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.

Recommendation 6

The Committee recommends that, for the purposes of determining whether an alteration to a bill moved in the Senate increases a proposed charge or burden, the alteration 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.

8.3.5 It follows that if a bill increases an existing charge or burden, and the Senate wishes to decrease the level of charge or burden proposed by the bill, then the Senate is not precluded from doing this by the third paragraph. This is the case even if the Senate alteration still exceeds the existing charge or burden. Again, the Senate amendment is to be compared to the level of the charge or burden proposed by the bill and not the existing level of the charge or burden. The Committee did not receive a great deal of evidence on this issue, however it did receive evidence in relation to two examples dealing with this matter. It is useful to consider these briefly.

8.3.6 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 increase the rate to 30%, can the Senate amend the bill to change the rate to 25% or should it make a request? The Senate's changed rate is greater than the existing rate, but less than the rate proposed by the bill.

8.3.7 Mr Evans' view is that the Senate could not amend the bill to provide for a tax rate that exceeded the existing rate.[335] As has already been stated his

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

approach focuses on the 'status quo' and whether the taxpayer has to pay an increased amount of tax.

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

8.3.9 Mr Barlin indicated that in such a case the Senate alteration would reduce the total of the additional funds that would have been required for the amendment proposed by the bill itself. Consequently, on the 'bottom line' approach the alteration would not increase the charge or burden on the people and the Senate could amend the bill.[336]

8.3.10 Mr Jones, of the Office of Parliamentary Counsel, submitted that the Attorney-General's Department had recently advised the Office that the Senate alteration should be compared with the existing charge or burden as proposed to be affected by the bill.[337]

8.4 Should the word 'proposed' (second occurring) be ignored?

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

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

336 *Seminar transcript*, p. 37.

337 *Submission*, p. S304.

by the Senate.[338] He pointed out that it was a 'well-established' rule of statutory construction that a word could be disregarded if it is contrary to the intention of the statute.[339] Mr Turnbull indicated that the same effect could be achieved by changing 'proposed charge or burden' in the third paragraph to 'existing or proposed charge or burden'.[340] He did not give any historical support for disregarding the second 'proposed'.[341]

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

8.4.4 Appropriation matters are discussed in detail in chapter 9. It is sufficient for the purposes of this chapter to note that a bill which does not itself contain an appropriation does not contain a proposed charge or burden. The Senate could not amend such a bill to include an appropriation because of the first paragraph of section 53.[342] (The first paragraph would apply on the basis that 'proposed law' includes a provision in a bill as well as the bill itself. Alternatively, it would apply on the basis that, once a provision originating an appropriation is added, the bill becomes a proposed law originating an appropriation).[343]

8.4.5 Furthermore, a parliamentary practice has developed such that the Senate may not amend a bill which does not contain an appropriation if the effect of the amendment would be to increase expenditure under a standing open-ended appropriation. This practice is consistent with ignoring the word 'proposed', and may also be justified on views put forward by Mr Rose. For a detailed discussion on this matter see chapter 9.

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

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

339 ibid.

340 *Transcript*, p. 74.

341 ibid.

342 Mr D. Rose, *Seminar transcript*, p.41 ; Mr H. Evans, *Seminar transcript*, p. 40.

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

administration bill so as to increase the existing rate or incidence of taxation in another Act (if that is regarded as not imposing taxation). It should be noted that chapter 6 discusses in detail whether imposing a tax includes increasing the rate or incidence of taxation.

8.4.7 Mr Rose argued that the power of the Senate to amend a bill that does not propose a charge or burden so as to increase the rate of tax or expand the tax base is no more anomalous than the power of the Senate to originate a bill containing such provisions. He submitted that judges who had enunciated the narrow view of imposing taxation must have foreseen such consequences. He is of the view that it would be difficult to ignore the word 'proposed'.[344] Ms Penfold agreed with Mr Rose that the third paragraph should be interpreted according to the natural meaning of the language used, regardless of whether this leads to what some might consider 'anomalies'.[345]

8.4.8 Mr Barlin submitted that based on his 'bottom line approach' the third paragraph could apply to a bill that did not propose a charge or burden. However, he acknowledged the application of the first paragraph to Senate amendments that impose a tax or include an appropriation.[346] Mr Evans' view is that the third paragraph has no application to a bill unless it contains a proposed charge or burden.[347]

8.4.9 Professor Blackshield argued that if the High Court were to interpret the third paragraph it could not ignore the word 'proposed'. However, he suggested that it was open to the Parliament to ignore 'proposed' if it was consistent with its underlying objectives.[348]

8.5 Comments

8.5.1 The Committee considers that it is inappropriate for the Senate to amend a bill (that itself does not propose a charge or burden) so as to increase an existing charge or burden by increasing the rate or incidence of taxation. Such an

344 Mr D. Rose, *Seminar transcript*, p.35.
345 Ms H. Penfold, *Seminar transcript*, p.37.
346 Mr L Barlin, *Seminar transcript*, p.37.
347 Mr H. Evans, *Submissions*, p. S58.
348 *Seminar transcript*, p. 35.

amendment would be inconsistent with the broad purpose of section 53 and the need to preserve the financial initiative of the House of Representatives, if not with its literal wording, given the reference to 'proposed' charges or burdens.

8.5.2 The Committee therefore recommends that the Houses adopt a practice whereby the Senate will not amend a House of Representatives bill that itself does not propose a charge or burden so as to increase the rate or incidence of taxation, even if such an increase is not regarded as amounting to the imposition of taxation.

8.5.3 The Committee acknowledges that, in relation to this recommendation, it could be argued the Committee is ignoring the word 'proposed' in the phrase '*proposed charge or burden*'. However, the recommendation sits naturally alongside, and is concomitant with, the Committee's earlier recommendation that bills increasing the rate or incidence of taxation should not originate in the Senate (refer to paragraph 6.5.5).

8.5.4 Furthermore, the recommendation is not precluded by the words of section 53. The Committee believes that it is open to both Houses to adopt the practice recommended by the Committee in relation to bills and amendments, the effect of which would increase the rate or incidence of taxation. The Committee considers that the recommendation is, in all the circumstances, appropriate.

Recommendation 7

The Committee recommends that, where a bill originates in the House of Representatives and does not itself propose a charge or burden, the Senate should not amend the bill to increase the rate or incidence of taxation.

Note: See recommendation 3.

Chapter 9 Expenditure under standing appropriations

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

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

9.1 Introduction

9.1.1 In chapter 8, the Committee considered the implications of the word 'proposed' in the phrase 'proposed charge or burden' in the third paragraph of section 53, particularly in the context of increases in the rate or incidence of taxation. This chapter further examines this issue by considering the practices of the Parliament in relation to the third paragraph of section 53 concerning bills that contain appropriations and bills that do not contain appropriations. In particular, the Committee will examine the parliamentary practice of applying the third paragraph of section 53 to a bill that does not contain an appropriation where a Senate alteration to the bill would increase expenditure under a standing open-ended appropriation.[349] On a literal interpretation, a bill must contain a 'proposed charge or burden' for the third paragraph to apply.

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

---

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

9.2 Fixed appropriations and standing appropriations

9.2.1 A significant part of government expenditure is authorised annually by the Parliament in statutes known as Appropriation Acts and Supply Acts. The amounts appropriated under these Acts are fixed or specified amounts for a particular financial year.

9.2.2 Many items of government expenditure are not authorised annually by the Parliament. The money required to meet such expenditure is appropriated by other specific Acts. The appropriation sections in such Acts are commonly referred to as special appropriations. Special appropriations may be specific or indeterminate in both duration and amount.[350]

9.2.3 Special appropriations that are not restricted in their application to a particular financial year are known as standing appropriations.[351] Standing appropriations do not as a rule specify a monetary limit on expenditure, that is, they are open-ended appropriations. For the purposes of this chapter, a reference to a standing appropriation is a reference to a standing open-ended appropriation.

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

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

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

9.2.5 Both Mr Turnbull and Mr Wright explained to the Committee the effect of an amendment that increases expenditure under a program funded from a standing appropriation.[352] For example, a program funded from a standing appropriation on the Consolidated Revenue Fund may provide for grants of financial assistance to people who satisfy certain criteria. An amendment to relax the eligibility criteria for grants under the program will result in more grants being made, and consequently,

---

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

351 ibid.

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

will increase expenditure under the program. As the appropriation is open-ended and the amendment increases expenditure, this automatically affects the draw on the Consolidated Revenue Fund to provide the additional money needed for the increased number of grants. Mr Turnbull stated that:

> ... if a Bill relies on a standing appropriation, ... a Senate amendment increasing expenditure automatically increases the amount appropriated.[353]

9.2.6 Mr Turnbull and Mr Wright explained that fixed appropriations are quite different in this regard. (A fixed appropriation specifies the amount of expenditure authorised). An amendment that increases expenditure under a program funded from a fixed appropriation does not increase the amount that has been appropriated.[354] If the program (discussed above) was funded from a fixed appropriation, by relaxing eligibility criteria for grants, the amendment could lead to the money that has been appropriated being used more quickly. However, the amendment does not increase the amount that has been appropriated to fund the grants. The amount that is appropriated under a fixed appropriation can only be increased by amending that amount to a larger amount.

9.3 Relevant provisions of the Constitution

9.3.1 In order to examine the application of the third paragraph of section 53 to standing appropriations, it is necessary to consider briefly the general application of the first and second paragraphs to appropriations. The first paragraph provides that laws appropriating revenue or moneys shall not originate in the Senate. The second paragraph precludes the Senate from amending proposed laws that appropriate revenue or moneys for the ordinary annual services of the Government. It is generally agreed (assuming that the third paragraph applies to appropriations) that the third paragraph applies to appropriations other than for the ordinary annual services of the Government.[355]

9.3.2 Section 56 of the Constitution provides that a proposed law for the appropriation of revenue or moneys may not be passed unless the purpose of the appropriation has been recommended by a message from the Governor-General. The

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

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

355 Refer to chapter 7.

recommendation must be made to the House in which the appropriation originates, namely the House of Representatives. As only the Governor-General can recommend an appropriation, the Government of the day has the exclusive authority to originate a proposal for an appropriation.

9.4 Appropriation bills

9.4.1 The third paragraph has been treated as applying to a bill containing a standing appropriation, where a Senate amendment to the bill would increase expenditure under the appropriation.

9.4.2 Mr Evans submitted that the Sugar Bonus Bill 1903 established that the third paragraph applies to an appropriation bill.[356] The Bill authorised payments from the Consolidated Revenue Fund (appropriated in the bill itself) of a bounty for sugar cane that was grown under certain conditions involving the use of white labour. The Senate alteration to the bill relaxed the criteria for a sugar grower to be paid the bounty. The alteration probably would have led to an increase in the number of eligible claims.

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

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

- There was no difference between a charge on the revenue (appropriation) and a charge on the people - it was the people's revenue. Therefore a proposal for an appropriation out of the Consolidated Revenue Fund imposed a charge or burden on the people.[357]

- Any provision in a bill of this kind (bill appropriating revenue) which prescribed a larger expenditure than that proposed by the House was, to

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

357 *Parliamentary Debates*, 14 July 1903, p. 2014.

the extent of the excess, origination of further appropriation – and thus in contravention of paragraph 1 of section 53.[358]

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

- There was a difference between originating a bill and originating a proposal in a bill. Section 56 implied that the Senate might receive messages recommending appropriation and by extension of this argument might appropriate revenue (even if under section 53 it could not originate a bill making an appropriation) and by further extension might alter an appropriation.[359]

- An increase in appropriation was not necessarily an increase in the burden on the people (for example, if the budget was in surplus there would be no need for increased taxes).[360]

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

Is the parliamentary practice consistent with the third paragraph of section 53?

9.4.7 Mr Evans submitted that the interpretation of the third paragraph adopted in the Sugar Bonus Bill debate is 'rational and coherent'.[361] As previously stated, it is his view that the third paragraph applies only to bills which the Senate is precluded from initiating but entitled to amend, namely appropriation bills other than for the ordinary annual services of the Government.[362] The bill itself must contain the proposed charge or burden.[363] Mr Turnbull submitted that in relation to an appropriation bill the proposed charge or burden is 'obvious'[364], that is, it is the appropriation itself.

358 ibid., p. 2015.
359 *Parliamentary Debates*, 22 July 1903, pp.2375-5.
360 ibid., p. 2377.
361 Mr H. Evans, *Submissions*, p.S53.
362 ibid., p.S50.
363 ibid., p. S58.
364 Mr I. Turnbull, *Submissions*, p. S258.

9.4.8 The Committee accepts that the third paragraph applies to a bill which contains an appropriation. In this context, a reference to a proposed charge or burden is a reference to a charge or burden contained in the bill itself.

Recommendation 8

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

9.5 Bills that do not contain appropriations

9.5.1 Mr Turnbull submitted that since 1910 it has been the parliamentary practice to treat the third paragraph as applying to a bill that does not itself contain an appropriation, if a Senate amendment to the bill would increase expenditure from a standing appropriation in another Act or bill.[365] Mr Evans takes the view that this practice should be limited to bills that amend Acts which contain standing appropriations in such a way as to affect expenditure under the appropriations (refer to paragraphs 9.7.2-9.7.7).[366]

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

> It is considered that the provisions would apply in respect of expenditure if an amendment is expected to cause an increase in the sum of money to be expended under an appropriation – in other words, expected to increase government expenditure. This is seen as a charge or burden on the people. It has been considered by the House that it is the proposed expenditure which is the charge or burden on the people – whether or not this is covered in an appropriation in the bill itself is not the point. The same sum of money is involved, and therefore the same charge or burden will result, whether it is funded by an appropriation in the bill which is subject to the amendment or by a consequential automatic extension of an appropriation located elsewhere – that is, in another bill or in an existing Act.[367]

365 *Submissions*, p. S258, S263.

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

367 ibid., pp. S197-198.

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

9.5.3 Mr Evans informed the Committee that, on a 'pure interpretation' of the third paragraph, an amendment to a bill that does not contain an appropriation so as to increase expenditure from a standing appropriation could be made by the Senate.[368] However, Mr Evans acknowledged that the parliamentary practice is to require such an amendment to be made by way of a request.[369]

9.5.4 Mr Evans submitted the parliamentary practice was established by the debate concerning the Surplus Revenue Bill 1910.[370] Under clause 5 of that bill, the Commonwealth was to pay Western Australia a certain amount of money over a ten year period. In the first year approximately 250,000 pounds was to be paid and in each subsequent year that amount was to be reduced by approximately 10,000 pounds. The Senate alteration provided for the payments to Western Australia to be continued beyond the ten year period.

9.5.5 There was uncertainty in the Senate as to whether the alteration should be moved as an amendment or a request.[371] The matter received little consideration in the Senate and was glossed over with the remark 'What does it matter whether we proceed by way of request or amendment?'[372]. The Senate ultimately proceeded by way of a request. Mr Evans submitted that the parliamentary practice was hastily adopted without proper thought being given to the implications of such a practice.[373]

Expenditure and non-expenditure bills

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

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

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

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

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

372 ibid.

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

9.5.7 Bills that do not contain appropriations can be divided into bills that affect expenditure under a standing appropriation ('expenditure bills') and bills that do not ('non-expenditure bills').[374] These bills need to be examined in relation to the parliamentary practice.

(a) Expenditure bills

9.5.8 A bill that increases expenditure from a standing appropriation in an existing Act is an expenditure bill. For example, a bill that amends an Act that contains a standing appropriation to increase the upper limit on payments under the Act, or to expand the class of persons who are eligible to receive payments under the Act, would be regarded as increasing expenditure. A bill that extends the object or purpose of a standing appropriation or alters the destination of the appropriation is also an expenditure bill.[375]

9.5.9 Mr Evans' view is that an expenditure bill does not contain a proposed charge or burden and, consequently, the third paragraph should be regarded as having no application to such a bill.[376] (The charge or burden, that is, the relevant standing appropriation, is contained in the Act that the bill amends.[377]) Mr Evans submitted, however, that the third paragraph has been applied in relation to expenditure bills since 1910 as if they did contain appropriations.[378]

9.5.10 Mr Turnbull submitted that where a bill does not itself contain an appropriation it is difficult to identify the 'proposed' charge or burden.[379] He suggested that in relation to an expenditure bill the proposed charge or burden is the 'standing appropriation as proposed to be affected by the Bill'.[380] That view has been adopted by the Office of Parliamentary Counsel.[381]

---

374 Chapter 8 discusses whether a bill that decreases expenditure falls within the ambit of the third paragraph. A bill that increases expenditure is, of course, subject to the third paragraph.

375 Browning, op.cit., p.410.

376 *Submissions*, p. S229.

377 *Seminar Transcript*, p. 65.

378 ibid.

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

380 ibid.

381 *Submissions*, p. S125.

9.5.11 Mr Rose also suggested that the proposed charge or burden is not limited to that contained in the bill itself, but may include 'an *existing* charge or burden *as it would be altered by the provisions proposed in the bill*'.[382]

(b) Non-expenditure bills

9.5.12 A non-expenditure bill is a bill that amends an Act but not so as to affect expenditure from a standing appropriation. An example of such a bill would be a bill that merely decreases the level of penalties for offences contained in an Act.

9.5.13 A non-expenditure bill neither contains a 'proposed charge or burden' nor does it 'propose' to affect the relevant standing appropriation (cf the arguments outlined in relation to an expenditure bill at paragraphs 9.5.10 and 9.5.11).

9.5.14 The Attorney-General's Department submitted that it appeared to have been accepted by the Houses that the third paragraph applied to amendments even though they did not increase any charge or burden proposed in the bill itself.[383] The approach taken by the House of Representatives as outlined by Mr Barlin appears to support this (refer to paragraph 9.5.2). The Attorney-General's Department initially suggested that in such a case the proposed charge or burden is the charge or burden proposed in the amendment (to the bill) proposed by the Senate.[384] That view was based on the approach taken to certain Social Services Bills in 1960. Mr Turnbull did not accept that suggestion on the ground it confused the Senate amendment with the bill it was amending.[385] Mr Morris was also critical of the suggestion.[386] In a subsequent submission, it was explained that after a closer examination of the Social Services Bills, the Department no longer holds the view that the proposed charge or burden is the charge or burden proposed in the amendment proposed by the Senate.[387]

9.5.15 Mr Rose took the view that the third paragraph would not apply to a non-expenditure bill.[388] However, he argued that, even though the third paragraph did

382 *Submissions*, p. 278.
383 Mr P. Lahy, *Submissions*, pp. 238-239.
384 Mr P. Lahy, *Submissions*, p. S238.
385 Mr I. Turnbull, *Submissions*, p. S259.
386 Mr A. Morris, *Submissions*, p. S102.
387 *Submissions*, p. S248; p. S278.
388 ibid., p. S248, S287.

not apply, the Senate was not free to amend a non-expenditure bill so as to increase expenditure under a standing appropriation. This view was based on two propositions. Firstly, a Senate amendment increasing expenditure under a standing appropriation is a law appropriating revenue or money within the meaning of the first paragraph.[389] Secondly, the first paragraph of section 53 precluded, not only the introduction of a bill appropriating revenue or moneys or increasing amounts under a standing appropriation, but also the insertion in a bill of a clause doing either of those things. [390]

9.5.16 Mr Turnbull considered the argument advanced by Mr Rose and suggested that the better approach was to treat the second 'proposed' as a mistake, and ignore it. Mr Turnbull contended that this would give effect to the intention of the third paragraph. (For a more detailed discussion of Mr Turnbull's suggestion, refer to paragraph 8.4.1).

9.5.17 Mr Morris, although of the view that the third paragraph did not apply to appropriations, argued that if a bill did not contain an appropriation the Senate could amend the bill so as to introduce an appropriation, or to increase an existing appropriation.[391]

Is the parliamentary practice consistent with the third paragraph of section 53?

9.5.18 None of the submissions suggested that the parliamentary practice, in relation to bills that do not contain appropriations, should not continue. Mr Turnbull submitted that the practice is correct. He suggested that if the practice was not in place, there would be a gap in the scheme of section 53 that allowed the Senate to indirectly increase appropriations by amending bills from the House of Representatives which did not propose a charge or burden.[392] Mr Barlin also agreed that the current practice should continue.[393]

389 ibid., p. S287.
390 ibid., p. S249.
391 Mr A. Morris, *Submissions*, p. S104.
392 Mr I. Turnbull, *Submissions*, p. S258.
393 *Seminar Transcript*, p.66.

9.5.19 The parliamentary practice is inconsistent with the interpretation of the third paragraph advanced by Mr Evans. Nonetheless, he agreed that the practice should not be overturned.[394]

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

9.5.21 The application of the third paragraph to non-expenditure bills is consistent with the interpretation proposed by Mr Turnbull that the word 'proposed' (second occurring) be ignored. The Committee also notes that it is justified if the argument of Mr Rose is accepted, that is, that the first paragraph of section 53 precludes the Senate inserting into a bill a clause that increases expenditure under a standing appropriation.

9.5.22 The Committee considers that the current parliamentary practice is consistent with the broad policy of section 53 and is not precluded by that section. Having regard to this argument and recognising the force of Mr Rose's argument, the Committee considers that the following recommendation is appropriate.

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.

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

9.6 Should expenditure bills be originated in the Senate?

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

9.6.2 Mr Rose submitted that the long-established views, at least of successive Governments, are that a bill which increases expenditure under a standing appropriation is a proposed law appropriating moneys within the meaning of the first paragraph of section 53. A Governor-General's message under section 56 is required for such a bill.[395] Mr Rose also referred to an advice dated 26 November 1962 of the then Attorney-General, the Hon Sir Garfield Barwick QC, MP, who expressed the same view.[396] Mr Turnbull indicated that the existing practice was to treat such bills as requiring a Governor-General's message and that such bills were introduced into the House of Representatives.[397]

9.6.3 Mr Evans told the Committee that, as part of the parliamentary practice, expenditure bills had been introduced into the Senate and the Senate had amended such bills to further increase expenditure under a standing appropriation.[398]

9.6.4 The Committee considers that whether or not a bill which increases expenditure under a standing appropriation is a bill that falls within the first paragraph, it is inconsistent with the broad policy of the third paragraph that such a bill be 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.

395 Mr D. Rose, *Submissions*, p. S246.

396 *Submissions*, pp. S290-291.

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

398 *Seminar Transcript*, p.65; *Transcript*, p. 16.

9.7 Proposals by Mr Evans

9.7.1 In evidence to the inquiry, Mr Evans made a number of proposals concerning expenditure. Mr Evans stressed that the proposals were not designed to give effect to what he considered to be the 'correct' interpretation of the third paragraph, but rather to make the best use of the precedents and to formulate a coherent and consistent interpretation of that section given those precedents.[399]

9.7.2 Mr Evans submitted that under the existing parliamentary practice, the third paragraph could be extended to apply to an unwieldy range of bills and amendments that indirectly affect appropriations.[400] The first proposal appears to address these concerns. It provides that:

> it should be explicitly declared by the Senate that the paragraph does not apply to bills in respect of appropriations unless such bills contain appropriations or amend acts which contain appropriations in such a way as to affect expenditure under the appropriations, and does not apply to bills originating in the Senate.[401]

9.7.3 Mr Turnbull considered that the first recommendation reflected the existing parliamentary practice, although it was too narrow. He noted that it was inconsistent with Mr Evans' interpretation of section 53 (that the third paragraph applies only to bills which the Senate is precluded from initiating, but entitled to amend, namely appropriation bills other than for the ordinary annual services of the Government).[402]

9.7.4 Mr Rose also considered that the first recommendation was too narrowly expressed.[403] He argued that the recommendation should not be limited to a bill that amends *'an Act containing the relevant appropriation'*. It should extend to any bill that would result in an increase in expenditure under any standing appropriation, regardless of whether that appropriation was contained in the Act being amended by the bill *'or elsewhere'*.[404]

---

399 ibid., *Submissions*, p. S301.

400 Mr H. Evans, *Submissions*, pp.S55-56.

401 Mr H. Evans, *Submissions*, p. S56-57.

402 Mr I. Turnbull, *Submission*, p. S261.

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

404 ibid.

9.7.5 In a later submission, Mr Rose suggested that the Clerk's proposal should at least include bills which require or authorise payments and which will result in an increase in expenditure under *'any'* standing appropriation, *'whether or not the Act containing the appropriation is being amended'*.[405]

9.7.6 The approach taken by the House of Representatives as outlined by Mr Barlin indicates that the standing appropriation may be contained in an existing Act or bill, that is, it need not be contained in the Act that the bill is amending (refer to paragraph 9.5.2). Ms Penfold submitted there were very few standing appropriations which were likely to be affected by other Acts that were not part of the same legislative scheme or package. In her view, very few standing appropriations risk being affected by arguably unrelated Acts.[406]

9.7.7 The Committee considers that the first recommendation is too narrowly framed in relation to standing appropriations. The Committee acknowledges that, by limiting the application of the third paragraph to bills that amend Acts that contain standing appropriations, it may be easier to determine whether a bill, and a Senate alteration to the bill, will affect expenditure under a standing appropriation. However, the Committee's view is that this can be determined even if the standing appropriation is contained in another Act or bill.

9.7.8 Mr Evans' second proposal was that:

> every government bill which amends an act containing a standing appropriation so as to increase expenditure under the appropriation should contain a clause appropriating the additional money, should be classified as an appropriation bill, and should be introduced in the House accordingly.[407]

9.7.9 Both Mr Turnbull and Mr Rose considered that the second recommendation was not necessary because such a bill was already a bill appropriating revenue or money.[408] Mr Rose also submitted that it was not clear why the proposal should only apply to Government bills, although he did acknowledge that it was of little practical significance because it was unlikely that the a non-Government bill would be passed by the House of Representatives.[409]

---

405 ibid., p. S288.

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

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

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

409 *Submissions*, p. S288.

9.7.10 The Committee considers that it is not necessary for such bills to contain an appropriation clause. The Committee notes that recommendation 10 is consistent with Mr Evans' suggestion that such bills be originated in the House of Representatives.

9.7.11 Mr Evans made two further proposals which are dealt with in chapter 10.

Chapter 10 Determining whether an amendment will increase the 'proposed charge or burden'

This chapter considers the test that should be applied to determine whether an alteration in the Senate increases the proposed charge or burden on the people. The test to be applied in these circumstances 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 of section 53 applies if the 'probable, expected or intended' effect of the amendment will increase expenditure. The Clerk of the Senate applies a test where the third paragraph applies if the effect of the amendment will 'necessarily, clearly and directly' increase expenditure under an appropriation.

An alternative test of 'availability' is also discussed. This test involves considering whether the amendment will increase the amount available for expenditure, regardless of whether any of the extra amount available is likely to be spent.

10.1 Introduction

10.1.1 In the discussion of expenditure under appropriations in chapter 9, it was assumed that an increase in expenditure had occurred. Chapter 10 considers how to determine whether an amendment will increase expenditure.

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

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

(b) the test for deciding whether the Senate amendment increases the charge or burden.[410]

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

10.1.3 If there is, in fact, a charge or burden on the people and if a Senate amendment will increase that charge or burden, the third paragraph of section 53

410 *Submissions*, p. S285.

applies and the Senate is precluded from amending the bill to increase that charge or burden.

10.2 Is there a charge or burden?

10.2.1 Mr Rose submitted that it is reasonably arguable that any provision appropriating moneys is a provision imposing a charge or burden on the people, even though no actual expenditure may result. On this view, a charge or burden would include the making of moneys *available* for expenditure, whether or not the money will actually be spent (as it could be spent by the Government).[411] The Committee accepts this proposition.

10.2.2 It should also be noted, in this context, that the Committee has accept the view put forward by Mr Rose that it is open to the Houses to accept that there is a proposed charge or burden even where a bill proposes a decrease in the charge or burden: see chapter 8 and recommendation 5.

10.2.3 Mr Rose suggested that a possible distinction could be drawn between a bill which, say, increases pension rates (and therefore deals with money) and a provision requiring the doing of things other than the payment of money (for example, the construction of a building).[412] If such a view were adopted, it could be argued that a provision requiring or authorising 'the doing of things other than the payment of money' does not impose a charge or burden even if the expenditure for the doing of the thing is covered by a standing appropriation. On this view, the third paragraph would have no application. Consequently, the third paragraph does not apply to a provision merely by reason that it will or may lead to expenditure.[413] It should be noted that Mr Rose did not advance this argument as his view, but rather he advanced it as a *possible* argument.

10.2.4 Mr Turnbull did not agree with the argument that a provision authorising the doing of things other than the payment of money is not subject to the third paragraph. His view was that any amendment which has the effect of increasing expenditure under a standing appropriation falls within the ambit of the third

411 ibid., p. S285.

412 ibid., pp. S285, S343, *Transcript*, p. 35 and *Seminar Transcript*, p. 80.

413 ibid., p. S285.

paragraph.[414] During the seminar, Mr Evans stated that he did not think that the distinction - between a bill which deals with money and a provision requiring the doing of things other than the payment of money - was viable. Mr Rose said that he was strongly inclined to agree with Mr Evans on this issue.[415]

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

10.3.1 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 Clerks. The Clerk of the House of Representatives believes that the third paragraph applies where the 'probable, expected or intended effect' of the amendment is to impose a greater financial imposition on the people than would be the case if the amendment were not passed. The view of the Clerk of the Senate is that the third paragraph of section 53 applies where the effect of the amendment 'necessarily, clearly and directly' increases expenditure under a standing appropriation.

10.3.2 The Committee notes that whether the effect of a Senate alteration should be compared to the existing charge or burden, or the charge or burden proposed by the bill, is relevant to the application of a test for determining whether there has been an increase in the proposed charge or burden. The level that the Senate alteration must be measured against is considered in chapter 8 and recommendation 6. The Committee recommends that the alteration be compared to the charge or burden proposed by the bill and not the existing charge or burden.

The view of the Clerk of the House of Representatives

10.3.3 According to Mr Barlin's view, the limitation imposed by the third paragraph of section 53 applies whether the imposition is either direct or indirect.[416] It suggests that the only satisfactory approach is for each case to be considered on its merits. The view considers that a charge or burden will result, whether it is funded by an appropriation in the bill which is subject to the

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

415 *Seminar Transcript*, p. 80.

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

amendment or by a consequential automatic extension of an appropriation located elsewhere – that is, in another bill or in an existing Act.[417]

10.3.4 It has been submitted that the 'probable, expected or intended effect' test has the advantage of being relatively easy to apply and allows for the application of certain common sense assumptions about human behaviour in general, and the state of Australian society in particular.[418]

10.3.5 Mr Evans criticised the approach of the House of Representatives in a 1992 paper. He stated that, adopting the approach of the House of Representatives and deciding each case on its merits, '... is a recipe for ... confusion, inconsistencies and disputes' and '... the lack of any principle to determine difficult cases simply results in ad hoc decisions ...'.[419]

10.3.6 The approach of the House of Representative has been further criticised as unsatisfactory because it injects uncertainty into the parliamentary process. It has also been suggested that the application of the test will result in disagreement between the Houses[420] and may amount to an unjustified hindrance on the Senate. However, it should be noted in this context that, in Mr Barlin's view, the third paragraph should not be interpreted as preventing the Senate making an amendment which may result indirectly in a relatively minor and possibly incidental increase expenditure in the administration of a program or scheme.[421]

The view of the Clerk of the Senate

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

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

---

417 ibid., p.S197-201.

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

419 'Amendments and Requests', p. 3 in House of Representatives Standing Committee on Legal and Constitutional Affairs, op. cit.

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

421 *Submissions*, p. S198.

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

(c) the amendment must have the effect of necessarily, clearly and directly increasing expenditure under the appropriation.[422]

From the evidence, it is clear that Mr Evans still subscribes to the view that a clear and direct impact on expenditure should be the test of whether a request is required.[423]

10.3.8 It has been submitted that support for the view of the Clerk of the Senate can be found in the requirement 'so as to increase'. It has been suggested that the phrase requires a motive and an effect. In order for the Senate to have the requisite motive, the proposed amendment must directly have the effect of increasing the charge or burden on the people.[424] However, a majority of the judges in *Chew* v. *The Queen* suggested that 'so as to' may sometimes signify purpose rather than result.[425] This interpretation would appear to conflict with the 'necessary, clear and direct' test which requires a direct link with the resultant expenditure before the third paragraph of section 53 is invoked.

10.3.9 The 'necessary, clear and direct' approach has also been criticised as an extraordinarily narrow view[426] and as inappropriate where there is a potential increase in appropriation and where the expenditure in question is subject to ministerial or some other element of discretion.[427] It has also been suggested that the narrow test of necessity gives the Senate considerably more scope for amendment. At the time the amendment is being considered, it may not be possible to prove that it will 'necessarily, clearly and directly' increase expenditure, and thereby require a request if the Senate wants to make an alteration. Reasons that may make it impossible to satisfy the first test include that intended beneficiaries may be unaware of their eligibility and therefore may not apply for the relevant

422 Cited in 'The Legislative process in the Parliament of the Commonwealth: Amendments and Requests', p. 9 in House of Representatives Standing Committee on Legal and Constitutional Affairs, loc. cit.

423 *Submissions*, p. S303.

424 Mr G. Carney, *Submissions*, p. S68.

425 (1991) 173 CLR 626 at 630 per Mason CJ, Brennan, Gaudron and McHugh JJ.

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

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

benefits, or claimants may not satisfy the eligibility requirements for payment of the benefit.[428]

10.3.10 Mr Rose suggests that the approaches of both Clerks involve speculation as to the likelihood that expenditure will occur and the exercise of administrative discretions.[429] Mr Rose suggested that rules could not be drafted which can determine whether an expenditure increase amounts to a charge or burden in every conceivable situation, but he suggested that this does not mean some useful rules could not, or should not, be laid down.[430]

Areas of agreement

10.3.11 Despite the conflicting views of the Clerks in relation to this issue, there do appear to be some areas of agreement. Mr Rose submits that it appears to be generally accepted that:

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

(b) the third paragraph applies where the appropriation is standing and open-ended, and it will necessarily result in a greater amount being expended (whether the appropriation is in the Bill itself, in an Act being amended by the Bill or in some other Act).[431]

10.3.12 The Committee notes that, in relation to (b), Mr Evans' view is that the third paragraph should only apply where a standing appropriation is in the bill itself or in the Act being amended by the bill (refer to paragraph 9.5.1).

10.3.13 The Committee agrees that the area of controversy concerns those bills that will not 'necessarily, clearly and directly' result in increased expenditure.[432] Mr Barlin appears to agree that the third paragraph applies to bills that will necessarily

428 Office of the Clerk of the House of Representatives, 'The legislative process in the Parliament of the Commonwealth: A Background Paper,'p.3 in House of Representatives Standing Committee on Legal and Constitutional Affairs, *The third paragraph of section 53: Inquiry information*, April 1994. See also paragraph 2.14.5 ff of the Committee's Issues Paper.

429 *Transcript*, p. 36 and *Submissions*, p. S341.

430 *Transcript*, p. 38.

431 *Submissions*, p. S341.

432 ibid., p. S341.

or probably cause an increase in expenditure under an appropriation because the nature of the amendment is such that it is reasonable to conclude that it will result in an increase in expenditure.[433]

The 'availability' test

10.3.14 Mr Rose proposes a test whereby increases in expenditure could be determined by considering whether the amendment would increase the amount *available* for expenditure, whether or not any of the extra amount is likely to be spent.[434] Where Parliament makes more money available to the Executive, that is a burden on the people, regardless of whether the money is actually spent.[435]

10.3.15 During the seminar, Ms Penfold suggested that the 'availability' test would be relatively easy to apply[436] and it would enable identification of the purpose for which the bill was being drafted[437]. If an amendment added a class of people to those eligible to receive a benefit, the amount available under the appropriation would be increased by the amount needed to pay the increased benefits.[438] The effect of the application of this test is that while increased expenditure is authorised, it is not obligatory that the authorised moneys be spent.

10.3.16 However, Mr Evans was critical of the test and stated that it does not accord with the third paragraph which refers to actualities and not intentions.[439] He also argued that the question of whether the amendment authorises more expenditure often becomes the same question as whether any expenditure is going to occur. He suggested that the application of entitlements to an empty class does not authorise any expenditure.[440] Ms Penfold disagreed and said that an application of entitlements to an empty class would clearly authorise expenditure.[441]

433 See Mr L. Barlin, *Submissions*, p. S204 and Mr D. Rose, *Submissions*, p. S341.
434 *Submissions*, pp. S286, S341.
435 Mr D. Rose, *Transcript*, p. 36.
436 *Seminar Transcript*, p. 71
437 ibid., p. 74.
438 Mr D. Rose, *Submissions*, p. S341.
439 *Submissions*, p. S350.
440 *Seminar Transcript*, p. 72.
441 ibid., p. 72.

10.3.17 Mr Evans' view was that the 'availability' test may not be helpful in relation to standing appropriations. He suggested that it is often difficult to determine whether a particular appropriation in a bill or a particular amendment increases the maximum amount of money available under the appropriation. As the amount of the appropriation is indefinite, and the effect of the amendment is uncertain, it is not possible to say whether the provision or amendment increases the maximum amount available under the appropriation.[442]

10.3.18 Mr Rose suggested there was another possible option to determine whether expenditure has been increased. Wherever the Senate wants to amend a bill and is precluded from doing so by the third paragraph, because of the effect under an appropriation, the Senate could include an amendment that would break the link with that appropriation.[443] Mr Rose cites a standing appropriation for the cost of buildings of a certain description as an example. If a bill provided for a building to be constructed, the Senate may want to amend the bill to increase the size of the building. In order to do this, it could include a provision stating that the cost of the increase would be met from moneys to be appropriated.[444] Mr Evans notes that this approach has been used in the Senate and it could also be applied to taxation bills.[445]

10.3.19 Ms Penfold put forward the proposition that a request could be required where an alteration makes an increase legally possible even if the net effect of the alteration is a decrease (in the expenditure available under the appropriation or the total tax or charge payable).[446] According to this proposition, to determine whether there has been an increase in the proposed charge or burden, the effect of a charge or burden on any class of people is relevant, not the net effect on the revenue or on the people as a whole.[447] Ms Penfold also explained the way in which she thought that this proposition appeared to have been accepted by Professor Blackshield.[448]

10.3.20 As previously noted, Ms Penfold suggested that this proposition could be applicable to appropriations, taxes and other charges. Generally, whether there has

442 *Submissions*, p. S300.
443 *Submissions*, p. S342.
444 ibid.
445 *Submissions*, p. S350.
446 *Submissions*, p. S354, p. S362.
447 *Submissions*, p. S362.
448 *Submissions*, pp. S361-2, *Seminar Transcript*, p. 45.

been an increase in the proposed charge or burden on the people has been discussed only in relation to expenditure as that is where the problems have arisen in the past. However, the Committee perceives some benefit in a test which covers all types of charges as Ms Penfold's test does. Such a test would cover issues concerning taxation which may arise in the future. For example, there may be a proposed amendment in the Senate which would result in some taxpayers being liable to pay more tax and other taxpayers being liable to pay less tax. Ms Penfold's test would be applicable to such a case. Ms Penfold stated that she did not think her test was inconsistent with Mr Rose's specific views, but he had not seen this formulation.

10.3.21 The Committee is attracted, in principle, to Ms Penfold's variant of the 'availability test'. It notes the advantages, particularly for drafting, in using a test which is relatively easy to apply. But the Committee is also aware of Mr Evans' concern that a test of this kind would severely curtail the Senate's power to amend bills containing proposed charges or burdens, even if the test was not applied to minor and incidental increases in expenditure or taxation . However, curtailing the power of the Senate in amending bills of this type to increase the proposed charge or burden is consistent with preserving the financial initiative of the House of Representatives.

10.3.22 Given the increasing number of disputes prompted by this issue (refer to chapters 1 and 2), it is evident that there is no established parliamentary practice on which the Committee can rely as a criterion for making a decision on this issue. The Committee considers that the current approaches do not appear to be operating satisfactorily because the Houses do not apply the same test.

10.3.23 The Committee considers that a request should be required where an alteration to a bill is moved in the Senate which will make an increase legally possible, even if the net effect of the alteration is a decrease. The Committee considers that the House of Representatives would be unlikely to object if the Senate proposed to amend a bill where the alteration would result in a minor or incidental increase in expenditure. The Committee notes that this appears to be the current practice.

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).

10.4 Further proposals by Mr Evans

10.4.1 This is an appropriate place to discuss Mr Evans' third and fourth proposals which deal with administrative issues concerning the third paragraph of section 53. (His first two proposals were discussed at paragraph 9.7).

10.4.2 Mr Evans' third proposal was that:

> Where a government bill originating in the House amends an act containing such an appropriation [ie. standing], in relation **to each amendment** to such a bill circulated in the Senate, the responsible Senate minister should be required to provide, before the amendment is moved, a statement of whether the amendment would, in the government's view, affect expenditure from the appropriation, and to give a statement of reasons for that view.[449](emphasis added)

10.4.3 The Committee suggests that it may be an 'administrative nightmare' if the responsible Senate Minister were required to provide a statement for every amendment.

10.4.4 Mr Evans also suggested that:

> Where an amendment, which will affect expenditure from an appropriation is to be moved in the Senate, is stated by a Minister to have the effect of increasing expenditure from such an appropriation, the amendment shall be moved as a request to the House of Representatives.[450]

10.4.5 The Committee recognises that Mr Evans' fourth proposal is related to his earlier proposals. That is, the proposal is related to appropriation bills where the bill contains an appropriation or amends an Act containing an appropriation so as to

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

450 ibid., p. S222.

increase expenditure under an appropriation.[451] The Committee does not agree with that limitation. However, it considers that the idea in this proposal could be usefully applied to all expenditure and appropriation bills.

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

10.4.7 The Committee suggests that if the Senate proposes an amendment to a bill which has originated in the House of Representatives and the responsible Senate Minister considers that the amendment will increase expenditure under a standing appropriation, the Minister should, give a statement to the Senate to that effect.

451 ibid., p. S221.

Chapter 11 Further issues

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 should apply to bills that have originated in the Senate, whether the term 'charge or burden' refers only to financial burdens, whether it is within the Senate's power to request an amendment to a bill which it could amend itself and whether the Senate can press a request for an amendment.

11.1 Introduction

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

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

11.2.1 There are a number of arguments that support the view that the third paragraph of section 53 should not apply to bills that have originated in the Senate. First, Mr Morris submitted that the term 'proposed laws' should be read as applying to a bill which has reached that stage, that is, a bill that has been passed by one house of parliament.[452] He argued that a bill originated in the House of Representatives, but which has not yet been passed by that House, is not a 'proposed law'. The same applies for a bill originated in the Senate.

11.2.2 There are a number of criticisms that can be made in relation to this argument. The argument assumes that 'proposed' only means 'proposed by a House' and cannot include 'proposed by the member who introduced the bill'.[453] It has also been noted that Mr Morris' construction of 'proposed law' is inconsistent with the first paragraph of section 53 which provides that proposed laws appropriating

---

452 ibid., p. S90.

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

moneys and imposing taxation cannot be originated in the Senate. It would not make sense to suggest that the first paragraph applies to a bill only after it has been passed by the Senate.[454]

11.2.3 The second argument, which supports the view that the third paragraph should not apply to bills which originate in the Senate, is based on the word 'return' in the fourth paragraph of section 53. The fourth paragraph provides that:

> 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.

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. It would appear that the reference to the return of proposed laws the Senate may not amend in the fourth paragraph includes a bill that the Senate cannot amend in a particular way.[455]

11.2.4 In his 1950 opinion, Sir Robert Garran agreed that the prohibition on amendment only applies to proposed laws that have come from the House of Representatives. He stated that this is in accord with one purpose of the section, that is, in the case of a difference between the Houses, the House of Representatives shall be responsible for the form of the bill, but the Senate will have a voice as to whether the bill shall become law.[456]

11.2.5 Furthermore, if a bill was originated in the Senate, but the application of the third paragraph prevented the Senate from amending the bill, the Senate could reject that bill and simply originate another bill which includes the desired amendments.[457]

---

454 See Mr H. Evans, *Submissions*, p. S218 and Mr D. Rose, *Submissions*, p. S277.

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

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

457 See Mr A. Morris, *Submissions*, p. S91 and Mr D. Rose, *Submissions*, p. S277.

11.2.6 It appears that most commentators, including Mr Morris, Sir Robert Garran, Ms Penfold[458] and Mr Evans, support the view that the third paragraph should not apply to bills originated in the Senate. However, the source of Mr Evans' view is not those arguments outlined above. As previously noted, Mr Evans submitted that the third paragraph applies only to bills which the Senate may not initiate but may amend (that is, bills appropriating money other than for the ordinary annual services). He argues that it would be a nonsense if the third paragraph was interpreted as preventing the Senate from amending a bill which it may initiate.[459]

11.2.7 The use of the word 'return' and the fact that it makes no sense to prevent the Senate amending a bill which was originated in the Senate leads the Committee to agree that the third paragraph of section 53 should not apply to bills that originate in the Senate.

11.2.8 The Committee would add only that this view must be considered in the wider context of bills which should not be originated in the Senate because of the first paragraph of section 53 or which should not be originated in the Senate because of the broad policy of section 53. In this respect, this recommendation is tied to an acceptance of recommendations 3 and 6. In summary, the Committee considers that the bills which the Senate should not initiate include bills increasing the rate or incidence of taxation and bills increasing expenditure under a standing appropriation.

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.

458 *Submissions*, pp. S352-353.

459 *Submissions*, pp. S50-51.

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

11.3.1 The issue was raised in submissions by Mr Jones[460] and Ms Penfold. Ms Penfold noted that:

> The concept of 'financial' charges and burdens has not been raised expressly but is, ... inherent in some of the discussions about how far the expression 'charge or burden' can extend.[461]

That also appears to be the conclusion reached by some witnesses when considering the Native Title Case.[462] The Committee agrees that the third paragraph applies only to financial burdens.

11.3.2 The Committee has not attempted to define what is meant by charges or burdens of a financial character. This will generally be clear, but there are borderline cases. The Taxation Laws Amendment Bill (No. 4) 1993, which gave rise to this inquiry, is one of those cases. The bill advanced the dates by which company tax was to be paid. The consequence was that taxpayers had to pay in more frequent instalments and thereby lose interest, or pay interest on moneys required to make payments earlier than required under the existing law.[463] The Senate amendment would have resulted in a similar interest burden being incurred by another class of taxpayer (refer to paragraph 1.6.3). The Committee did not receive evidence on the issue and it has not formed a concluded view. However, the Committee considers that the third paragraph of section 53 should only apply to charges or burdens of a financial character.

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

11.4.1 It has been submitted that the third paragraph of section 53 refers only to 'a charge or burden **on the people**' and that it does not refer to either a charge or burden on the Consolidated Revenue Fund or on the States.[464]

---

460 *Submissions*, p. S310.

461 *Submissions*, p. S353.

462 Refer to para. 3.4.18 ff.

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

464 Mr A. Morris, p.S12.

11.4.2 It has also been suggested that the third paragraph may not apply to an increase in a 'proposed charge or burden' to be imposed on legal entities, such as companies, corporations and trade unions.[465] While the word 'person' generally includes a corporation[466], the word 'people' is consistently used in the Constitution to refer to natural persons. The preamble and sections 7, 24 and 127 (before it was repealed) of the Constitution are cited in support of that proposition.[467] Furthermore, the High Court has held that the term 'residents' in section 75(iv) of the Constitution refers to natural persons and not corporations.[468] Consequently, Mr Morris argued that the third paragraph has no application where a proposed law is amended by the Senate to increase any proposed charge or burden on non-human entities.[469]

11.4.3 However, while Mr Morris noted that ordinarily 'people' would almost certainly refer to natural persons, it has been suggested that 'charge or burden on the people' may have been intended to have a less literal meaning that is wide enough to cover charges where legal entities bear the direct impact. Such entities are, after all, legal entities by which people are organised.[470] Furthermore, in some cases, the imposition of a charge or burden on non-human entities (eg. corporations) will be passed on to natural persons (eg. shareholders) by increased prices or membership fees.[471]

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

---

465 ibid., pp. S12-13.

466 *Royal Mail Steam Packet Co.* v. *Braham* (1877) 2 App Cas 381 and subsequent cases. See also Mr Morris at p. S13 referring to the relevant Australian cases which are cited in *The Australian Digest* second edition, volume 37, columns 182-191. The principle has been included in statute in section 22(a) of the *Acts Interpretation Act 1901* and section 161 of *The Corporations Law*. The principle has also been referred to in recent High Court decisions - see, for example, *Koowarta* v. *Bjelke-Petersen* (1982) 153 CLR 168 at 236 per Mason J.

467 ibid., p.S13.

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

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

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

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

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

11.5.1 Mr Morris suggested that the third paragraph of section 53 may not apply to a 'proposed charge or burden' which is to be imposed on persons who are not residents of Australia. The use of the word 'people' elsewhere in the Constitution supports the argument as the 'people' referred to in the Constitution are residents of the Commonwealth.[472] Mr Morris concluded that it is an open question whether charges levied on non-residents (for example, arrival and departure taxes or payments for visas) are subject to the third paragraph of section 53.[473] The Committee agrees that this is an open question.

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

11.6.1 It has been suggested that if the Senate agreed to request the House to amend bills which the Senate believes it could amend itself, the problems surrounding the application of the third paragraph of section 53 may be solved. However, there is a threshold question as to whether the Senate can request amendments in situations where the Constitution does not require requests to be made.

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

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

11.6.4 As previously noted, where a Senate request is not complied with, the Senate bears the responsibility of determining the fate of the bill. It may drop the

472 ibid., p.S28.

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

request or veto the whole bill.[474] It might be argued that if the Senate can amend a bill, it should not be able to opt instead to request an amendment in order to retain its ability to veto the bill altogether. It appears that it would be open to the House to refuse to consider the request and return the bill to the Senate.[475] Alternatively, the House may accept the request even if it is of the view that the Senate could have amended the bill.

11.6.5 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. A failure to pass may invoke the double dissolution procedure in certain circumstances (refer to paragraph 6.4.10 for discussion of section 57).

11.6.6 Mr Evans suggests that the boundary between amendments and requests needs to be clear otherwise the Houses will be

> ... sliding down that slippery slope that people have expressed concern about in the past, whereby every amendment will become a request.[476]

11.6.7 The Committee recognises that there is still a need for delineation between situations where amendments are permitted and those where requests are required. It is anticipated that the proposed compact will assist in developing this delineation.

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

11.7.1 It has been suggested that, where the Senate proposes to make alterations that would be a combination of requests and amendments, it would be simpler if all of those alterations were drafted in the same form. This issue involves a question of constitutional power. It also raises the possibility that where the Senate makes a request when it could amend the bill, the House of Representatives may return the bill and ask that the Senate make the amendment (refer to paragraphs 11.6.4-11.6.6).

---

474 Refer to paragraphs 1.7.1-1.7.4.

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

476 *Seminar Transcript*, p. 52.

11.7.2 Mr Turnbull submitted that, in this situation, it would be desirable to treat all of the alterations as requests. The rationale for this view is that the Constitution bars the Senate from making amendments in certain circumstances, but there are no restrictions on the Senate making any sort of request.[477]

11.7.3 Where an alteration could be drafted as an amendment, but it is consequential on a request, the Office of Parliamentary Counsel takes the view that the alteration should also take the form of a requests.[478]

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

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

11.8.1 The House of Representatives has never conceded the Senate's right to repeat and thereby press or insist on a request for an amendment in a Bill which the Senate may not amend. The Clerk of the Senate argues that the Senate has successfully pressed requests on many occasions since 1901 and suggests that if the framers of the Constitution had intended that the Senate be prevented from pressing its requests, such a prohibition would have been included in the Constitution.[479]

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

> ... in the case of a bill which the Senate may not amend, the House of Representatives alone is responsible for the form of the measure; the Senate cannot strike out or alter a word of it, but can only suggest that the House of Representatives should do so. If that House declines to make the suggested amendment, the Senate is face to face with the responsibility of either passing the bill as it stands or rejecting it as it stands. It cannot shelve that responsibility by insisting on its suggestion, because there is nothing on which to insist ... If its request is not complied with, it can reject the bill, or shelve it; but it must take the full responsibility of its action ... .[480]

---

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

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

479 *Submissions*, p. S233.

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

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

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

(a) the words 'at any stage' in the fourth paragraph of section 53 do not mean the same thing as 'at any time and from time to time', but rather they refer to the recognised stages in the passage of a bill through the chamber[481];

(b) in 1902 Sir Isaac Isaacs stated that once the Senate had made a request, its power of suggestion was exhausted as far as that stage was concerned; it has no right to challenge a decision of the House of Representatives in matters where it has made requests and received a definite answer[482];

(c) Sir John Latham's statement that the only practical way a distinction may be drawn between a request and an amendment is by taking the view that a request can only be made once and having made the request, the Senate has exercised all the rights and privileges allowed by the Constitution[483]; and

(d) in relation to a request, the form of the bill rests solely with the House; to press a request is to insist on it and that is a contradiction in terms and unconstitutional.[484]

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

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

---

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

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

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

484 ibid., p. 449.

(b) at the Constitutional Convention of 1898 an amendment to insert the word 'once' in the fourth paragraph, to prevent the Senate repeating a request, was defeated[485]; and

(c) even if the Senate cannot press a request, it could easily circumvent the restriction by slightly modifying a request when it was repeated. (It has been suggested that it cannot be supposed that the framers of the Constitution intended to impose a prohibition that could be so easily avoided)[486].

11.8.5 The fourth paragraph of section 53 permits the Senate to make a request by message for the omission or amendment of an item or provision at any stage. The Committee agrees with the view expressed by Sir Isaac Isaacs that once the Senate has made a request in relation to a particular issue, its power of suggestion is exhausted as far as that stage is concerned. The Committee also agrees with the meaning attributed to 'stage' in paragraph 11.8.3, that is, it 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.

11.8.6 The possibility that the pressing of requests may invoke the process outlined in section 57 of the Constitution should also be noted in this context. At some point, for the purposes of section 57, the Senate must fail to pass the proposed law. As previously discussed, if the Senate twice rejects or fails to pass the proposed law within the prescribed time frame, or passes it with amendments to which the House of Representatives will not agree, this may provide the 'trigger' for a dissolution of both Houses of Parliament (refer to paragraph 6.4.10 for further discussion of section 57 of the Constitution).

11.9 Other issues on which there is little or no evidence

11.9.1 A number of issues were brought to the Committee's attention by Mr Kerry Jones. The Committee has little or no evidence on these issues and consequently has not made a decision on them. Nevertheless, those issues have been listed here to

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

486 ibid., p. S233.

promote further discussion prior to the drafting of the proposed compact and the tabling of the Committee's final report.

11.9.2 Mr Jones queried whether, in the case of a tax base increase, there will still be an increased charge or burden if the person is given a choice whether to accept the increase. Mr Jones gave the example of where a bill requires taxpayers to keep onerous records and assesses the taxpayer $100 whenever a transaction occurs. An alteration gives the taxpayer a choice of not keeping records but paying $150 tax instead.[487] Mr Evans responded that to define voluntary payments of this type as taxation would blur the distinction between taxation and other compulsions[488]. It appears that Mr Evans does not think a payment of this type should be classified as a charge or burden within the meaning of the third paragraph.

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

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

(b) In relation to (a), if the charge or burden on other people is decreased, must the increase be a net increase in order to fall within the third paragraph? If so, is this to be done on the basis of the number of people or the quantum?[489]

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

(i) separately to each alteration;

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

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

487 *Submissions*, p. S310.

488 *Submissions*, p. S349.

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

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

The Committee would welcome any comments on these issues.

11.10 Issues related to the fourth paragraph of section 53

11.10.1 The fourth paragraph of section 53 is relevant to any discussion of the third paragraph because it is the only way by which the Senate may alter a bill if the prohibition in the third paragraph is invoked. The text of the fourth paragraph of section 53 is set out at paragraph 11.2.3. The ability to amend is perceived as more significant than the ability to make requests. Therefore, the fourth paragraph of section 53 is central in relation to the powers of the respective Houses.

11.10.2 Two issues relevant to the fourth paragraph of section 53 have been raised by Ms Penfold.[490] Those issues are set out below.

(a) The fourth paragraph refers to 'any **proposed law** which the Senate may not amend'; it does not refer to a proposed amendment. Does the fourth paragraph of section 53 therefore only apply to the second paragraph?

(b) The fourth paragraph provides that the Senate may request the omission or amendment of any items or provisions. Does this mean that a request is not available if it would involve the insertion of new material?

11.10.3 The Committee is inclined to answer both of these questions in the negative, as a positive answer seems to depend on a particularly literal approach to section 53, but it has not formed a concluded view.

490 *Submissions*, p. S355.

Chapter 12 Overview

This chapter provides an overview of the exposure draft. It discusses the main criteria on which the Committee has relied in making decisions on the issues and it outlines the Committee's recommendations together with the criteria used to reach that recommendation. The Committee has sought to adhere to the broad purpose of section 53, that is, to maintain the financial initiative of the House of Representatives, and to preserve existing parliamentary practices. The chapter also discusses the consistency of the Committee's recommendations.

12.1 Introduction

12.1.1 The following chapter will draw together, and discuss the consistency of, the Committee's recommendations concerning the third paragraph of section 53 of the Constitution. A diagrammatical representation of the Committee's recommendations is located at the end of this chapter.

12.1.2 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. The Committee has consistently referred to this rule in framing its recommendations and the rule appears to be supported by all witnesses and participants.

12.1.3 There are a number of criteria that can be used in interpreting the third paragraph of section 53 of the Constitution. The relevant criteria include the broad purpose of section 53, current parliamentary practice, the drafting history of section 53, the natural meaning of the words, the workability of any interpretation and the opinions of respected commentators. All of these criteria need to be considered in order to provide a coherent view of the third paragraph of section 53.

12.1.4 The Committee has evidently relied on some criteria more frequently, and to a greater extent, than other criteria. This is due, in part, to the fact it is impossible to reconcile all of the competing views on this matter. Two criteria that are often relied upon are the broad purpose of section 53 and parliamentary practice. It is apparent that there needs to be compromise of one or more of the relevant criteria in order to arrive at a sensible and practical interpretation of the third paragraph of section 53. This is not an inconsistent approach, but rather a

pragmatic view designed to reduce the difficulties surrounding the interpretation of the third paragraph of section 53 of the Constitution.

12.2 Discussion of recommendations

12.2.1 The Committee's first recommendation is that the third paragraph of section 53 should be regarded as applicable to tax and tax-related measures. In reaching that recommendation, the Committee traces the history of the issue through early opinions, focusing specifically on the 1950 opinion of Sir Robert Garran. The recommendation is based on that opinion and current, although recent, parliamentary practice.

12.2.2 The Committee then recommends that provisions imposing fines or other pecuniary penalties, and provisions for the demand, payment or appropriation of fees for licences or fees for services should not be regarded as charges or burdens for the purposes of the third paragraph of section 53. The Committee suggests these imposts are not charges or burdens on the people because they serve other purposes, such as providing a sanction for unlawful behaviour, or are provided in exchange for something received. The recommendation is also based on current parliamentary practice.

12.2.3 The Committee's third recommendation is that a bill which increases the rate or incidence of taxation should not be originated in the Senate. The Committee considers that the origination of such bills in the Senate is inconsistent with the purpose of section 53, and the constitutional objective of preserving the financial initiative of the House of Representatives. 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), 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.

12.2.4 In the Committee's view, this approach is an example of a sensible practice being open to the Houses which is not precluded by section 53. It also avoids having to determine the meaning of 'imposing taxation', which has been the subject of considerable discussion, uncertainty and diversity of opinion.

12.2.5 The Committee then recommends that 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 the Government, which the Senate is prevented from amending by the second paragraph of section 53). This recommendation is based on historical intention and nearly a century of parliamentary practice.

12.2.6 The Committee then considers the appropriate benchmark for determining whether there has been an increase in the proposed charge or burden within the meaning of the third paragraph of section 53. The Committee accepts that a bill that decreases an existing charge or burden contains a proposed charge or burden for the purposes of the third paragraph. Consequently, an alteration in the Senate to increase the level of the charge or burden proposed by the bill should take the form of a request. Recommendations five and six are again based on preserving the financial initiative of the House of Representatives. Once that House takes the financial initiative and reduces a charge, the level for determining whether there has been an increase is the charge proposed in the bill, not the original charge.

12.2.7 The Committee is aware that, on a literal interpretation, the third paragraph of section 53 would not apply to a bill that does not contain a proposed charge or burden. Consequently, a bill could be amended in the Senate to increase an existing charge or burden by increasing the rate or incidence of taxation, if that is regarded as not imposing taxation. The Committee's seventh recommendation is that the Senate should not amend a bill originated in the House of Representatives (that does not propose a charge or burden) so as to increase the rate or incidence of taxation. This recommendation sits alongside the Committee's earlier recommendation that bills increasing the rate or incidence of taxation should not originate in the Senate. The recommendation is also consistent with the purpose of section 53 to preserve the financial initiative of the House of Representatives. It is a further example of a sensible practice that is open to the Houses and not precluded by the words of section 53.

12.2.8 The Committee recommends that the third paragraph should apply to a bill which contains a standing appropriation, where a Senate alteration to the bill would increase expenditure under the appropriation. This recommendation is based on existing parliamentary practice.

12.2.9 The Committee then considers the parliamentary practice in relation to bills that do not contain appropriations. The current practice is that the third paragraph of section 53 applies to a bill that does not itself contain an appropriation, if a Senate alteration to the bill would increase expenditure under a standing appropriation. The Committee recommends that the current parliamentary practice should continue.

12.2.10 The Committee then considers whether a bill which itself affects expenditure under a standing appropriation should be originated in the Senate. If such a bill appropriates revenue or money, it can only be originated in the House of Representatives by virtue of the first paragraph of section 53. Such bills have previously been originated in the Senate and these bills have been amended in the Senate to further increase expenditure under a standing appropriation. The Committee considers that this is inconsistent with the broad purpose of section 53, to preserve the financial initiative of the House of Representatives, and recommends that a bill which increases expenditure under a standing appropriation should not be originated in the Senate.

12.2.11 The Committee's eleventh recommendation concerns the test which should be applied to determine whether an amendment in the Senate increases the proposed charge or burden on the people. The Committee considers that as the Houses currently do not apply the same test, a new approach is needed. The Committee recommends that , in relation to appropriations, taxes and other charges, a request should be required where an alteration is made in the Senate which will make an increase legally possible (even if the net effect of the alteration is a decrease). The Committee considers this test to be workable and the recommendation is a sensible practice open to the Houses which would not be precluded by section 53.

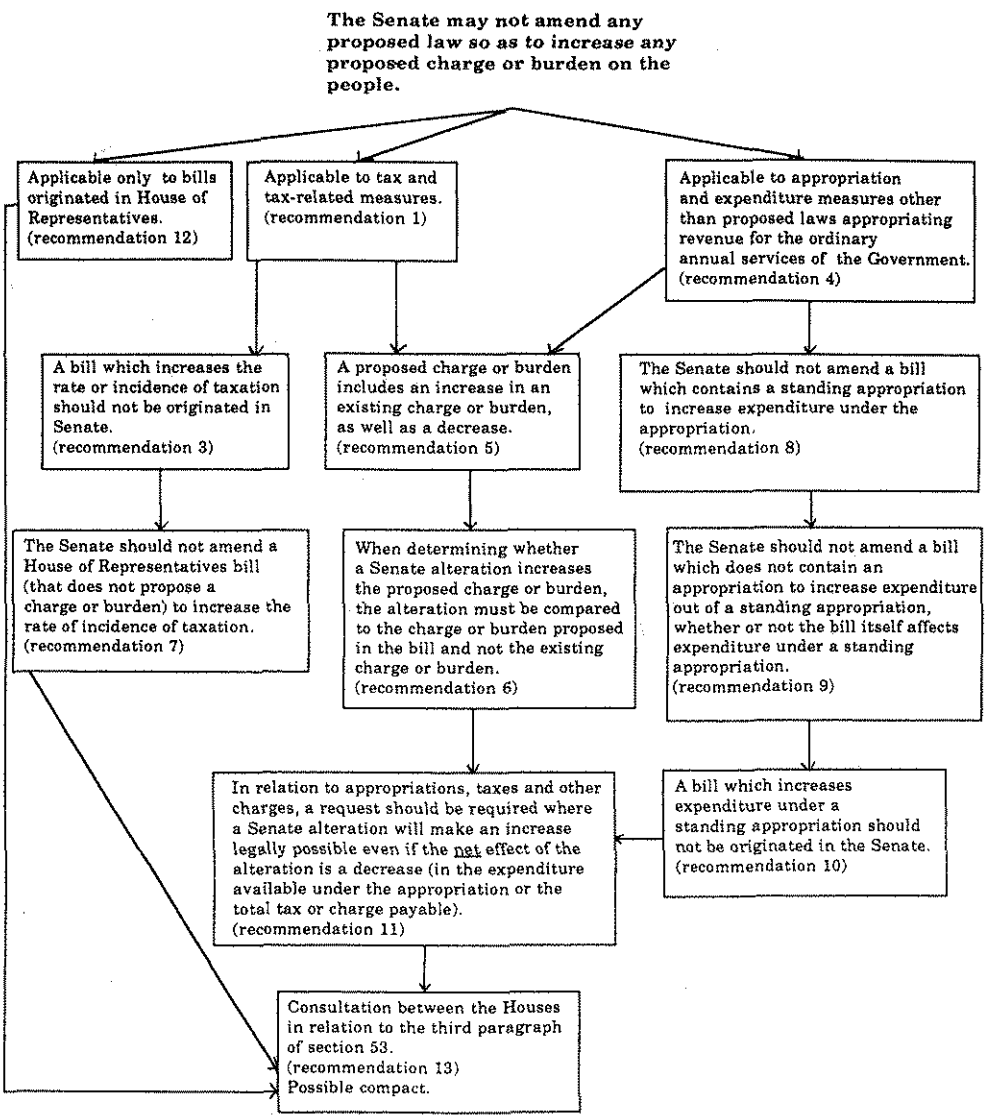
12.2.12 The Committee further recommends, in recommendation 12, that the third paragraph of section 53 should not apply to bills that have originated in the Senate. This recommendation is based on the word 'return' in the fourth paragraph of section 53. The fourth paragraph provides that the Senate may return to the House of Representatives, a proposed law which the Senate may not amend, requesting the omission or amendment of certain items in the proposed law. The Committee considers that 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. This recommendation is also supported by the fact that it makes no sense to prevent the Senate amending

a bill which was originated in the Senate. It should also be noted that this recommendation is tied to an acceptance of recommendations 3 and 7.

12.2.13 The Committee's final recommendation is that there should be a compact between the Houses on 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 Committee and the Senate Legal and Constitutional References Committee to determine how negotiations for the compact should proceed. The Committee has devised a statement of principles that it considers should be included in any proposed compact on this issue. That statement of principles is outlined in the next chapter.

12.2.14 The Committee's recommendations are consistent in that they are designed to preserve the financial initiative of the House of Representatives and, where possible, preserve existing parliamentary practices. This theme is evident in all the recommendations and the Committee considers that adhering to that policy will assist in formulating a workable interpretation of the third paragraph of section 53 of the Constitution.

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 13 Compact

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

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

13.1 Introduction

13.1.1 Evidently there is no consensus in relation to the legal meaning of all aspects of the third paragraph of section 53 of the Constitution. Most witnesses and participants in the seminar thought that a compact – detailing the circumstances where the third paragraph of section 53 does or does not apply – was desirable, although there were varying levels of optimism concerning the likelihood of both Houses agreeing to such a compact.

13.2 Previous compacts

13.2.1 There have been previous compacts within the Australian Parliament. A compact was established in 1965 on the meaning of 'the ordinary annual services of the Government' (within the second paragraph of section 53). The compact was between the Government and the Senate. It provided that a number of items of expenditure were not appropriations for the ordinary annual services of the government. Those items are outlined at paragraph 1.5.3.

13.2.2 The compact stated that proposed laws for the appropriation of revenue or monies for expenditure on those items shall be presented to the Senate in a separate Appropriation bill (that is Appropriation Bill (No. 2)) and that bill would be subject

to amendment by the Senate.[491] It is interesting to note that this compact was between the Government and the Senate.[492] The compact was amended in 1988 and 1989 in correspondence between the Senate and the Government.

13.2.3 In 1982 a separate compact was completed. It was a subset of the ordinary annual services compact and it provided that appropriations for the parliament were not ordinary annual services of government. The parties to this compact were again the Government and the Senate.[493]

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

13.3 The basis for a compact

13.3.1 Section 50 of the Constitution provides that:

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

During the seminar, it was suggested that section 50 may provide a basis for the compact as an agreement of that type would assist in the way the business and proceedings of the Parliament were conducted.[494] On the other hand, it was suggested that section 50 may not only be a grant of power, but may also impose a limitation on the ability of the Houses to make such an agreement.[495]

---

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

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

493 ibid.

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

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

13.3.2 If, as the Committee considers is likely, section 53 is not justiciable, it may not be necessary to find a statutory basis for the compact as the Houses would have a broad discretion to determine their own rules.

13.4 Parties to the compact

13.4.1 During discussions concerning the parties to a compact, Mr Evans suggested that a resolution of the two Houses may be preferable to an agreement between the Government and the Senate (who were the parties in the earlier compacts). It is probable that if the High Court did consider the Houses' interpretation of section 53, a resolution of the two Houses may carry more weight than an agreement between the Government and the Senate.[496]

13.4.2 It has also been suggested that if the compact was between the House of Representatives and the Senate, section 50 of the Constitution may provide some basis because it deals with the powers of each House of Parliament.[497] However, section 50 may not provide such a basis for a compact between the Government and the Senate. As previously mentioned, the Committee considers that any proposed compact on this issue should be between the Houses of Parliament.

13.5 Objectives of the compact

13.5.1 The objectives of any compact are to assist in the practical workings of the parliamentary process and to define and limit the constitutional powers of both Houses.[498] The Committee considers, as Ms Penfold suggests, that the Houses should be looking to develop an appropriate interpretation of the third paragraph of section 53, rather than ascertaining some pre-existing interpretation from what has happened previously.[499] However, the Committee notes that this interpretation should be based on a sensible and practical view of section 53 that is reasonably sustained within the words of that section and reasonably consistent with history and parliamentary practice.

---

496 *Seminar Transcript*, p. 52.

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

498 ibid., p. 52.

499 *Submissions*, p. S352.

13.5.2 Any interpretation of the third paragraph should also be consistent with the principle underlying the third paragraph of section 53 (and, in fact, the rest of section 53), that is, the preservation of the financial initiative of the House of Representatives. All witnesses and participants appeared to agree that this principle should be upheld.

13.6 The justiciability of the compact

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

13.6.2 The general feeling appeared to be that if the Houses entered into a compact, it would be unlikely that the Court would intervene.[500] It was suggested that if the compact were a bona fide attempt to resolve interpretive and practical issues between the Houses, then the court would probably approach it in the same way as it is anticipated the court would approach section 53. However, if the Houses agreed to a compact that was in flagrant disregard of the Constitution, the High Court may be interested in considering the matter.[501] For example, the High Court may examine the compact if it provided that the Senate could originate laws imposing taxation[502] as that would be in direct contravention of the first paragraph of section 53.

13.7 Structure and content of the compact

13.7.1 During the seminar, the prospect of devising a compact based on a wide-ranging view of the cases where Senate alterations ought to be requests was raised. Mr Evans suggested the compact could usefully contain a statement of general principles and an elaboration of some examples relating to previous cases.[503] Another approach (which could be combined with that suggested by Mr Evans)

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

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

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

503 *Seminar Transcript*, p. 51.

would be to list those examples which can be excluded from the third paragraph of section 53.[504]

13.7.2 The Committee notes that the Office of Parliamentary Counsel is willing to looking at proposals for a compact and to advise on the implementation of those proposals.[505] The Committee suggests that the compact should contain some initial statements of general principle. The circumstances when Senate alterations should be in the form of requests could then be outlined and examples provided of situations where a request would be appropriate.

Recommendation 13

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

13.7.3 The proposed compact should embody the recommendations set out earlier in the report. The compact could also embody further principles considered by the Committee but not made the subject of particular recommendations. Set out on the following page is a statement of principles which the Committee considers should be included in any proposed compact.

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

505 Ms H. Penfold, *Transcript*, p. 67.

Statement of principles for inclusion in the proposed compact

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

(a) a bill is originated in the House of Representatives; and

(b) the bill proposes a charge or burden; and

(c) an alteration proposed by the Senate to the bill would increase the proposed charge or burden.

2. It is accepted that:

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

(b) a provision for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services is not a proposed charge or burden for the purposes of the third paragraph of section 53; and

(c) the word 'proposed' in the phrase '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; and

(d) to determine if a Senate alteration to a bill would increase 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.

Statement of principles continued

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

If an alteration proposed by the Senate to makes an increase, whether in relation to taxes, appropriations or expenditure, legally possible (even if the net effect of the alteration is a decrease), the third paragraph of section 53 applies.

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

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

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

(c) the bill itself affects the rate or incidence of taxation and the alteration would further increase the rate or incidence of taxation;

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

Statement of principles continued

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

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

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

13.7.4 The compact could also usefully contain certain safeguards. For example, it could provide that the Office of Parliamentary Counsel is authorised to draw the attention of the Clerks of both Houses to situations where the compact might be, or may have been, contravened.[506] The proposed compact could also contain a mechanism for resolving disputes between the Houses in this area.[507]

13.8 Conclusions

13.8.1 The provisions of section 53 of the Constitution were initially a political compromise brought about by the conflicting principles of responsible government and federation. That compromise has resulted in perceived inconsistencies and anomalies in the interpretation and application of the third paragraph of section 53 since Federation.

13.8.2 In its proposals, the Committee has attempted to preserve the basic principle underlying section 53 - a principle which all witnesses and participants appear to support. However, just as section 53 of the Constitution was originally

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

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

drafted as a compromise, the Houses will also need to be prepared to make concessions to reach a workable agreement. The Committee is confident, however, that the statement of principles and recommendations contained in this exposure draft can form the basis of a workable agreement.

Daryl Melham
Chair

6 March 1995

APPENDIX A

List of Submissions

LIST OF SUBMISSIONS

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

9 Ms Hilary Penfold
First Parliamentary Counsel
Office of Parliamentary Counsel
MTA House
39 Brisbane Avenue
BARTON ACT 2600

10 Mr Mark Leeming
5/2 Nuyts Street
RED HILL ACT 2603

11 Mr Leonard John Matthews
PO Box 87
WOODY POINT QLD 4019

12 Miss M C Peake
12 Rose Avenue
FULHAM GARDENS SA 5024

13 Dr Imtiaz Omar
School of Law
Deakin University
GEELONG VIC 3217

14 Mr Jerry Cleary
23 Toufik Street
ROCHEDALE QLD 4123

15 Mr Paul Fenton-Menzies
Solicitor
Commonwealth Bank of Australia
Legal Department
2nd Floor
Bank House
Cnr London Circuit & Ainslie Avenue
CANBERRA ACT 2600

16 Ms Nicolee Dixon
Lecturer in Law,
Faculty of Law
Queensland University of Technology
GPO Box 2434
BRISBANE QLD 4001

17 Mr W H Vaughn
Secretary
Associated Mens Electoral Network Inc.
PO Box 3058
INALA QLD 4077

18	Mr L M Barlin Clerk of the House of Representatives Parliament House CANBERRA ACT 2600
19	Mr Harry Evans Clerk of the Senate **Supplementary submission to No. 5**
20	Mr Harry Evans Clerk of the Senate **Supplementary submission to Nos. 5 & 19**
21	Mr Peter Lahy & Mr Dennis Rose QC Acting Senior & Chief General Counsel Office of General Counsel Attorney-General's Department Robert Garran Offices National Circuit BARTON ACT 2600
22	Mr Ian M L Turnbull QC 167 Belinda Street GERRINGONG NSW 2534
23	Mr Pat Brazil C/- Allen Allen & Hemsley GPO Box 1530 CANBERRA ACT 2601
24	Mr Dennis Rose QC Chief General Counsel Attorney-General's Department **Supplementary submission to No. 21**
25	Mr Harry Evans Clerk of the Senate **Supplementary submission to Nos. 5, 19 & 20**
26	Mr Harry Evans Clerk of the Senate **Supplementary submission to Nos. 5, 19, 20 & 25**
27	Mr Harry Evans Clerk of the Senate **Supplementary submission to Nos. 5, 19, 20, 25 & 26**

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

29 Mr Kerry Jones
First Assistant Parliamentary Counsel
Office of Parliamentary Counsel
MTA House
39 Brisbane Avenue
BARTON ACT 2600

30 Mr L M Barlin
Clerk of the House of Representatives
Supplementary submission to No. 18

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

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

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

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

35 Ms Hilary Penfold
First Parliamentary Counsel
Office of Parliamentary Counsel
Supplementary submission to No. 9

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

37 Ms Hilary Penfold
First Parliamentary Counsel
Office of Parliamentary Counsel
Supplementary submission to Nos. 9 & 35

APPENDIX B

List of Witnesses

APPENDIX B

LIST OF WITNESSES

Canberra, 11 October 1994

Mr Harry Evans
Clerk of the Senate

Mr Patrick Brazil AO
Allen Allen & Hemsley

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

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

Canberra, 12 October 1994

Ms Hilary Penfold
First Parliamentary Counsel
Office of Parliamentary Counsel

Mr Kerry Jones
First Assistant Parliamentary Counsel
Office of Parliamentary Counsel

Mr Ian Turnbull QC
167 Belinda Street
GERRINGONG NSW 2534

Canberra, 19 October 1994

Mr Lyn Barlin
Clerk
Department of the House of Representatives

Mr Ian Harris
Deputy Clerk
Department of the House of Representatives

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

Perth, 26 October 1994

Dr Jim Thomson
44 Perina Way
CITY BEACH WA 6015

SEMINAR ON S53(3)

28 OCTOBER 1994

Participants

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

Professor Anthony Blackshield
Professor of Law
Macquarie University

Professor Michael Coper
Consultant to the Committee

Mr Harry Evans
Clerk of the Senate
Department of the Senate

Ms Hilary Penfold
First Parliamentary Counsel
Office of Parliamentary Counsel

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

Professor Cheryl Saunders
Director
Centre for Comparative Constitutional Studies

Dr Jim Thomson
Part-time Faculty Member
University of Western Australia and Murdoch Law Schools

APPENDIX C

Table of Views

TABLE OF VIEWS[1]

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Taxation						
Application to taxation bills	No. If a bill does not impose taxation, it does not propose a charge or burden.	Yes.	Yes, relies on Parkes' statement and also the 1950 opinions of Garran and Bailey.	Yes.	Mr Brazil's view is that tax bills are dealt with in paragraph 1 and paragraph 3 deals with other money bills is the preferred resolution of the matter (pp. S272-3). So paragraph 3 does not apply to tax bills that do not impose tax.	Yes.

A10

1 Those participants whose views have been included on the table were consulted in the drafting of the table. All except one of those participants responded with suggested alterations to the table to make it more accurately reflect their views.

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Where a proposed law increases the rate of taxation imposed in another Act, is that a proposed law imposing taxation?	Yes.	Question for the Houses whether to apply the High Court decisions on laws expanding the base of a tax imposed by another Act, or to treat such a bill as 'imposing' taxation.	No.	No, on the basis of High Court decisions.	Yes.	Yes. But paragraph 3 may apply if the rate of tax is increased, even if (on the view of the Attorney-General's Department), no tax is imposed.
Take a House of Reps bill that affects the level of tax. Does paragraph 3 apply if the Senate wants to increase that tax?	The Senate could not make that amendment because the bill would be a proposed law imposing taxation which the Senate could not amend because of paragraph 2.	Paragraph 3 applies (unless the bill is one 'imposing' taxation, in which case a Senate amendment is precluded by paragraph 2).	Yes, paragraph 3 applies.	Yes, paragraph 3 applies.	The Senate could not make that amendment because the bill would be a proposed law imposing the taxation which the Senate could not amend because of paragraph 2.	The House of Reps bill would be a law imposing tax, so paragraph 2 would prevent the Senate amending it.

R11

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Where there is a House of Reps bill that does not deal with the level of taxation (eg. it deals only with admin. matters), does paragraph 3 apply if the Senate wants to increase a rate of taxation?	No. The amendment would be a proposed law imposing taxation (paragraph 1).	No. Paragraph 3 does not apply (because there is no proposed charge or burden) and the Senate can amend it to increase the level of taxation (so long as the amendment does not itself seek to 'impose' the taxation: cf paragraph 1).	The word 'proposed' (second occurring) should be ignored. This would give effect to the intention of paragraph 3 and prevent the Senate amending a House bill to raise taxation, whatever the form of the bill when it is received by the Senate.	Yes, if the Senate proposal involves an increased charge or burden on the people.	No. The amendment would be a proposed law imposing taxation (paragraph 1).	

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Can the Senate introduce its own bill to raise the level of a tax?	No, should be regarded as a bill imposing taxation and paragraph 1 would prevent the Senate introducing such a bill.	Yes (so long as the amendment does not itself seek to 'impose' taxation). If take the view that increasing the tax rate is not a law imposing taxation, then a bill to increase the tax rate could be introduced in the Senate. Introduction of such bills in Senate can sometimes be convenient given parliamentary timetables.	Yes.	If the distinction made by the High Court in respect of the imposition of tax is accepted, then such a bill could be introduced in the Senate, undesirable though that would be.	No, should be regarded as a bill imposing taxation and paragraph 1 would prevent the Senate introducing such a bill.	No, because on Morris' view of laws imposing taxation, paragraph 2 would prevent the Senate introducing such a bill.
Can the Senate amend upwards the bill referred to above?	No, because that would be amendment of a bill imposing taxation which is prohibited by paragraph 2.	Yes (so long as the bill does not itself seek to 'impose' taxation).	Yes. The Senate can amend its own bill (but not a House of Reps bill).	The words of the third paragraph do not exempt Senate bills. However, it is anomalous that the Senate can introduce such a bill but not amend it to increase tax rates.	No, because that would be amendment of a bill imposing taxation which is prohibited by paragraph 2.	No because of paragraph 2. Says that Evans' comment is a cogent argument against the Government's current advice on 'imposing'.

R13

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Can the Senate initiate a tax admin bill (ie. a bill that does not deal with the level of tax?)	Yes.	Yes.	Yes.	Yes.	Yes.	
Where there is a tax bill (initiated in the Senate), that deals with admin matters, can the Senate amend its own bill to increase the level of taxation (ie. there is no proposed charge or burden in the bill)?	The Senate can amend, but it cannot amend so as to increase tax (because the amendment would be a proposed law imposing tax)	Yes. Where a bill contains no proposal, paragraph 3 not apply. (Re similar issue and appropriations - Even though paragraph 3 does not apply, the Senate is not free to insert a provision increasing expenditure under existing appropriation as that would infringe paragraph 1.) (p.S249)	Yes, but not to increase tax (if the second 'proposed' is ignored)	Such an amendment would seem inconsistent with the perceived purpose of the third paragraph of section 53.	The Senate can amend but cannot amend so as to increase tax (because the amendment would be to proposed laws imposing taxation).	

R14

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
<u>Expenditure</u> Application of paragraph 3 to appropriations	Paragraph 3 confined to appropriations - applies bills appropriating money other than for ordinary annual services.	Yes.	Yes - relies on Parkes' statement, Quick and Garran and parliamentary practice since 1903 (see p.S255).	Yes, paragraph 3 applies if amendment is expected to cause an increase in the sum of money to be expended under an appropriation.	The advice given by Mr Brazil in relation to the third paragraph relates only to bills dealing with taxation and deals with other types of money bills only in passing.	Outlines a number of arguments that suggest para 3 not intended to refer to appropriation or expenditure of Commonwealth money (p.S8 ff)

R15

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Does paragraph 3 apply to a House of Reps bill that does not itself contain an appropriation (but affects expenditure under a standing appropriation), if the Senate amendment would increase expenditure from a standing appropriation in another Act or bill?	No. But because the Houses have for many years applied the paragraph to such bills, Mr Evans' recommendations take account of this.[2]	Yes.	Yes. *Parliamentary practice has applied paragraph 3 since 1910. *If the second 'proposed' is ignored, paragraph 3 clearly applies. *If it is not ignored, paragraph 3 applies for reasons given by Mr Rose (p. S258).	Paragraph 3 applies if expenditure expected to cause increase in money expended - whether covered in an appropriation in the bill itself or not.		

A16

2 Mr Evans emphasised that the recommendations he has made do not reflect his view of the correct interpretation of the third paragraph of section 53 of the Constitution, but rather are designed to make the best of the precedents.

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Does para 3 apply to a House of Reps bill that does not itself contain an appropriation (and does not affect expenditure under a standing appropriation), if the Senate amendment would increase expenditure from a standing appropriation in another Act or bill? (ie. there is no proposed charge or burden in the bill)	No, paragraph 3 does not apply because there is no proposed charge or burden.	No, because there is no proposed charge or burden. But, because of paragraph 1, the Senate would be unable to make an amendment increasing expenditure under a standing appropriation as that would be law appropriating money and the Senate cannot originate such a law due to paragraph 1 (relies on Barwick opinion).	Yes, if the second 'proposed' is ignored. However, it does matter whether para 3 applies, because the amendment would be a proposed law appropriating money (agrees with Mr Rose).	Yes, if the wider purposes of section 53 are to be respected.		
Can Senate initiate a bill that affects (up or down) expenditure under a standing appropriation in another Act or bill?	Yes.	Yes, but not to increase the amount available for expenditure. If it did increase that amount, it would be a proposed law appropriating money.	Yes, but not to increase expenditure. If it did increase expenditure, it would be a proposed law appropriating money.	Yes, but not to increase expenditure. If it did increase expenditure, it would be a proposed law appropriating money.		

R17

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Can the Senate amend the above bill?	Yes. But, on the precedents, not to increase expenditure above the original level of expenditure.	Yes, but not to increase the amount available for expenditure.	Yes, but not to increase expenditure. If it did increase expenditure, it would be a proposed law appropriating money (agrees with Mr Rose).	Yes, but not to increase expenditure.		
Can the Senate initiate a bill that does not affect expenditure under a standing appropriation in another Act or bill? (For example, a bill unrelated to expenditure such as a bill dealing with criminal penalties)	Yes, but not to make a new appropriation (otherwise would be proposed law appropriating money under paragraph 1).	Yes, not to make a new appropriation (otherwise would be proposed law appropriating money under paragraph 1).	Yes, but not to make a new appropriation, otherwise it would be a proposed law appropriating money.	Yes, provided it did not itself seek to appropriate revenue or moneys.		

R11B

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Can the Senate amend the above type of bill?	Yes.	Yes, not to increase the amount available for expenditure under an existing appropriation, otherwise that would be a proposed law appropriating money.	Yes, but not to increase expenditure under an existing appropriation, otherwise that would be a proposed law appropriating money.	Yes, but not to increase expenditure under an existing appropriation otherwise that would be a proposed law appropriating money.		
If a bill is funded from a fixed appropriation, does paragraph 3 apply to amendments that could lead to increased expenditure?	No, but the precedents are to the contrary.	No.	No.	An amendment which might cause expenditure to be made more quickly would be in order provided the sum of the fixed expenditure is not exceeded.		

R19

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
What test should be applied to determine which appropriations are subject to paragraph 3?	Paragraph 3 applies where the effect of the amendment **'necessarily, clearly and directly'** increases expenditure under an appropriation in an Act affected by the bill (otherwise nearly every amendment would have to be request)	Suggests that an appropriation imposes charge or burden, regardless of whether the money is likely to be spent. Seem to follow that **an amendment that will further increase the amount that a bill makes available for expenditure** is an amendment to increase the proposed charge or burden, *whether or not any of the extra amount is likely to be spent* (p.S286).	The probable, expected or intended effects of the amendment should be taken into account.	Paragraph 3 applies where the **probable, expected or intended effect** of the amendment is an increase in expenditure under an appropriation Paragraph 3 should not be taken as preventing Senate from making an amendment which may result indirectly in minor and perhaps incidental increases in expenditure eg. increase in membership of statutory body.	Favours the 'probable, expected or intended' approach. Do not have to see with absolute certainty that there is going to be an expenditure involving appropriation of money.	If paragraph 3 applies to appropriations, the test is whether the bill will necessarily and directly result in increased expenditure under an existing appropriation.

R20

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
General issues Where the House proposes to reduce an existing charge or burden and the Senate wants to increase it (not above the original charge), does para 3 apply? (ie Tax eg - where the existing tax rate is 20%, the House of Reps decreases it to 10% and the Senate wants to increase it to 15%)	No. Open to Senate to increase so long as amendment does not increase it above the original charge. The existing charge is the benchmark (see p.12-14 of transcript).	It is strongly arguable that paragraph 3 applies. The Senate change will increase the proposed amount payable and para 3 will apply. The benchmark is the charge as amended by the House of Reps.	Yes. If the second 'proposed' is ignored, paragraph 3 clearly applies. If it is not ignored, paragraph 3 applies for reasons given by Mr Rose.	No, Mr Barlin adopts a 'bottom line approach'. The existing tax rate would not be exceeded by the Senate amendment, so the Senate would not have to proceed by way of request.		
Does paragraph 3 apply to fines, penalties, and fees for licences or services?	No.		No.	No.	No.	Yes.

Issue	Mr Evans	Mr Rose	Mr Turnbull	Mr Barlin	Mr Brazil	Mr Morris
Does paragraph 3 apply to bills that originate in the Senate?	No.		No.	The third paragraph makes no distinction between House of Representatives bills and Senate bills.		No.

APPENDIX D

Opinion by Sir Robert Garran GCMG EC

OPINION

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

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

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

Proposed laws

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

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

Charges or burdens on the people

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

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

Proceedings in the 1891 Convention began with some general resolutions moved by Sir Henry Parkes, one of which was that the House of Representatives should possess the sole right of originating and amending all bills appropriating revenue or imposing taxation. (Deb. p.23). In the ensuing discussion

there was much difference of opinion about the power of the Senate as to money bills. At p.449 Sir Henry Parkes strongly supported the resolution, and said:

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

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

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

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

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

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

The above extracts suggest, for what they are worth, that the words were probably those of Parkes; that he regarded them

as referring to taxes only; and that Griffith did not regard that provision as a particularly important part of the compromise.

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

Charge or burden in the Context

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

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

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

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

But to give the paragraph an effect, there is no need to stretch the words "charge or burden". It could equally apply

to proposed laws which, without imposing taxation, affect the amount of taxation.

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

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

(It may be, by the way, that the reason why the paragraph escaped clarification in the revision stages of the Convention that it formed part of the early compromise in one of the most critical issues - a compromise that had been more than once attacked and narrowly escaped defeat, and to tamper with which was dangerous.)

Bill originating in Senate

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

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

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

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

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

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

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

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

Does the Bill impose taxation or appropriate moneys?

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

Section 81 of the Constitution provides that:

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

The National Welfare Fund Act 1943-1945 establishes a Trust Fund (within the meaning of the Audit Act, s.62A) to be known as the National Welfare Fund, and provides that in each financial year there shall be paid out of the Consolidated Revenue Fund, which is appropriated accordingly, certain fixed sums, to be applied for the purpose of the National Welfare Fund. Moneys standing to the credit of the Fund are to be applied in making such payments as are directed by any law of the Commonwealth to be made from the Fund, in relation to ... welfare or social services.

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

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

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

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

(sgd.) R.R. Garran

13 April 1950

APPENDIX E

Letter to Sir Robert Garran from Sir Kenneth Bailey

CANBERRA. A.C.T.

21 April, 1950.

My dear Sir Robert,

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

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

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

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

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

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

With kind regards,

Yours sincerely,

(BAILEY.)

Sir Robert Garran, C.B.E., K.C.,
22 Mugga Way,
RED HILL, A.C.T.

APPENDIX F

Letter to Senator the Hon R McMullan from the Hon M Duffy MP

DESPATCH
21 NOV 1990
Initial

Attorney-General

APPENDIX F

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600

90/15078

Senator the Hon Bob McMullan
Parliamentary Secretary
to the Treasurer
Parliament House
CANBERRA ACT 2600

Dear Senator McMullan

I refer to your letter dated 18 October 1990 concerning the recent proposed amendments to the Taxation Laws Amendment (Rates and Provisional Tax) Bill 1990 ('the Bill') moved in the Senate by the Australian Democrats to increase to 60% the marginal rate of income tax on incomes exceeding $100,000.

During debate, the Chairman of Committees was asked to rule whether the amendment should have been worded as a request to the House, on the basis that it dealt with a law 'imposing taxation' within the meaning of s.53 of the Constitution. The Chairman ruled that the amendment was in the appropriate form as it did not deal with the imposition of tax (Hansard, 17 October 1990, p.3231). You have sought my advice in order to clarify views expressed by the Clerk of the Senate on the matter.

The questions and my short answers are:

(a) Q. Was the proposed amendment a proposed law imposing taxation?

A. No.

(b) Q. Is s.53 of the Constitution justiciable?

A. No, except the last paragraph to the extent that the courts would not accept as law a bill that had not been passed by the Senate (unless it had been passed by a joint sitting under s.57).

(c) Q. Was the proposed amendment a proposed law increasing a charge or burden on the people?

A. Yes.

(d) Does the third paragraph of s.53 only refer to appropriations or does it extend to taxes?

A. It extends to taxes.

Section 53 of the Constitution

Section 53 provides:

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

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

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

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

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

Question (a)

The proposed amendment in question was an amendment to the Income Tax Rates Act 1986. That Act is not an act 'imposing' taxation within the meaning of the first two paragraphs of s.53: it merely sets rates of tax that are imposed by the Income Tax Act 1986. Similarly, the proposed amendments to the Income Tax Assessment Act 1936 were not amendments to a proposed law 'imposing' taxation.

Question (b)

Section 53 is concerned with 'proposed laws' - that is, bills still under consideration by the Parliament. The first four paragraphs set out certain rules, obligations or limitations to be observed with respect to proposed laws and which are addressed to the Parliament. The view has been consistently taken since Federation that these rules, being concerned with parliamentary procedures, are not justiciable: see Osborne v The Commonwealth (1911) 12 CLR 321 at 336, 352, 355. The resolution of any disputes over the interpretation of these

provisions is, therefore, in the final analysis, a matter for the Houses themselves.

The Clerk of the Senate states, on page 2 of his memorandum dated 18 October 1990, that s.53 'may be regarded as justiciable in part'. It is not entirely clear what is intended by that statement. If it is directed to the final paragraph of s.53, I agree with it to the extent that the courts would not regard as law any bill that had not been passed by the Senate unless it had been passed at a joint sitting under s.57 (see also s.58).

Questions (c) and (d)

There is some controversy as to the ambit of the third paragraph of s.53. The existing Senate practice (which is reflected in the memorandum from the Clerk) is based on the view that the paragraph is intended only to prevent the Senate increasing an appropriation and that it does not relate to bills dealing with taxation. The Clerk states that 'taxation bills ... are the subject of a different provision', by which he presumably means the second paragraph of s.53 (see p.2 of his memorandum). However, that is not an accurate statement unless the expression 'taxation bills' is limited to bills for imposing taxation. (A similar statement appears in Quick and Garran, Annotated Constitution of the Commonwealth (1900), p.671, who seem to assume that the second paragraph of s.53 applies to all bills that, as a matter of law, result in an increase in taxation. However, in 1950 Sir Robert Garran advised that the third paragraph of s.53 did apply to laws increasing rates of taxation imposed by another Act.)

As a matter both of ordinary language and constitutional principle, I see no reason why the third paragraph of s.53 should not apply to amendments of bills dealing with taxation (though not 'imposing' it) where the amendments would increase the rate of taxation that is imposed by another Act. As I have said, that view was expressed in 1950 by Sir Robert Garran. It was also supported by another eminent Solicitor-General, Sir Kenneth Bailey. Ultimately, as I have indicated above, the interpretation of the third paragraph is a matter to be determined by the Houses themselves.

Yours sincerely

Regards
Michael Duffy

MICHAEL DUFFY

APPENDIX G

'Financial relations between the Houses in bicameral Parliaments'
by Anne Twomey, Parliamentary Research Service

Department of the
Parliamentary
Library

Parliamentary Research Service

Prepared at Client Request

Financial relations between the Houses in bicameral Parliaments

Anne Twomey
Law and Public Administration Group
Telephone: 06 277 2432
Facsimile: 06 277 2407

29 November 1994

This paper makes use of publicly available information and deals with issues to meet the requirements of the client's request.

Views expressed should not be attributed to the Research Service, which, as an organisation, does not promote particular approaches to issues.

Introduction

This paper considers the powers of the upper and lower houses of the United Kingdom, Canada and the United States of America in relation to money bills.

United Kingdom

There are three restrictions on the powers of the House of Lords in relation to financial legislation:

1. the financial privilege of the House of Commons;
2. the restrictions in the *Parliament Act 1911* concerning Money Bills; and
3. the restrictions in the *Parliament Act* on the powers of the House of Lords concerning general bills.

The financial privilege of the House of Commons

The financial privilege of the House of Commons is based upon the following resolution of 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.

'Aids and supplies' have been interpreted as covering Finance Bills, which deal with taxation, and Consolidated Fund Bills, which authorise expenditure. Together they are categorised as Supply Bills. It also covers other bills which affect public revenue, involve charges on public funds, alter an area of taxation, or affect the administration of public funds. The privilege effectively limits the power of the House of Lords to initiate or amend such bills. It does not, however, affect the power of the House of Lords to reject such bills.

Restrictions on the power of the House of Lords to initiate bills

If the House of Lords initiates a bill dealing with expenditure or revenue which infringes the financial privilege of the House of Commons, the Commons usually either lays it aside or defers its consideration.

This position has been qualified by House of Commons standing orders, which waive its privilege in relation to bills or amendments introduced by the House of Lords which deal with 'pecuniary penalties, forfeitures, or fees, when the object of such penalties or forfeitures was to secure the execution of an Act; and when the fees imposed were not payable to the exchequer, or in aid of the public revenue.'[1] The House of Commons has also waived its privilege in relation to most categories of private bills emanating from the House of Lords.

Another manner of allowing the House of Lords to initiate bills which would otherwise breach the financial privilege of the House of Commons, is for the House of Lords to insert the following provision, known as the 'privilege amendment', in the bill at its third reading stage:

> Nothing in this Act shall impose any charge on the people or on public funds, or vary the amount or incidence of or otherwise alter any such charge in any manner, or affect the assessment, levying, administration or application of any money raised by any such charge'.

This provision is then removed by the House of Commons in the committee stage.[2]

Restrictions on the powers of the House of Lords to amend bills

The restriction on the power of the House of Lords to amend Supply Bills is treated so seriously that no debate has been held on a Consolidated Fund Bill since 1907 (although a peer did attempt to speak on such a bill in 1981), and any debate on a Finance Bill usually only deals with the general economic situation.[3]

If the House of Lords passes an amendment to a bill, other than a Supply Bill, which involves a charge on public funds or alters an area of taxation, or otherwise infringes on the financial privilege of the House of Commons, then the House of Commons may reject it on grounds of privilege, or waive privilege.

Rules against tacking

The restriction on the power of the House of Lords to amend Supply Bills has led to the House of Lords protecting its own privileges by

---

1 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed., 1989: 745.

2 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed., 1989: 746.

3 Shell, D., *The House of Lords*, Philip Allan/Barnes & Noble Books, 1988: 108.

incorporating in its standing orders a resolution of 1702 which provided:

> The annexing of any clause or clauses to a bill of aid or supply, the matter of which is foreign to and different from the matter of the said bill of aid or supply, is unparliamentary, and tends to the destruction of constitutional government.

The House of Commons has also adapted its standing orders to prevent the tacking of extraneous material onto Supply Bills.

Right to reject bills

Although the financial privilege of the House of Commons limits the power of the House of Lords to initiate or amend certain financial bills, it does not affect the power of the House of Lords to reject such a Bill.

The restrictions in the Parliament Acts concerning money bills

In 1909 the House of Lords exercised its power to reject financial bills by rejecting the *Finance Bill 1909*. This resulted in the passage of the *Parliament Act 1911*, which curtailed the powers of the House of Lords in relation to a special category of financial bills, described as 'money bills'. The Act has since been amended by the *Parliament Act 1949*, and the two are to be read together.

Erskine May summarises the definition of 'money bill' as a public bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects:

- *the imposition, repeal, remission, alteration, or regulation of* taxation;
- the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund or the National Loans Fund, or on money provided by Parliament or the variation or repeal of any such charges;
- supply;
- the appropriation, receipt, custody, issue or audit of accounts of public money;
- the raising or guarantee of any loan or its repayment; and

- subordinate matters incidental to any of the above.[4]

The Speaker must certify that a bill is a 'money bill', before the limitations on the powers of the House of Lords apply.

'Money bills' are not necessarily 'bills of aids and supplies' for the purposes of the financial privilege of the House of Commons. In some ways the definition of 'money bill' is wider than the category of 'bills of aids and supplies', but in other ways it is narrower. For example, while all Finance Bills are bills of aids and supplies, they are not necessarily money bills because they often include subjects other than those listed in the definition of 'money bills'. *Erskine May* records that approximately half the Finance Bills sent to the House of Lords since the *Parliament Act* was passed have not been certified as money bills.[5]

If a money bill sent to the House of Lords from the House of Commons[6] is not passed by the House of Lords, without amendment, within one month, it may be presented for Royal Assent and will take effect as an Act of Parliament on receiving Royal Assent. This eliminates the effective power of the House of Lords to reject such a bill.

The restrictions in the Parliament Acts concerning other bills

If a bill is not a 'money bill', then s. 2 of the *Parliament Acts* still limits the powers of the House of Lords to effectively reject the Bill. It provides that if a public bill is passed by the House of Commons in two successive sessions and is rejected by the House of Lords in each of those sessions,[7] and there is a gap of at least one year between the second reading of the bill in the House of Commons and the second date it passes the House of Commons, then (unless the House of Commons directs to the contrary) the bill shall be presented to Her Majesty for Royal Assent, and become an Act of Parliament.

Accordingly, as long as the bill is passed by the House of Commons in two successive sessions, and a year has passed between the second

---

4 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed., 1989: 751.

5 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed., 1989: 753.

6 The money bill must be sent to the House of Lords at least one month before the end of the session, for this provision to apply.

7 The bill must have been sent to the House of Lords at least 1 month before the end of the relevant session.

reading and the date the bill is passed a second time by the House of Commons, then it may become a law regardless of the objections of the House of Lords.

Canada

Constitution

Section 53 of the Canadian Constitution provides that bills for the appropriation of any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.

Section 54 provides that it is not lawful for the House of Commons to pass any bill for the appropriation of public revenue or for the imposition of any tax, unless it has been first recommended to the House by message of the Governor-General.

Practice

There is no express constitutional provision which prevents the Senate from amending a money bill. However, the House of Commons has contended that any amendment of a money bill by the Senate would amount to the 'introduction' of that bill by the Senate (as it would no longer be exactly the same bill as had been introduced by the House of Commons) and would therefore breach the Constitution.[8] Standing Order 80 of the House of Commons claims that it is the undoubted right of the House of Commons to direct, limit, and appoint in all bills of aids and supplies, the ends, purposes, considerations, conditions, limitations and qualifications of such grants, and these are not alterable by the Senate. It further provides that privilege will be waived where a bill introduced or amended by the Senate imposes or alters pecuniary penalties as long as they are only to punish or prevent crimes and offences and do not tend to lay a burden on the subject.

The Senate has disagreed with the House of Common's interpretation of its financial powers. The Senate has asserted that its position in the federal system means that it must have the power to protect the provinces in financial matters. The fact that the Senate is an appointed body, rather than an elected body, tends to limit the force of its arguments on these issues.

In practice, the Senate has rarely attempted to amend money bills, but when it has done so, the House of Commons has, on occasion, waived

---

8 Kunz, F.A., *The Modern Senate of Canada*, University of Toronto Press, 1967: 338.

privilege and given its consent to Senate amendments.[9] In order to waive privilege, Standing Order 80 of the House of Commons must be suspended.[10]

As a money bill cannot be enacted without being passed by the Senate, the Senate has the technical power to reject such a bill.[11] In practice such action is not taken, because the Senate is an appointed House and therefore does not have the legitimacy of democratic election.

On the question of tacking, Senate Standing Order 83 provides that a bill of aid or supply shall not have annexed to it any clause, the matter of which is foreign to, and different from, the matter of the bill.

Proposals to amend the Constitution concerning financial bills

There have been several unsuccessful proposals to amend the Canadian Constitution in recent years. One of the most recent was the Charlottetown Accord of 28 August 1992. It provided for an elected Canadian Senate, and consequential changes to the financial relations between the Houses.

The proposed changes related to 'revenue or expenditure bills' which were defined as public bills that contain only provisions dealing with:

- the raising of revenues, including the imposition, repeal, remission, alteration and regulation of taxation;
- the appropriation of public money;
- charges on the Consolidated Revenue Fund;
- the public debt, including borrowing authority;
- the guarantee of any loan or other debt obligation; or
- subordinate matters relating to any of the above.

---

9 Examples include amendments made by the Senate to the *Home Bank Depositors Relief Bill 1925*, the *Income War Tax Bill 1939*, the *Special War Revenue Bill 1941*: Kunz, F.A., *The Modern Senate of Canada*, University of Toronto Press, 1967: 343

10 *Beauschesne's Rules & Forms of the House of Commons of Canada*, 6th ed., 1989: para. 620.

11 *Beauschesne's Rules & Forms of the House of Commons of Canada*, 6th ed., 1989: para. 619.

It was proposed that if the Senate were to reject or amend a revenue or expenditure bill, the House of Commons could pass the bill again, in the form in which it was introduced in the Senate, or with such amendments made by the Senate with which the House of Common concurs, and that the bill would then be deemed to have been passed by the Senate in the form in which it was finally passed by the House of Commons. If the Senate did not dispose of revenue or expenditure bills within 30 days after they were received from the House of Commons, then the bill would be deemed to have been passed by the Senate in the form in which it was sent to the Senate. This would prevent the Senate from deferring such bills as an alternative to rejecting them.

The Charlottetown Accord was rejected in a referendum, so the above amendments were never made.

United States of America

Revenue Bills

Article 1(7) of the United States Constitution provides:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Apart from this constitutional restriction, there are no further restrictions on the power of the Senate, which may amend or reject such Bills. If the two Houses disagree, there is a constitutional procedure for a conference between the Houses to resolve the conflict.

Appropriations Bills

While there is no express constitutional provision demanding that appropriations bills be initiated in the House of Representatives, it is the practice of the Congress that such bills originate in the House of Representatives.[12]

The Senate has full power to amend an appropriations bill. However, the Senate has standing orders that specifically apply to appropriations bills. Rule XVI(1) of the Standing Rules of the Senate provides:

> On a point of order made by a Senator, no amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or

12 Tiefer, C., *Congressional Practice and Procedure*, Greenwood Press, 1989: 924.

act or resolution previously passed by the Senate during that session; or unless the same be moved by direction of the Committee on Appropriations or of a committee of the Senate having legislative jurisdiction of the subject matter, or proposed in pursuance of an estimate submitted in accordance with law.[13]

There is also a rule that any amendments must be 'germane' to the subject matter of the appropriations bills. Accordingly, if the bill is for the appropriation of funds for education programs, it should not be amended to include appropriations to fund labour programs. In addition, a point of order may also be raised if an amendment to an appropriations bill seeks to restructure the program which is being funded, rather than amend the actual appropriations.[14] Funds cannot be appropriated for a program unless that program has already been authorised by legislation. Any amendments which change the nature of the program must be made to the authorising legislation, rather than the appropriations legislation.[15]

One way of avoiding this restriction is for limitations to be placed in appropriations bills, as to how the money may be sent. For example, a limitation may be added to an appropriations bill that the funds may not be used to perform abortions.[16] This allows policy to be affected by means of an appropriations bill.

In any event, these Senate Standing Rules are not mandatory. They merely provide a ground of objection for a Senator to make a point of order. If no point of order is made, then they do not apply. Even when a point of order is made, the point can be overruled by a majority vote of the Senate.[17]

---

13 *Standing Rules of the Senate*, Revised to March 18, 1992, Washington, 1992: 10-11.

14 For a discussion of the rule on 'germaneness' and the rule against 'legislating' through an appropriations bill, see: Cummings, F., *Capitol Hill Manual* 2nd ed., Washington, 1984: 102-3.

15 Tiefer, C., *Congressional Practice and Procedure*, Greenwood Press, 1989: 928.

16 See case discussed in: Tiefer, C., *Congressional Practice and Procedure*, Greenwood Press, 1989: 986-7.

17 Tiefer, C., *Congressional Practice and Procedure*, Greenwood Press, 1989: 974-5.

List of Exhibits

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

The exhibits are published in a separate volume.