and it is supported by Ms Penfold and Professors Saunders and Blackshield. According to this approach, the Senate can not amend the bill so as to increase the level of the charge or burden above that proposed by the bill. The existing level of the charge or burden is simply not relevant. The approach is consistent with preserving the financial initiative of the House of Representatives.

8.3.3 Notwithstanding the parliamentary practice and the views of the Clerks of both Houses, the Committee prefers the approach based on a literal interpretation of 'proposed' charge or burden, recently advanced by Mr Rose. The Committee can see no reason why a bill that proposes a certain rate of tax (or tax base) or a certain level of expenditure should not be regarded as 'proposing' a charge or burden, even if it is less than the existing rate of tax or existing level of expenditure. The third paragraph precludes the Senate from increasing a proposed charge or burden. In determining if there is an increase, it follows that a Senate alteration must be compared to the level of the charge or burden proposed by the bill. A comparison with the level of the existing charge or burden is inconsistent with the plain meaning of the third paragraph, and is unnecessarily complicated.

8.3.4 Furthermore, the Committee notes that the approach is consistent with the purpose of section 53, that is, to preserve the financial initiative of the House of Representatives. The Committee also notes that under the 'availability' test (discussed at paragraph 10.3.14) the Senate alteration is compared to the existing charge or burden as proposed to be affected by the bill, even if the bill proposes a decrease in an existing charge or burden.

334 *Seminar transcript*, p.38.