Chapter 13

FINANCIAL LEGISLATION

THIS CHAPTER deals with financial legislation only in so far as different considerations apply to it and different procedures are followed in its consideration in the Senate; in so far as such legislation is treated in the same way as other legislation, it is covered by Chapter 12, and that chapter should therefore be read in conjunction with this chapter.

Section 53 of the Constitution

The term financial legislation refers to the two categories of proposed laws or bills which are distinguished by section 53 of the Constitution and which have different procedures applied to them by the provisions of that section.

The rationale of these provisions is to reserve to the executive government the initiative in proposing appropriations and impositions of taxation, without affecting the substantive powers of the Senate.

Because of the central importance of section 53 to the subject of this chapter, it is here reproduced in full:

> **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.

Section 53 thus provides that the two Houses of the Parliament have equal powers in relation to all proposed laws except as provided by the section. The categories of proposed laws to which

exceptions apply are proposed laws imposing taxation and proposed laws appropriating revenue or moneys. Section 53 provides that:

- bills to appropriate money or to impose taxation may not originate in the Senate
- the Senate may not amend a bill for imposing taxation
- the Senate may not amend a bill for appropriating money for the ordinary annual services of the government
- the Senate may not amend a bill so as to increase any proposed charge or burden on the people.

The section further provides that where the Senate may not amend a bill, it may at any stage request the House of Representatives to do so. This provision of section 53 refers to a bill which the Senate may not amend, but has always been interpreted as applying to a bill which the Senate may amend where an amendment would be contrary to the provision relating to proposed charges or burdens, the view being taken that the section does not prevent requests in that circumstance. The provision also refers to the Senate requesting "the omission or amendment of any items or provisions" in a bill which is not amendable by the Senate. This has been interpreted as not authorising a request for the insertion of a completely new item in such a bill (ruling of Chairman of Committees, 5/5/1936, J.186). This supposed implied limitation, however, was not observed in the early years of the Senate (for example, in relation to the Customs Tariff (British Preference) Bill 1906, 5/10/1906, J.190), and has also not been observed in recent times (8/11/1985, J.570-1; 7/4/1989, J.1522-4; 22/6/1992, J.2545). As with requests for amendments to bills which are amendable by the Senate, the view is taken that section 53 does not prevent requests being made other than in the circumstances listed in the section.

The provisions of section 53 are usually described as limitations on the power of the Senate in respect of financial legislation, but they are procedural limitations only, not substantive limitations on power, because the Senate can reject any bill and can decline to pass any bill until it is amended in the way the Senate requires. In particular, the distinction between an amendment and a request is purely procedural: in one case the Senate amends a bill itself, in the other it asks the House of Representatives to amend the bill. In both cases the bill is returned to the House of Representatives for its agreement with the proposed amendment. In the absence of agreement the Senate can decline to pass the bill.

The provisions of section 53 therefore have a purely procedural application, to determine whether amendments initiated by the Senate should take the form of amendments made by the Senate or requests to the House of Representatives to make amendments. The only effect of choosing a request instead of an amendment is that a bill makes an extra journey between the Senate and the House (see under Procedure on financial legislation, below). On the procedural character of section 53, see the judgment of the High Court in *Western Australia v Commonwealth* 1995 183 CLR 373 at 482.

While appropriation bills and bills imposing taxation may not originate in the Senate, this does not mean that the Senate is not an equal partner with the House of Representatives in actually making appropriations. Thus the first Senate insisted that words be removed from the preamble of the Supply Bills 1901 implying that the granting of appropriations was the work of the House of Representatives, and required details of items of expenditure (14/6/1901, J.36; 20/6/1901,

J.42). Similarly, the Senate caused to be removed from the Governor-General's opening speech words implying that in the granting of appropriations the House of Representatives had some priority (14/4/1904, J.27).

The Senate has also exercised its right to decline to pass appropriation bills and items in such bills until relevant information is provided (20/5/1975, J.655-7; 28/5/1992, J.2349-50).

Section 53 contains a qualifying clause providing that a bill is not be taken to be an appropriation bill 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". Thus bills containing such provisions may originate in the Senate and may be amended by the Senate (see ruling of President Baker, SD, 6/6/1901, p. 763). Bills imposing fees for licences or fees for services are therefore usually treated as amendable bills, but in recent times, having regard to the possibility of fees being held by the High Court to be taxes, some bills for imposing fees have been drafted as bills imposing taxation and have been treated as such by the Senate. (*Air Caledonie v Commonwealth* 1988 165 CLR 462; but see also *Airservices Australia v Canadian Airlines* 1999 167 ALR 392.)

Legislation which requires appropriations or the imposition of taxation for its operation may be introduced in the Senate with an indication that the necessary appropriation or imposition of taxation is to be inserted into the legislation in the House of Representatives (ruling of President Givens, SD, 10/12/1921, p. 14274; see also Aluminium Industry Bill 1960, Blowering Water Storage Works Agreement Bill 1963, Chowilla Reservoir Agreement Bill 1963, Scholarships Bill 1967, Compensation (Commonwealth Government Employees) Amendment Bill 1976, Liquor Education Fund Bill 1981 and Liquor Advertising Tax Assessment Bill 1981, Plastic Bag (Minimisation of Usage) Education Fund Bill 2002 and Plastic Bag Levy (Assessment and Collection) Bill 2002).
(See Supplement)
On occasions the Senate has made requests for the insertion of appropriation provisions in bills originating in the House (4/10/1984, J.1153; 18/10/1995, J.3958-9; 18/6/1996, J.327). The better view, however, is that such amendments may not be moved in the Senate at all, in that, by turning a bill into an appropriation bill, they are contrary to the initiation provision of the first paragraph of section 53 of the Constitution (statement by President Calvert, SD, 16/9/2003, p. 15275).

Types of financial legislation

Bills which appropriate money or which deal with taxation appear in the following categories:

Appropriation bills

- annual appropriation bills (usually called Appropriation Bill (No. 1), Appropriation Bill (No. 2) and Appropriation (Parliamentary Departments) Bill), which appropriate money for the services of the government and the Parliament for the financial year

- additional appropriation bills (usually called Appropriation Bill (No. 3), Appropriation Bill (No. 4) and Appropriation (Parliamentary Departments) Bill (No. 2)), which appropriate additional funds for the services of the government and the Parliament for the financial year

- supply bills (usually called Supply Bill (No. 1), Supply Bill (No. 2) and Supply (Parliamentary Departments) Bill), which appropriate money for the services of the government and the Parliament for the period from the beginning of the financial year until the annual appropriation bills are passed, and which are subsumed by the annual appropriation bills (following a change in the budget cycle in 1994, these bills are not necessarily required)

- special appropriation bills, appropriating money for special purposes, including bills which make continuing and indefinite appropriations (these matters are further analysed below).

The annual appropriation bills and the supply bills for the services of the government always appear in pairs because the provisions which appropriate money for the ordinary annual services of the government, and which may not be amended by the Senate, must, under section 54 of the Constitution, be separated from those provisions which appropriate money for services of the government other than ordinary annual services. The funds appropriated by the supply and appropriation bills are therefore divided between two bills to separate the provisions which are amendable by the Senate from those which are not amendable by the Senate. The ordinary annual services appropriations are usually in Appropriation Bills Nos 1 and 3, and other appropriations in Appropriation Bills Nos 2 and 4. (The distinction between ordinary annual services and other services is a matter for interpretation and was delineated by an agreement between the Senate and the government in 1965, as further outlined below.)

In 1999 the Senate amended two appropriation bills for special purposes to strike out provisions which allowed grants to be made to bodies and persons without terms and conditions. The Senate took the view that the specification of terms and conditions for grants is an essential element of audit control of expenditure. (Appropriation (Supplementary Measures) Bills (Nos 1 and 2) 1999, 11/10/1999, J.1815).

Provisions in bills which were described by the government as "switching off" and "switching on" appropriations were the subject of a statement by the Chair of Committees on 14 September 2005. They appeared to be a device to avoid the injunction in section 53 of the Constitution on the initiation of appropriations in the Senate, and did not appear to derogate from the processes of the Senate (SD, 14/9/2005, p. 37).

Until 2005 it was thought that the expenditure of money under appropriations was as a matter of law limited to the purposes of the appropriations. In *Combet v Commonwealth* 2005 221 ALR 621 (21 October 2005), however, a majority of the High Court, called upon to consider the legality of certain government advertising expenditure under the post-1999 outcome-based budgeting system reflected in appropriation bills, in effect held, as the minority justices observed, that the executive government is free to expend money from appropriations on any purpose it deems appropriate. This judgment, as the Chief Justice explicitly stated, placed the

task of controlling expenditure under appropriations exclusively in the responsibility of the Parliament. (See also report by the Finance and Public Administration Committee on *Transparency and accountability of Commonwealth public funding and expenditure*, PP 47/2007; response by the Chairs' Committee presented 21/6/2007, J.4028.) (See Supplement)

Taxation bills

- bills imposing taxation
- bills which do not impose taxation, but which deal with taxation
- customs tariff bills, which impose customs duties
- excise tariff bills, which impose excise duties
- other taxation measures.

Bills which impose taxation must be separate from bills which otherwise deal with taxation, and bills imposing taxation must deal with only one subject of taxation, except for customs tariff and excise tariff bills. These requirements, which are contained in section 55 of the Constitution, are further analysed below.

Loan bills

When the expenditure and revenue-raising proposals of the government announced in the budget result in a deficit of revenue, it is normal for the Parliament to pass a Loan Bill authorising the government to borrow money to the extent of the deficit. Parliament thus has the opportunity annually to determine whether the government should be authorised to borrow. As these bills do not appropriate money or impose taxation, they are amendable by the Senate.

In 1985 and 1986 Loans Bills were presented to the Senate in a form which would have made permanent the statutory authority for the government to borrow money, and the bill for 1987 would have extended the authority to borrow into the supply period of the following financial year. In each case the Senate amended the bill to restrict the authority to borrow to the current financial year, thereby preserving the right of the Parliament to consider annually the government's authority to borrow.
(See Supplement)

Advances

The annual appropriation bills include sums for advances to government (called Advances to the Minister for Finance) to provide for payments in advance of appropriations, the money for which is recovered by later appropriations for the purpose, and for urgent and unforeseen expenditure. Similar advances are provided in the parliamentary appropriation bills for the President of the Senate and the Speaker of the House of Representatives for parliamentary expenditure.

The appropriation bills set out the conditions governing expenditure from the advances, and provide for particulars of such expenditure to be laid before the Houses. Following a report in 1979 of the Senate Standing Committee on Finance and Government Operations (PP 217/1979), statements of issues from the advances have also been presented since 1981. Such issues may or may not become final charges on the advances reflected in the statements of expenditure.

Statements of expenditure from the advances are referred to the standing committees for estimates hearings. The Senate considers them in committee of the whole on a motion that the statements be approved. This does not have the effect of authorising the expenditure, which is authorised by the original appropriation. Rejection of such a motion would signify dissatisfaction with a statement as an accountability document.

Terminology

Proceedings in the Senate in relation to financial legislation are often discussed without regard to the terms of section 53 and with the use of terms such as "supply" and "money bills", which confuses the discussion. There has also always been considerable confusion about the processes by which the Parliament appropriates money for the operations of government and the terminology applying to those processes. The word "supply" has come to be used for virtually any appropriation of money, and any rejection or amendment by the Senate of any appropriation bill, or even any bill having any financial content, is liable to be referred to as "blocking supply".

In order to clear up the confusion it is necessary first to clarify the terminology. Strictly speaking, supply was the money granted by the Parliament in the supply bills which, before the change in the budget cycle in 1994, were usually passed in April-May of each year, and which appropriated funds for the period between the end of the financial year on 30 June and the passage of the main annual appropriation bills. The latter appropriate funds for the whole financial year, were formerly passed in October-November and are now passed in June. The term "supply" may be loosely applied to all of the annual appropriation bills, that is, the main annual appropriation bills, the additional appropriation bills and any supply bills, since those bills together annually provide the funds necessary for government to operate. It is not legitimate to apply the term to any other appropriation bills, or to the revenue raising measures properly called tax bills.

The term "money bills" may be used to refer to all bills which appropriate money. This includes not only the annual appropriation bills, which consist of the main appropriation bills and the additional appropriation bills, but also any other bills which appropriate money. There are many bills which appropriate money for particular purposes, and, in many of these, the appropriation is continuing and does not have to be renewed annually. Under section 53 of the Constitution bills which appropriate money may not originate in the Senate, and it is therefore legitimate to use the term "money bills" to refer to all such bills. The term "money bills" is also used, however, to refer only to that category of appropriation bills which under section 53 may not be amended by the Senate, that is, bills which appropriate money for the ordinary annual services of the government. Not all appropriation bills fall into this category. The term "money bills" is also used to include bills which impose taxation, which may not originate in the Senate. Such bills, however, are more properly called tax bills.

The term "tax bills" should properly be confined to bills which impose taxation and which, under section 53 of the Constitution, may not originate in the Senate and may not be amended by the Senate. Under section 55 of the Constitution, laws imposing taxation must deal only with one subject of taxation, and must deal only with the imposition of taxation (this provision also is further outlined below). Provisions dealing with the assessment and collection of taxation are contained in separate bills, and such bills should not be referred to as "tax bills". A proper term for them would be "tax assessment and collection bills".

The term "budget measures" is used to refer to all bills which put into effect the financial measures proposed in the Treasurer's budget speech. The term covers not only the main annual appropriation bills and any bills containing increases in taxation proposed in the speech, but bills making minor adjustments to appropriations, taxes or government outlays. Thus the only distinguishing characteristic of "budget measures" is that they have been proposed in the budget speech. It is not, therefore, a useful category of bills: it does not indicate the importance of the bills, and bills appropriating money, imposing taxation or carrying out other financial measures, including bills of great importance, may not be budget measures simply because they were not referred to in the budget speech.

The conceptual confusion surrounding these categories of bills occurs because these terms are used as if they were interchangeable without any regard to the distinction between them. The terms are also used to include all bills which refer to financial matters or which have some financial implications. This category virtually includes all bills presented, because every piece of proposed legislation has some financial implications.

Appropriation bills and tax bills are the only useful categories of bills because they are the only categories which are given special treatment by the Constitution. All other bills are treated alike and the Houses have equal powers in relation to them.

The two useful categories of bills are distinguished by their defining characteristics. Money bills, which should properly be called appropriation bills, are those bills which contain clauses which state that money, of specified or indefinite amount, is appropriated for the purposes of the bills. A bill which does not have such a clause is not an appropriation bill. A tax bill is a bill which contains a clause which provides that tax is imposed upon a specified subject, either by setting a new tax or raising the level of an existing tax. A bill which does not contain such a clause is not a tax bill.

Another concept which is sometimes used in discussion is that of "measures vital to government" or "measures vital to the survival of a government". The bills which may be regarded as falling into this category are:

(a) the annual and additional appropriation bills and any supply bills (without which government would not be able to continue to fund its various services); and

(b) tax bills which impose income tax (without which there would be insufficient revenue to appropriate in the appropriation and supply bills).

If any of these bills were not passed by the Parliament the government would not be able to continue to function. The failure to pass other bills, however, would not in normal circumstances prevent the continuing operations of government.

Constitutional safeguards: sections 54 and 55 of the Constitution

The Constitution contains two sections which are designed to ensure that the Senate is not unduly inhibited in its consideration of legislation by the conditions imposed upon it by section 53.

Section 54 provides that a proposed law which appropriates money for the ordinary annual services of the government must deal only with such appropriation. This means that appropriations for purposes other than the ordinary annual services of the government, or provisions dealing with appropriations, which the Senate may amend, may not be combined in one bill with provisions which the Senate may not amend. This ensures that the Senate is not prevented from amending provisions which do not appropriate money for the annual services of the government because of such provisions being linked with such appropriations in a single bill. Such a linkage of provisions is usually referred to as "tacking", and section 54 seeks to prevent "tacking".

Section 55 of the Constitution provides:

- laws imposing taxation must deal only with the imposition of taxation and any provision dealing with any other matter is of no effect

- laws imposing customs duties must deal only with customs duties, and laws imposing excise duties must deal only with excise duties

- other laws imposing other kinds of taxes must deal only with one subject of taxation.

This section is also designed to prevent the combination in a single bill of matters amendable by the Senate with non-amendable matters, and to ensure that different taxes are not combined in one bill so that the Senate is presented with a choice of agreeing to all taxes or agreeing to none if the House of Representatives will not make amendments.

These sections use the same expressions to distinguish the categories of bills with which they deal as section 53, and interpretation of the three sections is therefore of necessity closely connected.

There is a significant difference, however, between section 55 and the other two sections. Sections 53 and 54 refer to proposed laws, and do not impose any prohibitions on the contents of laws resulting from the enactment of those proposed laws. Nor do they impose any remedies against the two Houses for any breach of the conditions relating to dealings with proposed laws set out in the sections. It is therefore generally agreed that these sections are non-justiciable, that is, the High Court cannot enforce compliance with the sections in relation to either the proceedings followed by the Houses in dealing with bills, or the contents of bills, and in no case has the High Court done so. (The non-justiciable character of the requirements of section 53 was

explicitly referred to in the Constitutional Convention Debates: Adelaide, 1897, pp 576-7; and by the High Court in *Osborne v Commonwealth* 1911 12 CLR 321 at 336, and *Western Australia v Commonwealth* 1995 183 CLR 373 at 482.)

Section 55, on the contrary, refers to laws, and is therefore justiciable. The High Court may enforce compliance with the provisions relating to the contents of laws, and has done so in numerous cases. The Court therefore has the ability to determine the interpretation of expressions used in section 55, and such interpretations, while not binding on the Houses in relation to section 53, have generally been followed by the Houses in the interpretation of that section. Thus a proposed law would be regarded as imposing taxation for the purposes of section 53 if when enacted it would be a law imposing taxation within the meaning of section 55 as interpreted by the Court. (See also below under Decision as to amendments or requests.) (For examination by the High Court of the application of section 55, see *Austin v Commonwealth* 2003 195 ALR 321; *Permanent Trustee Australia v Commissioner of State Revenue*, 2004 211 ALR 18.) The High Court has indicated that laws imposing taxation may include provisions for assessment, collection and recovery of taxation where it is difficult to separate them, contrary to the strict separation of these matters usually observed by the drafters of government bills (see below, under When requests are required: (a) bills imposing taxation).

The interpretation of the expressions contained in sections 53, 54 and 55 is further dealt with below in the context of determining when amendments moved in the Senate should take the form of requests to the House of Representatives. It must be remembered, however, that the interpretation of the expression "imposing taxation", and the other expressions referring to taxation in section 55, is a question which may be determined by the High Court for the purpose of the application of that section to the validity of laws, whereas the interpretation of the expressions used in sections 53 and 54 is a matter for the two Houses to determine in their dealings with each other.

Governor-General's messages

Section 56 of the Constitution provides:

> A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

The purpose of this section is usually stated to be the preservation of the exclusive right of the executive government to initiate appropriations.

The reference in the section to a measure being passed is taken to refer to passage by the House in which the measure originates. In accordance with this interpretation, messages by the Governor-General recommending appropriations for the purposes of particular appropriation bills are usually reported to the House of Representatives before the bills are passed. There have been occasions, however, of messages referring to bills being reported after the bills have been passed by the House. Moreover, messages are usually framed so as to refer to any appropriation required by a bill or by any amendment to be moved by a minister, without any specification of the appropriation authorised by the messages. The messages are, therefore, largely a formality, but they reinforce the ministry's control of the House of Representatives.

As appropriation bills must originate in the House of Representatives, the section applies in practice only to that House, and Governor-General's messages of this kind are therefore not produced in the Senate. The reason for the reference in the section to "the House in which the proposal originated" was perhaps that the section was intended to apply in respect of bills which impose penalties or fees, which are not appropriation bills for the purposes of section 53 and which may therefore originate in the Senate (see J. Quick and R.R. Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, pp 682-3).

When requests are required: (a) bills imposing taxation

A bill for imposing taxation may not be amended by the Senate, and any amendments to such a bill moved in the Senate must take the form of requests to the House of Representatives to amend the bill.

In order to meet the requirements of section 55 of the Constitution, bills establishing schemes of taxation have been divided into bills imposing taxation and dealing only with the imposition of taxation and bills dealing with other matters associated with the taxation scheme such as provisions for the collection of the taxation and the enforcement of payment.

Until 1993, the principle was generally followed in the presentation of legislation, and accepted by both Houses, that only the bill which contained the expression "tax is imposed" was a bill imposing taxation within the meaning of sections 53 and 55, and any other bills dealing with other aspects of taxation were not bills imposing taxation within the meaning of those sections.

The form of the government's major taxation legislation arising from the 1993 budget, however, led to claims that it breached section 55 of the Constitution, and to a reconsideration of the application of section 55, and consequently of section 53.

Section 55 requires that laws imposing taxation deal only with the imposition of taxation and only with one subject of taxation. Over many years government drafters, who classify government bills (see below, Decision as to amendments or requests), taking clues from expressions used in judgments of the High Court under section 55, had drawn a distinction between bills imposing taxation, bills dealing with the imposition of taxation (for example, setting taxation rates) and bills dealing with taxation generally (for example, providing for assessment and collection machinery). Only the bills actually imposing taxation had been regarded as subject to the restrictions of section 55. This meant that there were some bills which, by affecting assessment and rates of taxation, had the effect of increasing the incidence of taxation, but which were regarded as technically not imposing taxation, although the government drafters had not been consistent in their classification of such bills. This had also meant that bills technically not imposing taxation could be amended in the Senate by way of direct amendment, rather than requests to the House of Representatives for amendment, under section 53 of the Constitution. The sales tax legislation, for example, had always consisted of acts which imposed the sales tax and acts which, in effect, set the rates of tax for various categories of goods, and bills amending the latter had been treated as amendable in the Senate.

The separation of bills imposing taxation and bills setting rates of taxation had been accepted in the past, and had been supported, in effect, in the Senate, because it allowed the Senate to make amendments instead of requests for amendments. This past acceptance, indeed support, by the Senate of the practice of separating the bill imposing the tax and the bill, in effect, setting the rates of tax, when the practice reinforced the ability of the Senate to make amendments to taxation proposals, is best illustrated by the case of the Sales Tax Bills 1981 (8/9/1981, J.474, 16/9/1981, J.503, 23/9/1981, J.521). Senators disputed the inclusion in those bills of provisions traditionally included in the amendable bills. The Senate, before dealing with the bills in committee of the whole, passed a resolution declaring that its decision to make requests for amendments to the bills did not indicate an acceptance that matter included in the bills was properly included in bills imposing taxation. (See also rulings of President Givens, SD, 10/12/1921, p. 14274, 19/7/1923, p. 1302; the Income Tax Bill 1943, recounted in *ASP* 6th ed., 1991, pp 592-3; ruling of Acting Deputy President Sibraa, 4/5/1984, J.822-3; and the amendment made by the Senate to the Taxation Laws Amendment (Rates and Provisional Tax) Bill 1990, 17/10/1990, J.346.)

The Taxation (Deficit Reduction) Bill 1993, however, drew attention to a significant consequence of this technical classification of bills: provisions which affected the levels of various taxes could be combined into one bill without breaching section 55, if the views of the government drafters were correct. The bill increased the rates of several taxes by this means, but it was classified by the government drafters as a bill which technically did not impose taxation.

The bill had the virtue of providing a *reductio ad absurdum* of the established classification of taxation bills, and an opportunity of considering that classification properly. As exemplified by the bill it could be seen to be based on an artificial distinction which, if carried to its logical conclusions, undermines a rational interpretation of the constitutional provisions. If accepted as it was manifested in this bill, it meant that bills which propose to increase significantly the levels of taxes may technically not be bills imposing taxation, may be introduced in the Senate, may be amended by the Senate (but presumably not to increase rates of taxation: a subsidiary absurdity, see below), and, most significantly, may be combined into one bill.

It was clear that if a bill such as this were to be enacted and were challenged in the High Court, it is possible that the Court would reject the technical and seemingly paradoxical classification of bills relied upon by the government drafters, and find that bills of this sort are bills imposing taxation and therefore subject to the limits of section 55. This the Court could do without setting aside, but by developing, its previous relevant judgments, and by having regard to the plain words and stated purposes of sections 53 and 55.

Because of the political significance of the changes contained in this bill, it was immediately questioned. The Leader of the Opposition in the Senate, Senator Hill, tabled two legal opinions to the effect that the bill would impose taxation and would violate section 55 if enacted (30/8/1993, J.396). The Leader of the Government in the Senate, Senator Evans, then tabled an Attorney-General's Department opinion, in anticipation of an order for the production of documents of which Senator Hill had given notice, which expounded the government's advisers' views on the classification of taxation measures (31/8/1993, J.412). Senator Hill later tabled a supplementary opinion criticising the government opinion (2/9/1993, J.440). Questions relating to sections 53 and 55 of the Constitution and the bill were referred to the Legal and

Constitutional Affairs Committee on the motion of Senator Hill (31/8/1993, J.420). The committee found that there was a substantial risk that the bill would be held to be invalid under section 55. To the motion to take note of the report an amendment was passed, calling upon the government to heed the conclusions of the report (27/9/1993, J.498). The government had already announced that it would divide the bill into a number of separate bills to avoid the possibility of the legislation being held to be invalid.

The new bills were rushed through the House of Representatives and received by the Senate. They consisted of a bill making the assessment-type changes to taxation, a "test bill" designed to provoke a legal challenge to determine the question of whether an alteration in rates of taxation is an imposition of taxation (this bill dealt with increases in the rates of fringe benefits tax and tax on friendly societies), a bill making the changes to income tax rates, and five separate bills making the changes to sales tax. The first two bills were referred to the Legal and Constitutional Affairs Committee (30/9/1993, J.548). The majority of the committee subsequently reported that the first bill would be valid and both bills should be passed, but the non-government senators doubted the validity of the first bill as well as the "test bill".

When the Senate dealt with the bills, declaratory resolutions were passed (5/10/1993, J.570; 6/10/1993, J.587), similar to a resolution passed in 1981 when the Senate dealt with the 1981 sales tax legislation (see above). The resolutions in substance declared that the Senate, by proceeding with the bills as either amendable or non-amendable, was not committed to any view of whether they would be held to be bills imposing taxation. Requests for amendments were then made to some of the bills which the government claimed did not impose taxation (20/10/1993, J.660).

Similarly, requests were made to the sales tax bills arising from the 1995 budget to remove certain sales tax increases, and the requests were agreed to by the government in the House of Representatives, although the government claimed (in the explanatory memorandum accompanying the bills) that they were not bills imposing taxation (28/6/1995, J.3560-3). To avoid a repetition of the 1993 dispute, the government divided the tax increases between three separate bills. Government amendments moved to certain bills which increased taxation were the subject of a statement by the Chair of Committees (SD, 31/8/1995, pp 761-2).

The issues arising from these events were not resolved; in particular, the "test bill" was not challenged and the High Court was therefore not given the opportunity of resolving the disputed questions of interpretation.

The Senate, in its subsequent decisions about whether to proceed by way of amendments or requests for amendments in relation to bills dealing with taxation, has not accepted the interpretation of the government's advisers. Bills stated by the government not to be bills imposing taxation have been treated by the Senate as bills imposing taxation and Senate amendments put in the form of requests accordingly. (Statements by Chair of Committees, A New Tax System (Fringe Benefits) Bill 2000, SD, 10/5/2000, p. 14265; New Business Tax System (Alienation of Personal Services Income) Bill 2000, SD, 29/6/2000, p. 16068.) The Governor-General Legislation Amendment Bill 2001 contained provisions regarded by the Senate as imposing taxation (subjecting the salaries of governors-general to income tax for the

first time) but also other provisions not dealing with the imposition of taxation (statement by Chair of Committees, 21/6/2001, J.4376). (See Supplement)

If a bill does not impose taxation, the Senate may amend it, and if a bill does impose taxation the Senate may seek amendments to it by way of requests. The difference between amendments and requests is a difference of procedure only, and does not in practical terms inhibit the Senate, as the Leader of the Government in the Senate, Senator Gareth Evans, pointed out in debate in the Senate (SD, 1/9/1993, p. 740). As was also pointed out in discussion in the Senate, however, the combination of various measures in one bill, regardless of whether any of those measures impose taxation, restricts the options of the Senate in dealing with the various measures. If the measures were contained in separate bills, the Senate could reject some measures, amend some measures and agree to some measures without amendment. Those to which the Senate agreed without amendment would proceed at once to assent, and only those which the Senate rejected or amended could be the subject of further dealings between the two Houses. With the combination of the measures in one bill, the Senate can seek changes to the various measures only by way of amending the bill, including by leaving out provisions of the bill, or by dividing the bill. The procedure of dividing the bill has no practical advantage over amendment, because the concurrence of the House of Representatives to the division of the bill is required before any of the measures can proceed to assent. By declining to agree to the division of the bill, the government in the House of Representatives can insist on the various measures being dealt with as a whole, and none of them can pass until agreement is reached between the two Houses on all of them.

The combination of various taxation measures in one bill therefore limits the Senate's scope for consideration of those measures, and section 55 is designed to avoid so limiting the Senate.

Under the second paragraph of section 55 of the Constitution, bills imposing customs or excise tariffs, unlike other bills imposing taxation, may cover more than one subject of taxation. A bill which increases any tariffs is regarded as a bill imposing taxation, even though it reduces or removes other tariffs (statements by the Chair of Committees, SD, 26/11/1997, p. 9461; 4/4/2001, p. 23731).

For an analysis of the suggested application of the third paragraph of section 53 to taxation bills, see below under When requests are required: (c) proposed charge or burden.

A bill which validates tax unlawfully imposed by regulations is regarded as an amendable bill (Wheat Tax Regulations (Validation) Bill 1987, 17/12/1987, J.458).

On the contrary, bills which are stated to "close a loophole" or "correct an anomaly", but which in fact impose tax where none was imposed before, even if the tax has been collected, are bills imposing taxation (Radiocommunications (Transmitter Licence Tax) Amendment Bill 2002; Bankruptcy (Estate Charges) Amendment Bill 2002).

Measures which provide for the indexation of taxation are not bills imposing taxation (Road Transport Charges (Australian Capital Territory) Amendment Bill 2002).

The imposition of charges on Commonwealth entities only is not an imposition of taxation (Australian Radiation Protection and Nuclear Safety (Licence Charges) Bill 1998 and its amendment bill 2002).

A bill which empowers the making of regulations to impose a tax is regarded as amendable (Life Insurance Policy Holders' Protection Levies Bill 1991, 19/12/1991, J.1987-8; Overseas Students Tuition Assurance Levy Bill 1993, 17/12/1993, J.1080). A bill which imposes a tax but allows the regulations to set or vary the rate of the tax is treated as non-amendable (Forest Industries Research Levy Bill 1993, 23/11/1993, J.862-3).

A bill which amends regulations so as to impose taxation where none was imposed before would seem to be a bill imposing taxation, but, by including other matters in such a bill, the government drafters seem to have taken the view that it is not (Migration Legislation Amendment (Contributory Parents Migration Scheme) Bill 2002, 5/3/2003, J.1527-9).

On occasions the Senate has made requests for the insertion of appropriation provisions in bills originating in the House (4/10/1984, J.1153; 18/10/1995, J.3958-9). On these precedents, it could be argued that it would be open to the Senate to request the insertion in a bill originating in the House of a provision having the effect of imposing taxation. The better view, however, is that such amendments may not be moved in the Senate at all, in that, by turning a bill into a bill imposing taxation, they are contrary to the initiation provision of the first paragraph of section 53 of the Constitution (statement by President Calvert, SD, 16/9/2003, p. 15275).

When requests are required: (b) ordinary annual services

Section 53 of the Constitution provides that the Senate may not amend a bill which would appropriate money for the ordinary annual services of the government.

A bill would appropriate money if it contains a provision expressly stating that money is appropriated for the purposes of the bill. It is therefore readily determined whether a bill is an appropriation bill. The question which arises for interpretation is: what kind of appropriation is an appropriation for the ordinary annual services of the government?

This expression is used only in sections 53 and 54, and not in section 55. It is therefore not justiciable and its interpretation is a matter for the two Houses in their dealings with each other.

The framers of the Constitution had a fairly clear conception of the meaning of the phrase "the ordinary annual services of the government", and it was expounded by a number of speakers at the Constitutional Conventions. The expression referred to the annual appropriations which were necessary for the continuing expenses of government, as distinct from major projects not part of the continuing and settled operations of government. The expression had been taken from the so-called Compact of 1857 between the government and the Legislative Council of South Australia, and the operation of that agreement was familiar to the framers of the Constitution. The interpretation of the provision was also explored in a number of debates in the Senate. (For a comprehensive history of the exposition of the phrase see *ASP*, 6th ed., 1991, pp 569-80.)

The interpretation of the expression was substantially settled in 1965 by what amounted to an agreement between the Senate and the government, and by agreed applications of the terms of that agreement since that time.

This agreement, which is generally referred to as the Compact of 1965, arose from an attempt by the government to place in the non-amendable annual appropriation bills provision for some matters which were traditionally regarded as not forming part of the ordinary annual services. After debate in the Senate and the consideration of the matter by an informal committee of senators, a statement was made on behalf of the government indicating that appropriations for the following matters would not be regarded as part of the ordinary annual services of the government and would therefore be included in the amendable bill:

(a) the construction of public works and buildings;

(b) the acquisition of sites and buildings;

(c) items of plant and equipment which are clearly definable as capital expenditure;

(d) grants to the States under section 96 of the Constitution; and

(e) new policies not authorised by special legislation, subsequent appropriations for such items to be included in the appropriation bill not subject to amendment by the Senate.

This list reflected the principles set out in the report of the informal committee of senators. (A detailed account of the establishment of the Compact of 1965 is in *ASP*, 6th ed., 1991, pp 580-3.)

In 1974 two estimates committees drew attention to appropriations for new policies included in the non-amendable appropriation bill, and the Standing Committee on Constitutional and Legal Affairs was given a reference to consider the inclusion of new policies not authorised by legislation in the non-amendable bill. The committee's report indicated that appropriations for new policies not authorised by legislation should not be included in the non-amendable bill, and recommended that the Senate reaffirm the principles of the Compact of 1965 (report of the committee, PP 130/1976). The Senate therefore passed the following resolution:

> That the Senate resolves:
>
> (1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government.
>
> (2) That appropriations for expenditure on:
>
> (a) the construction of public works and buildings;
>
> (b) the acquisition of sites and buildings;
>
> (c) items of plant and equipment which are clearly definable as capital expenditure;
>
> (d) grants to the States under section 96 of the Constitution; and

> (e) new policies not previously authorised by special legislation,
>
> are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate Appropriation Bill subject to amendment by the Senate. (*17 February 1977 J.572*)

The ordinary annual services are therefore defined by what they do not include rather than what they include.

The application of the Compact of 1965 was the subject of correspondence between the Standing Committee on Appropriations and Staffing and the government, tabled in the Senate on 3 November 1988 and 4 April 1989. It was agreed that expenditure on computers, which, due to changes in technology, are no longer major items of capital equipment, and expenditure on the fitting out of buildings, should be regarded as part of the ordinary annual services subject to certain limits.

In 1999 the Senate adopted a recommendation in the 30th report of the Appropriations and Staffing Committee that some adjustments be made in the classification of appropriation items for the purpose of determining whether they fall within the category of ordinary annual services in the context of accrual budgeting (22/4/1999, J.777). The adjustments provided that:

(i) items regarded as equity injections and loans be regarded as not part of ordinary annual services

(ii) all appropriation items for continuing activities for which appropriations have been made in the past be regarded as part of ordinary annual services

(iii) all appropriations for existing asset replacement be regarded as provision for depreciation and part of ordinary annual services.

In 2004 the Senate determined a matter relating to the classification of payments to international organisations, on the recommendation of the Appropriations and Staffing Committee (41st report of the committee, PP 360/2004; 8/12/2004, J.273).

In March 2005 two appropriation bills were presented to replenish money spent by departments and agencies on relief for the victims of the 2004 tsunami. One of the bills purported to be for the ordinary annual services, but as the expenditure could not possibly be ordinary annual services expenditure, both bills were treated as amendable bills (15/3/2005, J.499-500). The Northern Territory Emergency Response package of bills repeated this anomaly (17/8/2007, J.4254), as did bills to cover expenditure on an equine influenza outbreak (14/2/2008, J.152). See also statement by the Chair of Committees in relation to the Appropriation (Regional Telecommunications Services) Bill 2005-2006, SD, 14/9/2005, p. 37.

These instances indicated that the Department of Finance and Administration appeared to be taking a position that ordinary annual services include anything it regarded as falling within vaguely-expressed outcomes of departments, including new policy proposals, a position quite contrary to the compact of 1965 and subsequent Senate determinations (see Report No. 25 of

2005-06 of the Auditor-General, pp 40-41; Appropriations and Staffing Committee, Annual Report 2005-06, PP 157/2006; Annual Report 2006-07, PP 138/2007; report of Finance and Public Administration Committee on annual reports, PP 206/2007; report on additional estimates 2007-08, PP 230/2008; Appropriations and Staffing Committee, 45th Report, PP 148/2008: this report called for a return to the position formerly agreed between the Senate and the government).

An amendment passed on 20 March 2008 to the motion for the second reading of the 2007-08 additional appropriation bills drew attention to the reports of the Senate committees on this issue, and called upon the government to resolve it (J.322). (See Supplement). At the time of writing it remained unresolved.

During the debate leading up to the Compact of 1965, it was pointed out that appropriations for the two Houses of the Parliament should not be regarded as ordinary annual services of the government, or, indeed, services of the government, and it was recommended that they be contained in a separate bill. This recommendation was not put into effect until 1982, when a separate parliamentary appropriations bill was introduced as a result of the recommendations of the Senate Select Committee on Parliament's Appropriations and Staffing (see under Parliamentary appropriations, below).

For amendments of an annual appropriation bill not for the ordinary annual services, see 30/11/1995, J.4320-1; 24/6/2004, J.3697-8.

When requests are required: (c) proposed charge or burden

Section 53 of the Constitution provides in the third paragraph that the Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. Any amendment to a bill which would have this effect must be moved in the Senate by way of a request to the House of Representatives for an amendment. This expression is used only in section 53, and its interpretation is therefore a matter for the two Houses in their dealings with each other.

The interpretation of this provision has been the subject of much discussion in the Senate in the past, and, in particular, was the subject of an extensive debate in the Senate in 1903 in relation to the Sugar Bounty Bill.

The Senate may not initiate bills imposing taxation or appropriating money. The Senate may not amend bills imposing taxation or appropriating money for the ordinary annual services. In the absence of the latter prescription, the Senate would be able to initiate by way of amendment that which it may not initiate by way of its own bill. By the Senate making requests to the House of Representatives for amendments to such bills, the initiative of the House in proposing the imposition of taxation and the appropriation of money is preserved. The further prescription in the third paragraph of section 53 similarly ensures, in relation to appropriation bills which the Senate may otherwise amend, that is, bills appropriating money other than for the ordinary annual services, that the Senate does not initiate by way of amendment that which it cannot initiate by way of its own bill, namely, a further appropriation of money.

The paragraph should therefore be regarded as applying only to that category of bills which the Senate may not initiate but which it may amend, that is, bills appropriating money other than for the ordinary annual services. To seek to apply the paragraph to any other category of bills immediately makes nonsense of it and defeats its purpose. If the paragraph is interpreted as prescribing against the Senate amending a bill which it may initiate, this means either that the Senate may not amend a bill which it has introduced, an obvious nonsense, or that the Senate may not amend a bill for the reason only that the bill has been introduced in the House of Representatives rather than the Senate, which is also a nonsense. It makes no sense to seek to prevent the Senate doing by way of amendment that which the Senate may do by initiating or amending its own bill; the Senate could circumvent such a prescription by refraining from consideration of a bill sent to it by the House, and sending to the House its own bill with a message indicating that its consent to the original bill is dependent upon the House's consent to the Senate bill. Not only would the supposed prescription thereby be avoided, but the implied extension of the exclusive right of the House to initiate the prescribed kinds of proposals would be undermined.

Therefore the paragraph applies only to bills which the Senate may not initiate but may amend, that is, appropriation bills other than those for the ordinary annual services of the government.

If this interpretation is not adopted, it is not possible to find any coherent purpose of the paragraph; any other interpretation immediately entails a view that the paragraph has no coherent purpose.

This was the interpretation of the third paragraph adopted at the later constitutional conventions, and in the early parliamentary discussion of the paragraph.

At the conventions, it was pointed out that the difference between an amendment and a request would be a matter of procedural form only and not a matter of substantive power, and this was given as a reason for opposing section 53 in the form to which agreement was eventually given. (Speech by George Reid, Melbourne Session, 1898, pp 1997-8.) The same view was repeatedly expressed in the first and only comprehensive debate in the Senate on the interpretation of the paragraph. (On the Sugar Bounty Bill 1903, SD, 2, 8, 22 and 23/7/1903, pp 1691-1703, 1821-63, 2365-415, 2469-503. Speeches by Senators Higgs, MacGregor, Clemons, Millen, Symon and Pulsford, pp 1836, 1843, 1852, 1854, 2404, 2384, 2482.) This observation has repeatedly been made since that time, including by the Leader of the Government in the Senate. (Senator Gareth Evans, SD, 1/9/1993, p. 740.) As will be seen, it was a major factor in the subsequent somewhat careless application of the paragraph.

The claim that there is no substantive difference between amendments and requests, and that it is a matter merely of procedural form, has never been refuted except in terms of the foregoing interpretation of the third paragraph, that it is designed to preserve the initiative of the House in respect of imposition of taxation and appropriations.

When challenged with the assertion that there would be no difference between amendments and requests, Edmund Barton, the leader of the convention, explained the provision in terms of preserving the initiative of the House of Representatives. An amendment, he said, would allow the Senate to put back on the House of Representatives the responsibility for determining

whether the measure would pass, whereas a request would ensure that the Senate could not avoid that responsibility. The bill would remain as the House of Representatives had initiated it, and if the House declined to change it at the request of the Senate, the Senate would have to decide whether to agree to the House's bill. (Adelaide Session, 1897, p. 557.)

The exposition of the third paragraph by Quick and Garran clearly states that it applies only to those bills which the Senate may not initiate but may otherwise amend, that is bills appropriating money other than for the ordinary annual services, and is designed to preserve the House's originating prerogative:

> The second paragraph of sec. 53 takes from the Senate absolutely the power to amend tax bills and annual appropriation bills, *whilst the third paragraph restricts its power to amend other appropriation bills*. [emphasis added]
>
> Seeing that the Senate cannot amend a bill imposing taxation, it may be naturally asked — how can the Senate possibly amend a proposed law so as to increase any proposed charge or burden on the people? The answer is that the Senate is only forbidden to amend tax bills and the annual appropriation bill; it may amend two kinds of expenditure bills, viz.: those for permanent and extraordinary appropriations. ..... The Senate may amend such money bills so as to reduce the total amount of expenditure or to change the method, object, and destination of the expenditure, but not to increase the total expenditure originated in the House of Representatives. (*Annotated Constitution of the Australian Commonwealth*, 1901, pp 668, 671.)

Garran apparently subsequently changed his mind in that regard (in an opinion of 13 April 1950, presented to the Senate on 22 March 1994), but his later view creates many difficulties.

The first and only comprehensive debate on the interpretation of the paragraph in the Senate was occasioned by an assertion by the House of Representatives that a Senate amendment to a bill should have been a request because it fell within the terms of the paragraph, in that it would increase expenditure under an appropriation in the bill. The message from the House supported this assertion on the ground that the amendment was said to be "an infraction of the provisions of section 53 of the Constitution, which prohibits the Senate from originating a proposed law appropriating revenue or moneys", as well as the ground of infringement of the third paragraph itself; that is, the third paragraph was seen as supporting the provisions concerning origination. (SD, 1903, p. 2365.) The minister leading for the government in the debate similarly supported the contention that a request was necessary on the basis that an amendment violated the right of the House to originate appropriations (Senator O'Connor, pp 2367, 2369). This theme was emphasised by others during the debate (exchange between Senators Keating and Clemons pp 1854-5; Senator MacGregor p. 1845, Senator Millen pp 2405, 2409). The minister was similarly insistent that a bill must propose an appropriation in order to fall within the prescription of the third paragraph:

> Of course, if the bill does not make an appropriation, we can do anything we like with it. (Senator O'Connor, pp 2369, 2406, 2489.)

It was clear then, from this early discussion, that the third paragraph was taken only to prevent the Senate doing by way of amendment that which it could not do by way of initiating a bill, to apply only to appropriation bills which the Senate could otherwise amend, and to prevent only an amendment which would increase expenditure under the appropriation.

This was a rational and coherent interpretation of the paragraph, and an answer, the only coherent answer, to the repeatedly-made observation that there is no difference, other than of procedural form, between an amendment and a request.

(i) appropriations

There has been general agreement that the expression charge or burden refers to appropriations of money (its supposed application to matters other than appropriations is dealt with below). An appropriation of money is a charge or burden on the people in the sense that it is a charge on the public funds. An amendment to a bill which would increase expenditure under a bill out of money proposed to be appropriated for that purpose is an amendment which would increase a proposed charge or burden on the people.

On the basis of this analysis, it would appear at first sight that the interpretation of the relevant provision is relatively easy: if a bill contains a proposed appropriation of money, and an amendment would have the effect of requiring increased expenditure under that appropriation, for example, by increasing the payments which are to be made under the appropriation, the amendment would need to be in the form of a request.

The question soon arose, however, of the application of the paragraph to an amendment to a bill which did not itself contain an appropriation but which amended an act which contained an appropriation in such a way as to affect expenditure under the appropriation. Should such an amendment which would increase expenditure under the standing appropriation be moved in the form of a request?

Strong arguments could be advanced, on the basis of the 1903 debate and previous authority, that the third paragraph did not apply to such an amendment. The bill would not of itself *propose* an appropriation. Moreover, such a bill could presumably be introduced in the Senate, and, as has already been noted, the application of the paragraph to a bill which may be introduced in the Senate undermines the only coherent purpose and rational application of the paragraph.

Unfortunately, when this question arose in the Senate in relation to the Surplus Revenue Bill 1910, it was not considered. A request was moved, and when the necessity for a request was questioned, the matter was brushed aside with the by then familiar remark: “What does it matter whether we proceed by way of request or amendment?” (Senator Pearce, SD, 25/8/1910, p. 2060). The request was then agreed to.

In this unsatisfactory way it was established that a request was required for an amendment to a bill which would increase expenditure under an appropriation in an act to be amended by the bill.

The situation could be rationalised by the thesis that such a bill contains an implied appropriation, but there is still the problem that such an amendment could be initiated by way of a Senate bill and could presumably be made by way of an amendment to a bill first introduced in the Senate. The case thereby extended the application of the third paragraph in a way which undermined its rationale as a safeguard of the initiative of the House of Representatives.

The interpretation of the provision has also been complicated in relatively recent years by certain unfortunate features of the framing of government legislation. These features are called unfortunate because, apart from complicating the interpretation of the relevant provision, they also amount to a removal of appropriation and expenditure from parliamentary control and supervision. These aspects of legislation are as follows.

Standing appropriations. The Parliament has agreed to many bills which contain standing appropriations, usually called special appropriations, that is, appropriations which, when they have been put onto the statute book, continue to authorise the expenditure of money for some years or until they are repealed, and do not have to be renewed by Parliament. Bills to amend those bills are then introduced, and the provisions of the amending bills affect the amount of expenditure to be made under the standing appropriations. It is then necessary to determine whether any particular amendment by the Senate of the amending bills will increase the expenditure under the appropriation. This determination is further complicated because these standing appropriations are often also appropriations of indefinite amount.

Indefinite appropriations. The Parliament has passed many bills which contain appropriations of indefinite quantity. The provisions in question usually state that the money required for the operation of the legislation is appropriated from the Consolidated Revenue Fund, without any specification of an amount. This drafting device is adopted because it is often not possible for the government to calculate with any degree of accuracy the amount of expenditure which will be required by the legislation concerned, because of uncertainty as to the impact of the legislation. This uncertainty also has the effect of making it difficult to determine whether any particular amendment of the legislation will require increased expenditure. If the government cannot determine how much expenditure will be involved in a piece of legislation, it is asking a great deal that the Senate should determine with certainty whether any particular amendment of the legislation will increase the expenditure. (The Financial Management and Accountability Amendment Bill 2000, which belied its title, and which was passed in connection with the government's new tax scheme, added an indefinite amount to every annual and standing appropriation in every statute, but it was explained that this was a "bookkeeping" device not actually increasing expenditure.)

Separation of appropriations. The use of standing and indefinite appropriations and bills which amend the legislation containing those appropriations means that appropriations are separated from the provisions that affect the expenditure which may be made under them. It may be argued, as indeed it was argued during the 1903 Senate debate, that, on a strict interpretation of the relevant provision in section 53, if a bill does not contain a specified appropriation there can be no question of any amendment to it increasing a proposed charge or burden. This interpretation, while probably strictly correct, has not been followed, and it has been accepted that a bill proposes a charge or burden if it amends other legislation which contains an appropriation. This is a very loose interpretation which could, if carried to its logical conclusion, lead, as was pointed out in the 1903 debate, to virtually every amendment becoming a request, because virtually every amendment has an impact on an appropriation which exists somewhere. Fortunately the interpretation has not been carried to that logical conclusion, but it does indicate the difficulty of drawing clear lines in the application of the relevant provision of section 53 if a direct connection between an amendment and increased expenditure is not required as a condition for a request.

Complex provisions. Many bills passed by the Parliament in recent years contain complex provisions which determine whether expenditure is to occur. Usually these provisions take the form of providing that expenditure may occur if certain factors apply, and the expenditure will occur only if the factors apply and relate in a certain way. Specific examples of these types of provisions are referred to in relation to the particular cases described below. These kinds of provisions often make it difficult to determine whether there is going to be any expenditure under a bill at all, and, if so, how much, and thereby make it doubly difficult to determine whether particular amendments will have the effect of increasing expenditure.

Discretion conferred on officials. Many bills passed by the Parliament confer discretions on ministers and other office-holders to determine whether payments are made and therefore to determine whether expenditure occurs. In many cases these discretions are not governed by any objective factors. Many appropriations authorise expenditure which is not statutorily required, as it is, for example, by provisions which create entitlements to payments. Expenditure under such appropriations depends on the decisions of officials in the sense that it may be decided to make savings by not spending up to the authorised level, or not spending at all. This is quite different, however, from provisions which explicitly empower ministers and other officials to determine whether payments are made, and if so in what amounts. As will be seen in the following analysis of past cases, these sorts of provisions provide a basis for an argument, which was advanced by the Senate in 1981, that an amendment which merely affects such a discretion need not be a request.

Appropriations of these kinds have been used (or abused) to such an extent in recent times that only about 20 percent of total government expenditure is now subject to annual parliamentary scrutiny and approval in the annual appropriation bills. The remaining 80 percent of government expenditure has escaped from parliamentary control through the use of these types of provisions. The following figures, extracted from the annual budget documents, show the growth of standing appropriations as a percentage of total government expenditure:

1909-10	10%
1929-30	38%
1949-50	49%
1969-70	56%
1992-93	74%
2002-03	80%

Had the Parliament not fallen into the habit of passing these kinds of provisions (and, it is submitted, it is a very bad habit from the standpoint of parliamentary control and supervision of expenditure), the interpretation of the relevant provision of section 53 would be relatively straightforward. It is because of these kinds of provisions that difficulties of interpretation have arisen.

Proper parliamentary supervision and control of expenditure, and the proper application of section 53 of the Constitution, require that all government expenditure be approved annually in specified amounts by Parliament, with additional and supplementary appropriations when required, and that expenditure of appropriated funds be governed by objective conditions rather

than discretions vested in officials. There is no reason for this situation not being achieved, except an executive desire to avoid unwelcome parliamentary attention. (A bill to abolish standing appropriations and to make all appropriations subject to annual renewal was introduced in the Senate in 1986 by Senator Vigor: 24/9/1986, J.1229.)

A report of the Auditor-General presented in 2004 (Report No. 15, 2004-05, PP 240/2004) found widespread illegalities, lack of information and absence of accountability and control in the administration of special appropriations. It was pointed out that the nature of special appropriations ("bottomless buckets of money") encourages these problems. (29/11/2004, J.122; SD, 29/11/2004, pp 74-8) The problems posed by special appropriations were subsequently taken up in debate on bills containing new provisions for such appropriations and by the Scrutiny of Bills Committee (SD, 10/10/2005, pp 16-17; Fourteenth Report of 2005, Accountability and Standing Appropriations, PP 461/2005). The committee adopted the practice of reporting on provisions for such appropriations.

Other reports by the Auditor-General disclosed lack of proper control and accountability in other areas of the public finance system where annual appropriations are by-passed (Reports Nos 24 of 2003-04, 28 of 2005-06, 31 of 2005-06).

The Finance and Public Administration Committee presented a report in March 2007 on the appropriations and funding system and its effect on parliamentary accountability. The committee recommended significant changes not only to the system of appropriations but to other features of public finance introduced during the previous ten years which maximised flexibility for government but reduced transparency and accountability and hampered parliamentary scrutiny (*Transparency and accountability of Commonwealth public funding and expenditure*, PP 47/2007; response by the Chairs' Committee, 21/6/2007, J.4028).

It is no answer that other countries have extensively used standing appropriations. This means only that other countries have made the same mistake. Generally speaking they have not made the same mistake to the same extent. In the United Kingdom standing appropriations account for only 25 percent of government expenditure.

The following are four cases in which there was significant disagreement between the two Houses (in reality between the Senate and the government's advisers) in relation to amendments and requests affecting appropriations, and they illustrate some of the issues of interpretation.

States Grants (Tertiary Education Assistance) Bill 1981. This bill contained a provision empowering a minister to make certain determinations which could have the effect of reducing the payments otherwise authorised to be made to the states under the bill. A Senate amendment removed the relevant provision. The Senate passed a resolution declaring that it was in accordance with section 53 of the Constitution to amend the bill in that way. The principle which may be drawn from that resolution is that a request is not required for an amendment which removes a ministerial power which may be exercised in such a way as to reduce expenditure under a bill (see also statements by Chair of Committees, SD 20/3/1997, p. 1820; 25/9/1997, p. 6961; 2/12/1997, pp 10130-31; the same principle applies to an amendment which would empower a minister to make determinations which could be exercised to increase expenditure otherwise to be made under the bill: statement by Chair of Committees, 21/6/2007, J.4043).

States Grants (Technical and Further Education Assistance) Bill 1988. Under this bill a minister was empowered to authorise payments to a state in respect of expenditure of certain institutions. The minister was not to authorise the payment of an amount that exceeded a prescribed maximum. That maximum was determined by multiplying a certain sum of money by the number of students receiving instruction in the relevant institutions. In calculating the number of students, certain categories of students were to be disregarded. A Senate amendment had the effect of removing the reference to one of the categories of students to be disregarded. The belief that the amendment did not require a request was based on an assessment that the effect of the amendment on the expenditure under the bill would not be sufficiently direct or certain to require a request. Whether the amendment increased expenditure would be determined by whether, because of students falling into the relevant category, the number of students would be thereby increased (this would depend on numbers of students in the other relevant categories), whether the maximum amount payable would thereby be increased and whether the minister would therefore authorise an increased payment. It appeared on the face of the provisions that the connection between the amendment and an ultimate increase in expenditure involved too many links in the chain of causation and would be simply too indirect and uncertain to warrant the amendment taking the form of a request.

Social Security Legislation Amendment Bill (No. 4) 1991. The *Social Security Act 1991* and its predecessor statute is a frequently-amended act which contains a standing and indefinite appropriation, and amendments to amending bills have given rise to difficult questions of interpretation. To this bill the government moved in the Senate a number of amendments, one of which created a category of potential recipients of benefits in respect of whom a certificate could be issued by state or territory authorities. The payment of funds therefore depended upon the exercise of a power conferred not on a Commonwealth official but on state and territory officials. It was not known whether any certificates would be issued by the relevant authorities or whether any benefits would be paid, and subsequent publicity surrounding the bill indicated that the matter was still in doubt for some time after its passage. The view was therefore taken that the effect of the amendment on total expenditure under the bill was uncertain. After the amendments had been passed by the Senate and agreed to by the House of Representatives, a statement was made by the Speaker indicating a belief that the amendment in question should have been a request.

Local Government (Financial Assistance) Amendment Bill 1992. A provision of this bill empowered the relevant minister to determine a figure which, multiplied by a separately determined factor, produced an amount of a payment to the state of Tasmania, and a ceiling was prescribed for the figure to be determined by the minister. A Senate amendment had the effect of altering that ceiling. The view was taken that the amount actually expended under the bill would not necessarily be affected by the alteration of the ceiling by the Senate's amendment. Moreover, it was made clear that, if the ministerial power under this bill were exercised in such a way as to increase the payment to Tasmania, payments to the State under other legislation, also determined by ministerial determination, would be reduced by a corresponding amount. It was clear, therefore, that in practice the amendment would not result in additional expenditure. In this case the effect of the amendment was influenced by two different statutory ministerial discretions. Although, as the Speaker suggested in a statement to the House of Representatives, it is somewhat anomalous to be interpreting the question with reference to a ministerial undertaking,

it is also highly anomalous to argue that a request is required when it is known that there will be no increase in expenditure.

(See Supplement) An issue which has arisen from time to time relates to Senate amendments which remove proposed restrictions on entitlements to payments. The principle has been followed that where a bill proposes to restrict eligibility for payments under an act which contains a standing appropriation, and the Senate's amendments remove or liberalise the restrictions, those amendments do not need to be requests, although their effect is to increase the total of expenditure which would otherwise have occurred had the bill been passed without amendment. This principle appears to have been accepted by the government. (See government amendments moved in the Senate to the Social Security Legislation Amendment Bill 1990, 18/12/1990, J.633-7; statements by the Chair of Committees, SD, 26/11/1996, p. 5968; 29/11/1996, p. 6379; 13/12/1996, p. 7490; 12/2/1997, p. 539; for acceptance by the government, see HRD, 2/12/1996, p. 7454.)

In relation to a Senate amendment to the Social Security Amendment Bill 1993, it was conceded by the government that it was not possible to determine the effect of the amendment on expenditure (HRD, 26/5/1993, pp 904-6).

In 1997 government amendments to a bill dealing with veterans' affairs were circulated as requests even though the explanatory memorandum accompanying the amendments stated that they did not have any financial impact. The Chairman of Committees stated that he was at a loss to understand why the amendments had been framed as requests (SD, 12/2/1997, p. 539). See also the statements by the Chair of Committees in relation to the Taxation Laws Amendment Bill (No. 1) 1997, SD, 27/6/1997, p. 5456; the Child Support Legislation Amendment Bill 1998, SD, 30/11/1998, p. 910, 7/12/1998, p. 1328; New Tax System Bills, SD, 30/4/1999, p. 4657; 24/6/1999, p. 6252; 25/6/1999, p. 6465; Telecommunications Bills, SD, 27/5/1999, p. 5549. (See Supplement)

Amendments which may result in increases of expenditure from funds not yet appropriated or which authorise ministers to take action which may result in increased expenditure are not treated as requests (statements by Chair of Committees, SD, 20/3/1997, p. 1820; 25/9/1997, p. 6961; 2/12/1997, pp 10130-31).

Where amendments are purely consequential on amendments which are properly framed as requests, the consequential amendments may also be framed as requests (statement by Chair of Committees, A New Tax System (Family Assistance and Related Measures) Bill 2000, SD, 11/4/2000, p. 13807). On occasions government drafters have attempted to have groups of government amendments all treated as requests on the basis that some of them should be requests and they are related. The Senate has not accepted this distorted application of the constitutional provisions. (Statement by Chair of Committees, Further 1998 Budget Measures Legislation Amendment (Social Security) Bill 1999, SD, 20/9/1999, p. 8438).

In debate in the House of Representatives on the States Grants (Technical and Further Education Assistance) Bill 1988, the responsible minister quoted an opinion by a government adviser which indicated that the amendment to the bill was one which required a message under section 56 of the Constitution (HRD, 21/12/1988, pp 3777-8; the opinion was also quoted in the Senate p. 4809). In other cases in the past where there has been dispute about whether an amendment

moved in the Senate infringed the rule concerning a proposed charge or burden on the people, the government has sought to establish that the amendment should take the form of a request by advising that a Governor-General's message would be necessary if the amendment were passed by the House of Representatives.

In debate on the Trade Practices Revision Bill 1986, Senator Macklin pointed out that a message had been brought into the House of Representatives in connection with the bill. The bill did not contain any appropriation of money, and nor did the Trade Practices Act which it amended; the money necessary for expenditure under the Trade Practices Act is appropriated by the annual appropriation bills. There was a clause in the bill which enlarged the category of proceedings in respect of which, under the principal act, financial assistance might be granted by the Attorney-General. The funds necessary for this assistance were not appropriated by the bill or the Act, but were contained in annual Appropriation Bill (No. 1), and when the relevant section of the principal act was passed no message was produced. It was clear, therefore, that a Governor-General's message should not have been brought into the House of Representatives in respect of the bill. In response to Senator Macklin, Senator Evans, the Minister representing the Attorney-General, said that the introduction of the message represented an "abundance of caution" on the part of the Office of Parliamentary Counsel (the government drafting office). Senator Macklin asked why any caution at all was required, since the requirements of sections 53 and 56 of the Constitution are not justiciable. Senator Evans then conceded that the bill was not an appropriation bill and that the message should not have been produced (SD, 30/4/1986, p. 2072).

This incident demonstrated some of the issues of interpretation referred to, and also demonstrated that an opinion by government advisers that an amendment should have been a request cannot be taken as an infallible answer to the question.

In framing government amendments to be moved in the Senate the government drafters have occasionally suggested that such amendments should be made as requests if they make expenditure "legally possible"; in other words, section 53 of the Constitution should be read as if it referred to notional charges or burdens rather than real charges or burdens. This suggestion has not been accepted by the Senate. (Statement by Chair of Committees, Indirect Tax Legislation Amendment Bill 2000, SD, 26/6/2000, p. 15556; see also below under Procedure Committee's proposals.)

In the course of consideration of cases of disagreement, various papers were tabled in the Senate. In papers prepared by the Clerk of the Senate, it was suggested that an amendment to a bill relating to a standing or indefinite appropriation should not be regarded as increasing a proposed charge or burden unless the amendment would clearly, necessarily and directly cause an increase in expenditure under the appropriation. The contrary view appears to be that amendments have to be considered on a case-by-case basis without the application of any such general principle. (The various papers are collected in a volume entitled *Constitution, Section 53: Financial Legislation and the Houses of the Commonwealth Parliament*, Papers on Parliament No. 19, Department of the Senate, March 1993. These papers refer only to the question of the effect of the provision on appropriation bills; for the effect on taxation bills, see below. See also below under Procedure Committee's proposals.)

In relation to an appropriation bill which appropriates a definite sum and which is not for the ordinary annual services of the government, although the Senate may not amend the bill to increase the amount of the appropriation, it is clear that the Senate can alter such a bill to change the allocation of proposed expenditure and the purposes for which money is to be appropriated, provided that the total proposed expenditure of the bill is not increased (Appropriation (Works and Buildings) Bill 1910-11, 15/9/1910, J.98; see also J. Quick and R.R. Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, p. 671; cf ruling of President Gould, 3/10/1907, J.134, in relation to an amendment widening the scope of a bounty but subject to a limited total appropriation: this ruling was clearly in error). Thus the Higher Education Legislation Amendment (2005 Budget Measures) Bill 2005 was amended to reallocate appropriations within the same total (8/11/2005, J.1363; SD, 9/12/2005, p. 45). In the case of the States Grants (Primary and Secondary Education Assistance) Bill 2000, although the total effect of the Senate's amendments was probably to reallocate the funds to be appropriated, the effect of amendments which would have reduced grants for some private schools was not sufficiently clear to conclude that the reductions would have funded amendments to increase grants in respect of children with disabilities. The latter were therefore moved in the form of requests. (9/11/2000, J.3549-50; 10/11/2000, J.3555-68)

In its judgment in 1995 in the proceedings relating to the *Native Title Act 1993* (*Western Australia v Commonwealth* 1995 183 CLR 373), the High Court dealt with a submission that the Native Title Act was invalid because the amendments made to the Native Title Bill in the Senate were contrary to section 53 of the Constitution. The Court rejected the submission. In finding that the provisions of section 53 are not justiciable, the Court observed: "Section 53 is a *procedural provision* governing the intra-mural activities of the Parliament" (emphasis added). More significantly, the Court made the following observation: "In any event, the submission of want of conformity with s. 53 appears to be without merit. None of the Senate amendments appears to increase a 'charge or burden on the people' " (at 482). This confirmed the treatment of the amendments by both Houses at the time. They were moved in the form of amendments and not as requests because they did not directly increase expenditure under any appropriation contained in the bill or in any act amended by the bill. One of the Senate's amendments to the bill, however, established the Parliamentary Joint Committee on Native Title. This caused increased expenditure from a standing appropriation contained in the *Remuneration Tribunal Act 1973*, as modified by the *Remuneration and Allowances Act 1990*, in respect of remuneration of the chair of the committee and travelling allowances for members of the committee. The increased expenditure was automatic; no action by the Remuneration Tribunal was necessary. This suggests that the High Court took a view of the third paragraph of section 53 similar to that expounded here: only a very direct effect on an appropriation is regarded as an increase in a charge or burden.

(ii) taxation bills

A foundation of the 1903 debate in the Senate and the outcome of that debate was, as has been noted, the observation that the third paragraph of section 53 must apply to appropriation bills because it cannot apply to bills imposing taxation, which cannot be amended in any way. Therefore, notwithstanding that the expression "charge or burden" is suggestive of taxation, most senators on both sides of the debate rejected any notion of any such application. Much of the speech of Senator Symon, who supported the contention that the expression referred to

appropriations, was taken up by citations of persuasive authorities that the expression in fact historically referred to appropriations (pp 2391-8).

There is obviously a profound logical difficulty in any attempted application of the paragraph to taxation legislation. In order to fall within the prescription of the paragraph, an amendment must increase a *proposed* charge or burden contained in a bill. If a bill contains a *proposed* charge or burden, it must, on any reasonable construction of that expression if it is to have any application to taxation legislation, be a bill imposing taxation, which therefore cannot be amended at all. If an amendment is to increase a *proposed* charge or burden, there must be a proposed charge or burden to increase, that is, there must be an imposition of taxation.

This logical analysis provided an equally profound difficulty for those who wished to argue that the third paragraph has no application to appropriations. They were compelled to look for something else which may be referred to by the expression "charge or burden", and which is not an imposition of taxation or an appropriation. Perhaps, it was said, it refers to fines or fees, which are excluded from the definition of appropriations by the first paragraph of section 53. This argument has subsequently had appeal to some (opinion of Bailey, 21 April 1950, presented to the Senate on 23 March 1994 with that of Garran). Senator Baker came to the conclusion that the paragraph must refer to loan bills (SD, 1903, p. 1843). Both of these arguments involve the difficulty that the kinds of bills contemplated can be introduced in the Senate, a difficulty which Garran swept aside by declaring that the paragraph refers only to bills first introduced into the House, without considering the further difficulty arising from such a view. These arguments were not convincing at the time, and have become less convincing with the passage of time.

One senator in 1903 suggested that the paragraph could apply to bills which do not impose taxation but which provide for "machinery", an amendment to which might widen the scope of the taxation. This suggestion, however, was made in the context of a somewhat strange argument that the paragraph operated to prevent both amendments and requests, and was immediately dismissed and not taken up by any other speaker. It was thought, quite reasonably, and consistently with the arguments advanced in the debate, that an amendment which would have the effect of increasing tax would have to affect the imposition of the tax and not merely the "machinery" provisions, and in any other case such an amendment would be in effect a proposed law imposing taxation under the first paragraph of section 53 (Senators Millen and Dobson, pp 2403-8; Senator McGregor, p. 1845).

Thus the conclusion drawn in the 1903 debate is that the paragraph applies to appropriation bills otherwise amendable by the Senate and could have no application to taxation bills.

At first sight it may be thought that there is one obvious exception to this rule. A bill which reduces or abolishes a tax may be regarded as a bill which does not impose taxation. It may appear to be contrary to the third paragraph for the Senate to amend such a bill to substitute a higher rate of tax than that proposed. This apparent exception, however, conforms with the interpretation of the third paragraph here expounded. While the Senate could introduce its own bill to abolish a tax, when the question is posed: could the Senate introduce its own bill to raise the level of a tax?, the answer is clear: it could not, because such a bill would in that context clearly be a bill imposing taxation. The Senate may not do by way of amendment that which it may not do by initiating its own bill. Therefore an amendment may not be moved in the Senate to

raise the level of a tax. This is not an application of the third paragraph of section 53 but an application of the first paragraph: such an amendment to such a bill would indeed be a proposed law for imposing taxation.

On occasions the Senate has made requests for the insertion of appropriation provisions in bills originating in the House (4/10/1984, J.1153; 18/10/1995, J.3958-9). On these precedents, it could be argued that it would be open to the Senate to request the insertion in a bill originating in the House of a provision having the effect of imposing taxation. The better view, however, is that such amendments may not be moved in the Senate at all, in that, by turning a bill into a bill imposing taxation, they are contrary to the initiation provision of the first paragraph of section 53 of the Constitution (statement by President Calvert, SD, 16/9/2003, p. 15275).

An argument has been mounted from time to time that in the third paragraph the word "charge" refers to taxation while the word "burden" refers to appropriations, an argument which may appeal on linguistic ground alone, but there is no historical basis for such a contention. It was well said in the 1903 debate that "charge or burden" is a "drag-net" phrase (Senator Higgs, p. 1829), and the historical analysis and argument then presented sufficiently establish that "charge" historically referred to appropriations and that both words refer to appropriations.

Prior to the Taxation Laws Amendment Bill (No. 4) 1993, there were no precedents of the Senate making requests for amendments to bills which did not impose taxation for the reason only that the amendments would increase liability to pay a tax imposed under another bill or act. The Senate declared in relation to that bill that its action in making requests did not commit it to a view as to the application of the third paragraph of section 53 to that bill or in similar cases.

In debate on the Taxation Laws Amendment Bill (No. 4) 1993 on 22, 23 and 24 March 1994, it was pointed out that the bill was classified as a bill not imposing taxation, but government amendments which were moved to the bill were framed in the form of requests apparently because it was thought that the amendments would increase the taxation liability of taxpayers. It was suggested that this highlighted again the difficulties arising from the government's classification of taxation legislation, and the claim that a bill can increase taxation without being a bill imposing taxation within the meaning of section 53 of the Constitution, and that Senate amendments can increase taxation without imposing taxation and should then take the form of requests. This view was the basis of the dispute concerning the taxation legislation arising from the 1993 budget, which resulted in the government withdrawing and reframing its taxation bills (see above).

In this case the Senate agreed to the requests for amendments but passed a declaratory resolution, similar to resolutions used for the 1993 taxation legislation (see above), declaring that in agreeing to the requests the Senate did not necessarily accept that requests were appropriate and had not arrived at any concluded view as to the application of sections 53 and 55 of the Constitution to the bill. See also the statements by the Chair of Committees in relation to the Taxation Laws Amendment Bill (No. 4) 1994, SD, 8/12/1994, pp 4267-8; and the Tax Law Improvement Bill 1997, SD, 26/6/1997, p. 5317.

The problems with the interpretation advanced by the government's advisers were also well illustrated by a bill introduced by the government in the Senate and passed on 4 May 1994. The

Customs Tariff Amendment Bill 1994 increased rates of customs duties, but was classified as a bill which did not impose taxation and was introduced in the Senate. According to the view of the government's advisers, the Senate could have amended the bill to increase further the rates of duty. Thus the House of Representatives would not only receive from the Senate a bill which increased taxation but which had been amended by the Senate to increase the taxation beyond the level proposed by the government. This would completely undermine the main purpose of section 53, which is to give the House of Representatives the exclusive right to introduce taxation imposition and appropriation measures.

The Chair of Committees has directed that government requests to bills dealing with taxation be moved in the form of amendments where the amendments have been proposed as requests apparently because of a view on the part of government advisers that they might result in higher taxation by comparison with the bill, as distinct from the status quo in the absence of the bill. The chair has pointed out that the Senate has not accepted such a strained interpretation of the charge or burden provision (SD, 22/11/1995, p. 3722; 1/12/1995, pp 4570-1; 20/11/1996, p. 5711; 10/2/1997, p. 277; SD, 25/5/1998, p. 3022; SD, 10/5/2000, p. 14265; SD, 7/12/2000, p. 21146).

In relation to amendments which might increase tax payable, the constitutional provision refers to an amendment which would increase any proposed charge or burden, and the view taken in the Senate since 1903 is that a bill dealing with taxation does not contain a proposed charge or burden unless it is a bill imposing taxation. Amendments of this kind are therefore directed by the chair to be moved as amendments (New Business Tax System (Thin Capitalisation) Bill 2001, SD, 27/9/2001, p. 28123). The claim that any amendment which might be regarded as in any way disadvantageous to taxpayers should be a request was also not accepted (statement by Chair of Committees, SD, 27/6/1996, pp 2367-8).

On the other hand, the government drafters have taken the view that amendments which *reduce* the taxation payable should be requests on the basis that appropriations may increase to compensate for the lost revenue! In one case a Governor-General's message was prepared (but not used) to recommend the appropriation supposedly arising from the amendments (A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999: statements by Chair of Committees, SD, 9/12/1999, pp 11654, 11691). Where it has been indicated that an amendment will give rise to tax refunds payable out of a standing appropriation, the Senate has accepted that the amendments should be requests (statement by Chair of Committees, New Business Tax System (Miscellaneous) Bill 1999, SD, 8/6/2000, p. 14923, 26/6/2000, p. 15633; this case gave rise to a resolution of the Senate requiring explanations of government amendments framed as requests: 26/6/2000, J.2899; Indirect Tax Legislation Amendment Bill 2000, SD, 26/6/2000, p. 15556).

On occasions government amendments have been initially presented as requests despite the explanatory memoranda indicating that they would have no financial impact (Taxation Laws Amendment Bill (No. 1) 1997, SD, 27/6/1997, p. 5456; Superannuation Contributions Tax Bills, SD, 24/11/1997, p. 9289; Ballast Water Research and Development Funding Levy Collection Bill, SD, 26/3/1998, p. 1392; Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997, SD, 23/3/1998, p. 1087. For other cases involving tax bills see New Tax System Bills, SD, 30/4/1999, p. 4657; 24/6/1999, p. 6252; 25/6/1999, p. 6465; Telecommunications Bills, SD, 27/5/1999, p. 5549).

Procedure Committee's proposals

The Procedure Committee, in its first report of 1996 (PP 194/1996), recommended a scheme for the interpretation and application of section 53 of the Constitution, based on the foregoing analysis. Essentially, the scheme would require bills which appropriate money, either directly or indirectly, to contain an appropriation clause and to be first introduced into the House of Representatives, and bills which increase taxation to be treated as bills imposing taxation, and would provide for certifications by the government as to whether particular amendments moved in the Senate would increase expenditure from an indefinite appropriation, with statements of reasons for such certification. This proposal has not yet been adopted by the Senate.

Decision as to amendments or requests

The Chair of Committees may decide in the first instance whether an amendment should take the form of a request (ruling of President Baker, SD, 3/10/1906, pp 5966-8), but ultimately it is for the Senate to decide whether to proceed by way of amendment or request.

In June 2000 the Senate adopted a resolution requiring all amendments circulated in the Senate chamber in the form of requests to be accompanied by a statement of reasons for the amendments being framed as requests together with a statement by the Clerk on whether the amendments would be regarded as requests under the precedents of the Senate (26/6/2000, J.2899). This resolution followed a series of cases of government drafters presenting amendments as requests inappropriately and failing to respond to requests for explanations for so doing.

For the assistance of senators, the Senate Department classifies and marks bills as follows:

A — contains a provision appropriating money
AA — amends an act which contains a standing appropriation of money*
T — affects taxation but does not appear to impose a new tax or to increase an existing tax*
IT — appears to impose a new tax or to increase an existing tax*
N — does not attract any of these classifications*

* if more than one act is amended by the bill, the amendments to the acts are classified in accordance with these marks.

For cases of bills stated by government not to be bills imposing taxation, but treated by the Senate as bills imposing taxation, see above, under When requests are required: (a) bills imposing taxation.

Until late 1994 it was the practice of the Office of Parliamentary Counsel (the government drafters) to place marks on the bottom right hand corner of the first page of bills to indicate a view of their category. The marks were as follows:

MM — indicating a bill requiring a message from the Governor-General recommending an appropriation of loan moneys

MR — indicating a bill requiring a message from the Governor-General recommending an appropriation of revenue
MRM — indicating a bill requiring a message from the Governor-General recommending an appropriation of revenue and loan moneys
T — indicating a bill dealing with taxation, but not imposing tax
T* — indicating a bill imposing taxation
O — none of the above.

Where a bill required a message from the Governor-General recommending an appropriation and was also a bill with respect to taxation, the mark placed on the first page was a mark composed of the marks relevant to each aspect of the bill.

These classifications were not necessarily accepted by the Senate. Bills marked T* were not always regarded as imposing taxation, as often they merely amended statutes which imposed taxation without affecting the tax. Bills which clearly proposed fees for services were often marked T* (Overseas Students Charge Bill 1985, 29/11/1985, J.661).

During the controversy over the 1993 taxation bills (see above), it was pointed out that the drafters' classification of taxation bills often did not conform with the views then expounded by the Attorney-General's Department. In late 1994 the Office of Parliamentary Counsel abandoned the practice of placing marks on bills.

Cases of government amendments wrongly circulated as requests have been considered above in relation to the various categories of bills. Usually this arises because of inconsistent interpretations by government advisers of the constitutional provisions. Occasionally, however, even after the resolution of the Senate of 26 June 2000, government amendments which should be requests are mistakenly circulated as amendments (Taxation Laws Amendment (Research and Development) Bill 2000, SD, 27/9/2001, p. 28271).

Retrospectivity of tax legislation

The *Customs Act 1901* (ss 226 and 273EA) and the *Excise Act 1901* (ss 114 and 160B) contain provisions which allow the collection of customs duties and excise duties from the time of the announcement of proposals by the government, within a period of 12 months before the passage of legislation to validate the duties. The purpose of these provisions is to ensure that windfall profits may not be made between the time of announcement of duties and the enactment of legislation to levy the duties.

The Senate has not declined to pass a bill validating increases in duties, and there has long been speculation about the remedial action which might be taken in such a case. In June 2000 the Senate passed a resolution expressing opposition to rates of excise contained in an excise tariff proposal tabled in the House of Representatives (29/6/2000, J.2980). A compromise by the government avoided rejection by the Senate of the measure.

On 12 August 2003 the Senate deferred consideration of two customs and excise tariff bills to give effect to an ethanol subsidy scheme until the government produced documents required by various Senate orders relating to the scheme. The documents were not initially produced and the bills were not passed until documents were subsequently tabled. (12/8/2003, J.2089-90; 1/4/2004, J.3324-5)

On 17 June 2008 the Senate passed a resolution declaring its opposition to excise increases on certain alcoholic beverages in the absence of a more comprehensive plan to deal with alcohol abuse, foreshadowing a possible rejection of excise increases already being collected (17/6/2008, J.498). (See Supplement)

An amendment made by the Senate to the Taxation Laws Amendment (Budget Measures) Bill 1995 required public notification of any intention of the government to introduce changes to the sales tax law then in effect (29/6/1995, J.3591-3).

In relation to other taxes, the Senate in 1988 passed a declaratory resolution, as part of an amendment to the motion for the second reading of a bill, to the effect that if more that six months elapses between a government announcement of a taxation proposal and the introduction or publication of a bill, the Senate will amend the bill to reduce the period of retrospectivity to the time since the introduction or publication of the bill (8/11/1988, J.1104; precedents for removal of retrospective provisions: 22/5/1990, J.121; 31/5/1990, J.195).

The Scrutiny of Bills Committee draws the attention of the Senate to retrospective legislation, particularly tax legislation, and has been critical of the practice of backdating tax legislation to the date of a ministerial announcement (see Report on the Operations of the Committee 1990-1993, October 1993, PP 208/1993, pp 16-20).

Procedure on financial legislation

Except as described in this section, financial bills are proceeded with by the Senate in the same way as other bills.

The motion for the first reading of bills which the Senate may not amend, unlike the equivalent stage of amendable bills, is debatable (SO 112(2)). This variation in respect of non-amendable bills is necessary because, in compliance with the provision of section 53 of the Constitution that a request for an amendment may be made at any stage, requests may be moved on the motion for the first reading of such a bill (see below).

In debate on the motion for the first reading, matters not relevant to the subject matter of the bill may also be discussed (SO 112(2)). The purpose of this provision is to provide the Senate with a further opportunity to debate matters of general interest, and, on each piece of financial legislation, to discuss the general financial policy of the government.

In proceedings on bills which the Senate may not amend, requests for amendments may be made at any of the following stages of a bill:

(a) On the motion for the first reading of the bill.

(b) In committee after the second reading has been agreed to.

(c) On consideration of any message from the House of Representatives referring to the bill.

(d) On the third reading of the bill (SO 140(1)).

This standing order puts into effect the provision of section 53 of the Constitution that the Senate may make a request for an amendment at any stage of the consideration of a bill.

The motion for the second reading of a bill, however, is not included in the list of stages at which requests may be made. This provision was adopted on the basis that the second reading debate should be confined to the principles of a bill and the question of whether it should be passed subject to any subsequent requests. The Senate is not excluded, however, from making requests on the second reading, and may do so if this is appropriate (statement by President Gould, SD, 9/9/1909, p. 3225. For an early precedent of a request at the second reading, see Supply Bill (No. 1) 1901, 14/6/1901, J.35-6). Requests to be moved to the second reading of the Customs Tariff Amendment Bill (No. 2) 2001 and the Excise Tariff Amendment Bill (No. 1) 2001 were circulated in April 2001, but were not moved when the government agreed to amend the bills by way of requests moved in committee of the whole (the requests at second reading would have sought the division of the bills).

Under the expedited method for the introduction of bills, the motion for the first reading is dealt with together with other procedural motions and is now treated purely as a formal step. The second reading has therefore replaced the first reading as the first stage at which a request may effectively be moved.

For a precedent of a request moved on the motion for the first reading, see Customs Tariff Bill 1933, 31/5/1933, J.220. The request, motion for which was negatived, sought the return of the bill to the House of Representatives for the purpose of its amendment along certain lines which were indicated in the motion in a general way. For further precedents for requests moved on the motion for the first reading, see Appropriation Bill 1954-55, 28/9/1954, J.39; Appropriation Bill 1956-57, 16/10/1956, J.171. For a further precedent of a request in general terms, see Social Security (Home Child Care and Partner Allowances) Legislation Amendment Bill 1994, 24/3/1994, J.1504-6, 1523-6.

In practice, requests for amendments of non-amendable bills are now usually made during the committee of the whole stage.

If a request for an amendment is made at any stage, the bill is then returned to the House of Representatives with the request for amendment, and the bill is not further proceeded with by the Senate until the request has been dealt with (SO 140(4)). When requests for amendments are agreed to in committee of the whole, the report of the committee is adopted by the Senate, the bill is returned to the House of Representatives with the requests, and the third reading of the bill is not moved until the requests have been dealt with (SO 129(1)).

Bills which the Senate may amend but which are subject to requests for amendments are dealt with in the same way. If the Senate makes both requests and amendments in relation to a bill, the bill is returned after the committee stage to the House of Representatives with the requests, and when the requests are dealt with the bill is again returned with a message asking for concurrence of the House with the amendments (SO 129). The message forwarding the requests, however, also sets out the amendments which the Senate has made to the bill. The rationale of this

procedure is that the House should know of all the amendments required by the Senate before it deals with the Senate's requests. The House cannot actually deal with the Senate's amendments, however, until the requests have been disposed of and the Senate has passed the bill.

When the House makes amendments requested by the Senate and makes further amendments to the bill, the bill is not read a third time until the Senate has agreed to the House amendments (23/8/1999, J.1512, 1533; 18/10/1999, J.1922).

The Senate has dealt with requests suggested by the House of Representatives in substitution for Senate requests: 15/4/1986, J.898-9; 16/4/1986, J.904-12; 17/4/1986, J.917-8.

It is open to the Senate to request an amendment to a bill which is otherwise amendable as an alternative to amendments to the bill to which the House of Representatives has disagreed (see Chapter 12, Legislation, under Disagreement of House with Senate amendments). For example, in respect of an appropriation bill not for the ordinary annual services, the Senate may make amendments to the bill, and when the House of Representatives disagrees with the amendments the Senate may request an amendment to increase the amount of the appropriation as an alternative to the original Senate amendments disagreed to by the House. In that circumstance the Senate's non-insistence on its amendments is conditional upon the House making the requested amendment; it is not open to the House to decline to make the requested amendment and forward the bill for assent on the basis that the Senate had not insisted on its amendments. When the House has dealt with the Senate's requests the bill is returned for the Senate's final agreement (27/6/1996, J.431-3; 28/6/1996, J.442).

If the Senate amends a bill and the House of Representatives returns the bill with a suggestion that any amendments should have been made in the form of requests, the Senate, if it agrees with this suggestion, may then return the bill with requests, and after such requests have been dealt with any Senate amendments not resolved may be dealt with in accordance with procedures for amendments (SO 130). (For precedents of amendments changed to requests, see Sugar Bounty Bill 1903, 15, 22, 23, 24/7/1903; J.67, 80, 83, 87; Local Government (Financial Assistance) Amendment Bill 1992, 25/6/1992, J.2621, 2632, 2641.) In this circumstance also the Senate should make its non-insistence on its amendments conditional upon the requested amendments being made. In 1997 the government in the House of Representatives adopted the device of rejecting requests which its advisers claimed should have been amendments, but making identical amendments to the bill and then asking the Senate to agree to the amendments. This appears to have been resorted to as a means of saving time at the end of a period of sittings (Social Security and Veterans' Affairs Legislation Amendment (Family and Other Measures) Bill 1997; see statement by Chair of Committees, SD, 2/12/1997, pp 10130-31.)

In committee of the whole on a bill which the Senate may not amend, the following procedures are followed:

(a) The Chair calls on each clause or item, and puts the question — That the clause or item be now passed without requests.

(b) If motions for requests are moved and passed, the Chair puts a further question —That the clause or item be now passed, subject to the requests being complied with.

(c) If either of those questions is negatived, it is again proposed by the Chair, and consideration of the clause or item may continue until either question is agreed to. (SO 140(3))

The reason for the questions in relation to clauses or items being put in this form, rather than the question for an amendable bill, that the clause stand as printed, is that the Senate cannot amend the bill by negativing a clause as it can with an amendable bill.

If the committee, by majority vote, continues to negative the question that the clause or item be now passed without requests, or be now passed subject to requests being complied with, this means that the committee wishes to continue to consider the clause or item in question.

In 1993, in relation to the Customs Tariff (Deficit Reduction) Bill 1993 and the Excise Tariff (Deficit Reduction) Bill 1993, the question arose of the effect of the negativing of either of those questions by an equally divided vote, which would raise the possibility of the committee being unable to proceed to a subsequent clause of a bill. Although a formal ruling was not given on this question by the chair, it was suggested in an advice provided to the President and to senators by the Clerk of the Senate that, in this situation, the Chair of Committees should indicate to the committee that if there are no further requests to be moved the clause is passed without requests and the committee proceeds to the next clause.(For text of advice, see SD, 21/10/1993, p. 2448.) The rationale of this ruling would be that making a request is the only action the committee can take on the clause of a non-amendable bill, although, of course, at the third reading stage the Senate can reject the whole bill.

At the request of any senator a clause or item under consideration is divided (SO 140(3)(d)).

Consideration of a clause or item may be postponed, as with an amendable bill. (For postponement of items until documents tabled, see 28/5/1992, J.2349-50; for deferral of bills until information provided, see 20/5/1975, J.655-7; 12/8/2003, J.2089-90; 1/4/2004, J.3324-5; separate consideration in committee of the whole of answers to questions raised during committee of the whole debate: 28/5/1990, J.151.)

Any senator may move a request for an amendment. In that respect, a senator has a greater power in relation to financial legislation than a member of the House of Representatives, other than a minister. Under the procedures of that House, a private member cannot move an amendment involving the imposition of taxation or an increase in an appropriation in a bill (the latter kind of amendment requiring a message from the Governor-General).

A proposed request may be amended, just as a proposed amendment may be amended.

As with amendments made by the Senate, it is not normal for reasons for requests to be sent to the House of Representatives, although it would be open to the Senate to do so if it chose (ruling of President Baker, SD, 16/10/1903, p. 6243).

If the House of Representatives returns a bill with the Senate's requested amendments made, the bill is proceeded with by the Senate. If the requests were made in committee of the whole, as is

normal, a motion is then moved that the bill be read a third time. Further requests may be made at that stage, if necessary by a recommittal of the bill (28/6/1996, J.443).

If the House of Representatives returns a bill to which the Senate has requested amendments with the requested amendments not made or made with modifications, the bill is considered in committee of the whole, and any of the following motions may be moved:

(a) That the request be pressed.

(b) That the request be not pressed.

(c) That the modifications be agreed to.

(d) That the modifications be not agreed to.

(e) That another modification of the original request be made.

(f) That the request be not pressed, or agreed to as modified, subject to a request relating to another clause or item, which the committee orders to be reconsidered, being complied with. (SO 141(2)).

These procedures provide flexibility in any situation in which the House does not completely comply with the requests of the Senate. Any of the motions may be amended to alter the proposed course of action (11/6/1970, J.181; 21/12/1988, J.1366; 21/6/1991, J.1284; 24/3/1994, J.1504; for the substitution of amendments for requests, see the Health Legislation Amendment Bill (No. 2) 1999, 30/3/1999, J.664-5; Dairy Produce Legislation Amendment (Supplementary Assistance) Bill 2001, 28/6/2001, J.4512-4). The primary question to be determined is whether or not the Senate should insist on its requests as originally made.

There is no rule, as there is in relation to further amendments moved after disagreement by the House of Representatives with the Senate's initial action, that further requests must be relevant to the matters in issue: section 53 of the Constitution allows new requests to be made at any stage, and this is reflected in standing order 140(1), which provides that a request may be made on consideration of any message from the House (see Youth Allowance Consolidation Bill 1999, 22/6/2000, J.2859-71).

If the motion that a request be not pressed is negatived by a majority, the committee has resolved to press the request accordingly (ruling of President Young, SD, 20/10/1981, p. 1412). Similarly, if a motion that a request be pressed is negatived by a majority, the committee has resolved not to press the request.

In 1993, in relation to the Customs Tariff (Deficit Reduction) Bill 1993 and the Excise Tariff (Deficit Reduction) Bill 1993, the question arose of the effect of the negativing of either of the first two questions by an equally divided vote. It was ruled that, in that circumstance, the request is disposed of and the bill proceeds without the request. The rationale of this ruling is that a request requires the support of a majority to be made in the first instance, and an equally divided vote on either of the questions indicates that there is no longer a majority in favour of proceeding

with the request (ruling of President Sibraa, 21/10/1993, J.690-2; see also Procedure Committee, Second Report of 1994, 10/11/1994, PP 223/1994, pp 4-28; statements by Deputy President, 10/2/1997, J.1400-1; 24/6/1997, J.2192-3). If a request is disposed of in this way, the third reading of the bill could be negatived by an equally divided vote; in other words, a majority is required to pass the bill, and senators who unsuccessfully voted to insist on a request in that circumstance could vote to reject the bill as a consequence of the rejection of the Senate's request. (See Supplement)

The application of the principle underlying this ruling may be complicated if the House of Representatives makes amendments to a bill in substitution for requested amendments not agreed to by the House. In that circumstance, normally a motion is moved that the Senate does not press its request, but agrees to the amendment made by the House of Representatives in place thereof. If this motion were to be negatived on an equally divided vote, this would mean that the Senate would not press its request but would also disagree with the amendment made by the House of Representatives in substitution; in other words the bill would go forward in its original form (it is clear that a motion to agree to a substitute amendment made by the House of Representatives must be carried by a majority). This could well be an unintended outcome.

The solution to this problem is that a senator could ask for the question to be divided under standing orders 84(3) and 144(2) and (7); such a request is always granted, unless the question is incapable of division. The question would then be put that the committee not press its request. If that question is negatived by a majority, the request is pressed and the second part of the question is redundant. If the question is negatived on an equally divided vote and the request is thereby lost, senators can then consider their vote on the question that the substitute amendment made by the House of Representatives be agreed to. Senators who unsuccessfully voted to press the request could then vote for the amendment suggested by the House of Representatives as a second-best choice. If that second question is also negatived the Senate would have rejected the amendment proposed by the House of Representatives in substitution for its own request. Senators would then have the option of voting against the third reading of the bill.

If a request is not pressed because of an equally divided vote, a similar vote could also prevent the final passage of the bill by negativing either of the questions for the resolution of the committee to be reported or the report of the committee to be adopted. The bill would then remain in the Senate and would not pass.

There is also the potential complication of substitute amendments or requests being proposed in the Senate on the return of the bills, which is permitted by standing order 141. That procedure, however, does not raise any similar difficulties of interpretation. Any such amendments or requests would require a majority to be carried, subject to what is said in Chapter 12, under Disagreement of House with Senate amendments, in relation to amendments for the omission of clauses or items.

In unusual proceedings on the Wool Tax (Nos 1-5) Amendment Bills 1991, the Senate at first resolved to further press certain requests, but subsequently the message of the House of Representatives was reconsidered in committee of the whole, by leave, this resolution was reversed and an amendment made to each bill by the House of Representatives in substitution for the requests was agreed to, after the government had given certain undertakings in relation to the

bills. This action was possible only because a message informing the House of Representatives of the Senate's resolution to press its requests had not been sent before the matter was further considered (21/6/1991, J.1284).

Although it is open to the Senate to negative the third reading of a bill in which the House of Representatives has made amendments at the request of the Senate, there is at least an implied understanding that, if the Senate suggests amendments and the House of Representatives makes the amendments, the bill as amended will be passed by the Senate (see ruling of President Baker, SD, 11/10/1906, p. 6449).

Pressing of requests

In spite of the procedures of the Senate expressly providing for the pressing of requests, and the fact that the House of Representatives has dealt with and acceded to pressed requests, the right of the Senate to press requests has been questioned. Governments in the House of Representatives have not expressly conceded the Senate's right to press requests, and when dealing with pressed requests have usually passed a resolution to the effect that the House refrains from determining its constitutional rights in relation to the question.

The essence of the argument that the Senate may not press a request is that there must be some difference between an amendment and a request, and that is the difference. This argument disappears if it is concluded, as has been suggested in this chapter, that the difference between an amendment and a request is procedural only. The Constitution prescribes a number of matters of procedure, and to say that the difference is one of procedure is not to deny its importance. The distinction between an amendment and a request, according to this view, is closely related to another matter of procedure prescribed by section 53 of the Constitution, the exclusive right of the House of Representatives to initiate bills for appropriating money or imposing taxation. The provision relating to requests preserves that initiative without affecting the substantive powers of the Senate.

The following considerations support this thesis, and the right of the Senate to press its requests for amendments.

(1) There is nothing to prevent the Senate pressing its requests. If the constitution-makers had intended that the Senate be prohibited from pressing a request they would have provided some mechanism for enforcing the prohibition. To the contrary, section 53 of the Constitution provides that the two Houses have equal powers except as provided in the section.

(2) Not only was such a prohibition on the Senate not adopted, it was explicitly rejected. At the Constitutional Convention of 1898 an amendment to insert the word "once" in the relevant paragraph of section 53, to prevent the Senate repeating a request, was defeated. (Debates of the Convention, pp 1996-9.)

(3) Delegates to the Constitutional Conventions, including Edmund Barton, indicated that the difference between an amendment and a request would be one of procedure only, the rationale of the difference being to preserve the right of the House of Representatives

actually to alter the text of a bill by amendments involving additional appropriations or taxation. (Adelaide Convention, 1897, Debates p. 557.)

(4) The relevant paragraph of section 53 provides that the Senate may "at any stage" return a bill to the House of Representatives with requests. Even if "at any stage" is interpreted as meaning at any stage in the Senate's initial consideration of the bill, as has been suggested as an argument against the pressing of requests, the Senate could press a request many times by reiterating it at each stage of the consideration of a bill, and could provide in its own procedures that non-amendable bills pass through 100 stages.

(5) Even if the Senate could not press the same request, it could easily circumvent such a restriction, for example, by slightly modifying a request on each occasion on which it was repeated. It cannot be supposed that the constitution-makers intended to impose a prohibition which could so easily be circumvented.

(6) The Senate has successfully pressed requests on many occasions since 1901.

A practical argument in support of the right to press requests is that it provides a means of allowing further consideration of a matter in dispute between the Houses before the matter reaches the stage of final disagreement, for example, by the rejection by the Senate of the bill, which can then be settled only by the provisions of section 57 of the Constitution.

On the basis of these considerations the right of the Senate to press requests has been supported by many eminent and learned authorities, including Senator Josiah Symon, Senator, later Mr Justice, R.E. O'Connor, and Mr W.M. Hughes, MP. (Senator Josiah Symon: SD, 9/9/1902, pp 15813-28; Senator O'Connor: *ibid*., p. 15829; W.M. Hughes: HRD, 3/9/1902, pp 15705-6. See also remarks by Senator Gareth Evans, SD, 20/10/1981, pp 1395-8.)

As has been expounded in this chapter, the provisions of section 53, because they refer to the internal proceedings of the two Houses on proposed laws, as distinct from enactments of the Parliament, are not justiciable, and depend for observation and compliance upon agreement being reached between the two Houses. Thus if the Senate were to pass a bill imposing taxation or an amendment directly increasing expenditure, the only remedy would be for the House of Representatives to decline to consider the bill or the amendment. Similarly, the Senate may decline to pass a bill until its amendments or requests are agreed to by the House. To say that the provisions of section 53 are not justiciable and rely for enforcement upon the dealings of each House with the other is another way of saying that those provisions are procedural only. A real limitation on legislative power requires a means of legal enforcement. In that respect, section 53 is to be contrasted with section 55, as has been indicated earlier in this chapter.

Section 53 being thus a procedural section, prescribing procedural rules for the Houses to observe, it is for the Houses, in their transactions with each other, to interpret those rules by application. It is suggested that, in their dealings with Senate requests over the years, the Houses have supplied the required interpretation so far as the pressing of requests is concerned, and that interpretation is that requests may be pressed.

A list of occasions on which the Senate has made requests, showing the outcome of the requests, is contained in appendix 6.

Requests and section 57

Section 57 of the Constitution, which authorises the simultaneous dissolution of both Houses of the Parliament by the Governor-General in prescribed circumstances of disagreement between the Houses (see Chapter 21), refers to the Senate rejecting, failing to pass or passing a bill with amendments to which the House of Representatives will not agree. It is a significant question, which has not been considered, whether the Senate in making or pressing requests for amendments to a bill could be said to have failed to pass it within the meaning of the section. In that circumstance the Senate has not passed the bill with amendments. Certainly if the Senate makes or presses requests it cannot be said to have failed to pass the bill until the House of Representatives has definitely rejected the requests and the Senate has then had an opportunity to reconsider them. In that respect the government appears to have been in error in declining to consider the Senate's pressed requests in relation to the Sales Tax Amendment Bills (Nos 1A to 9A) 1981 (see SD, 22/10/1981, pp 1547-8, particularly the statement by Senator Harradine that the action taken by the government in the House of Representatives "was not only unconstitutional but also ... ensured that the time clock for action to be taken under the dissolution provisions of section 57 of the Constitution could not run").

Scrutiny of expenditure proposals by standing committees

The Senate has a system which allows intensive scrutiny of government expenditure proposals, or estimates, before the appropriation bills reflecting those proposals are received by the Senate.

The basis of this system is the scrutiny of estimates, from 1970 to 1994 by estimates committees and from 1994 by the legislative and general purpose standing committees. Schedules of the proposed expenditure contained in the main annual and additional appropriation bills are tabled in the Senate when the bills are introduced into the House of Representatives, and are referred to the committees for examination.

These committees provide the principal opportunity for senators to scrutinise, not only the expenditure proposals of the government, but the operations and activities of government departments and agencies. In effect, they have become twice-yearly general inquisitions into government operations. As such, they are regarded by senators as among the most valuable of the Senate's activities.

The committees, for each group of annual and additional appropriation bills, hold a main round of hearings at which all items of expenditure are open to examination, and in relation to the annual appropriation bills a supplementary round of hearings, after answers to questions taken on notice are received, which are confined to matters senators have notified for further questioning.

The committees report after their main hearings, and draw attention to any matters for further consideration by the Senate. They do not necessarily make any further reports after the supplementary hearings unless they have specific recommendation to make, for example, a recommendation that a matter be referred to a standing committee for further inquiry.

Strictly speaking, the committees have before them only the estimates of expenditure reflected in the annual appropriation bills, and, as has been noted, these account for less than 20 percent of government expenditure. In practice, however, the whole range of government expenditure is examined by the committees, particularly at the time of the main appropriation bills.

The introduction first of program budgeting and subsequently of output-based accrual accounting by government departments reinforced the practice. The requirements of estimates committees for more detailed explanations of expenditure proposals led to the development by departments of voluminous explanatory notes on the estimates and the tabling of those notes in the Senate. With program budgeting these notes were replaced by program performance statements, and then by output-based portfolio budget statements. These statements are tabled in the Senate and used by the committees as the basis of their scrutiny. (For a resolution of the Senate requiring further explanations of items in program performance statements, see 2/6/1992, J.2391-2.)

For directions to committees to hold further hearings on estimates, see 7/2/1995, J.2895-6, 2897; 4/11/1996, J.836; 10/4/2000, J.2582-3, 2585; 28/6/2000, J.2958; 28/11/2000, J.3594-5; 12/3/2002, J.154-6; 25/11/2003, J.2709-10; 16/6/2004, J.3473. (See Supplement)

It is considered that normally the appropriation bills should not be passed until the committees have concluded their hearings. The rationale for this is that the hearings may lead to senators wishing to move amendments or requests to the bills. The second reading debate on the bills may take place before the committees conclude their hearings. There is no fixed rule relating to this matter, and it has always been open to the Senate to pass the appropriation bills before the committees have concluded their deliberations. (For a postponement of the appropriation bills until the conclusion of estimates hearings, and debate on the matter, see SD, 20/6/1995, pp 1464-6.)

The Senate has on several occasions resolved, following reports of estimates committees, that there are no areas of expenditure of public funds by statutory authorities which are not open to scrutiny (9/12/1971, J.846; 23/10/1974, J.283; 18/9/1980, J.1563; 4/6/1984, J.902-3; 19/11/1986, J.1424).

The committees must hear evidence on the estimates in public session (SO 26(2)), and all documents received by the committees are published (see proceedings on report of Standing Orders Committee, 28/9/1972, J.1146, SD, p. 1331-2).

Normally only the main annual and additional appropriation bills are referred to the committees (precedent for referral of special appropriation bills: 1/12/1992, J.3169).

Further details on estimates hearings are in Chapter 16, Committees.

When proposed expenditure contained in an appropriation bill has been considered by a committee under these procedures, the bill is not considered in committee of the whole unless a senator has circulated in the Senate a proposed amendment or request for amendment to the bill. In that circumstance debate in committee is confined strictly to the purpose of the amendment

(SO 115(4); for precedents see 29/3/1995, J.3185-6; 6/4/2000, J.2567; 13/4/2000, J.2637-9; 24/6/2004, J.3697-8).

The adoption of any recommendations of the committees may be proposed by way of an amendment to the motion for the passage of any other stage of a bill (18/11/1993, J.821; 31/10/1996, J.813).

History of expenditure scrutiny

The history of these procedures is of interest. Prior to 1961, the only opportunities for the Senate to consider the estimates were the debate on the budget papers, the second reading debate and the committee of the whole stage on the appropriation bills. This system was unsatisfactory because the appropriation bills were often received late in the period of sittings and insufficient time remained for their consideration. This led to the adoption of a new procedure in 1961.

From 1961 the practice was adopted of considering the estimates (that is, the figures contained in the appropriation bills, as distinct from the bills themselves) in committee of the whole prior to the receipt of the appropriation bills. This system had the advantage of allowing more time for the consideration of the estimates earlier in the period of sittings. The unsatisfactory features of this procedure were that the consideration of the estimates engaged the whole Senate for a considerable period of time, and questions could be put only to ministers in the Senate, who mostly repeated answers provided to them by departmental advisers. These disadvantages were partly the cause of the Senate moving to the consideration of estimates in estimates committees in 1970.

In 1970, as part of the establishment of a comprehensive committee system which had been recommended by the Standing Orders Committee, estimates committees were established to examine the estimates in detail (see also Chapter 16, Committees). The estimates committees were intended to achieve the advantage of more expeditious consideration of the estimates, in that three estimates committees could meet simultaneously. An additional advantage was that questions could be put directly to departmental officers, subject to the right of ministers to answer questions themselves. The committees were also established with the intention that largely they would replace the committee of the whole proceedings. An explanatory note circulated in June 1970 with the motion to establish the committees stated:

> The reasonable expectation would be that, the Estimates having been examined by the Estimates Committees, the Senate would generally only consider any matters in respect of which further consideration had been recommended by the Committees.

The next major change in procedures was the adoption in December 1989 of a recommendation of the Select Committee on Legislation Procedures, which considered the estimates procedures in conjunction with its consideration of procedures for referring bills to committees (see also Chapter 12, Legislation, under Procedures for regular referral to committees). The select committee recommended that debate in committee of the whole on appropriation bills be confined to matters in respect of which estimates committee reports or reservations attached to the reports had made recommendations that the Senate further consider those matters.

The reason for this recommendation was that the committee of the whole stage on appropriation bills, which was intended to be largely replaced by estimates committee examination of the estimates, had in fact expanded into a full-scale reconsideration of the detail of the bills. As was pointed out by the then Deputy President, Senator David Hamer, in debate on the select committee report (SD, 4/12/1989, p. 3814), after the estimates committees were established in 1970 there was a large reduction in the time spent in committee of the whole on the appropriation bills, but that time had increased over the years until, in 1989, 33 hours were spent in committee of the whole on the bills. The recommendation of the select committee was intended to achieve the original purpose of the estimates committees of largely replacing the committee of the whole consideration of the bills, and focussing any debate in committee of the whole on matters which were raised in estimates committees and which were considered to require some further examination.

By the end of 1992, however, it was already clear that the adoption of the new procedures in December 1989 had not achieved its purpose. In 1990 nearly 20 hours were spent on the additional appropriation bills and over 37 hours on the annual appropriation bills in committee of the whole. In 1991 over 24 hours were spent in committee of the whole on the additional appropriation bills and 30 hours on the annual appropriation bills. There had not been a return to the original purpose of estimates committees of replacing committee of the whole consideration of the estimates. This was because a great many matters were recommended for further consideration by estimates committee reports or reservations attached to the reports. The 1989 procedures did not place any limitation on the number of matters which could be recommended for further consideration, and, as was pointed out by the Chair of Committees in relation to the annual estimates in 1990, many of the matters were very broad and did not relate to specific programs or items of expenditure (SD, 12 and 13/11/1990, pp 3893-7, 4036). In the 1991 reports and reservations, matters recommended for further consideration were more specific, but a great many matters were specified.

The fundamental difficulty with the various changes of procedures which had occurred over the years was that they provided more opportunities for the consideration of the estimates and the appropriation bills, and the consideration of the estimates and the bills had expanded to take up all of the available opportunities.

Originally there were only the second reading and committee of the whole stages of the appropriation bills in addition to debate on the budget papers. Thus there were three opportunities to consider the estimates, one of which was in committee. There were by 1992 four opportunities to consider the estimates, two of which allowed detailed consideration in committee:

(a) the debate on the budget papers (this debate is usually not extensive and is often not completed);

(b) consideration of the estimates in estimates committees;

(c) the second reading debate on the appropriation bills; and

(d) the committee of the whole stage of the appropriation bills.

The stages listed in (b), (c) and (d) had expanded into full-scale considerations of the estimates and the appropriation bills. The original intention of the establishment of the estimates committees, that they would largely replace the committee of the whole stage on the bills, had still not been realised. In effect, there were two opportunities to consider the estimates in committee, with each senator able to speak any number of times, when it was originally intended that there be only one such detailed consideration.

In 1992 the Procedure Committee considered ways of returning to the original purpose of estimates committees, and preventing the continuing expansion of consideration of the estimates so that it took up more and more of the time available for the consideration of legislation.

The Procedure Committee proposed that, as a substitute for the committee of the whole, supplementary hearings of estimates committees be held. (Procedure Committee, Discussion Paper, Estimates Committees and Appropriation Bills, December 1991; First Report of 1992, PP 527/1992, March 1992.)

This proposal was adopted by special orders agreed to on 6 May 1993 (J.99) and incorporated into standing order 26 in February 1997. The procedures required that, after the initial round of hearings of committees, written answers to questions and further information provided by departments were to be lodged with the committees in accordance with a deadline fixed by the committees. Senators were to lodge with the committees notice of specific matters which they wished to be further examined in the committees, and of matters arising from the written answers and the additional information which they wished to raise (these notices replaced the matters recommended for further consideration in committee of the whole in the estimates committee reports and the reservations attached to the reports under the 1989 procedures). The committees then met after the written answers and additional information had been provided, and held supplementary hearings on the matters notified by Senators for further examination. The responsible ministers were notified in advance of the particular matters to be raised at the hearings, and asked to provide the officers with responsibility for those matters. The hearings were to be held outside the Senate's sitting times, but the sittings of the Senate could be suspended to allow the hearings to take place if the Senate's program of business allowed. The committees decided the times of the hearings and how long they would last. The committees were to coordinate their supplementary meetings, just as their main meetings were coordinated.

Apart from avoiding long committee of the whole proceedings, and achieving the original purpose of the establishment of the estimates committees, these procedures had a number of advantages:

- a more satisfactory and systematic means is provided of dealing with matters arising from the initial hearings of the committees

- in particular, questions arising from written answers and additional information are put directly to officers

- answers to questions on notice and additional information are supplied more expeditiously and perhaps are more carefully composed

- officers do not need to attend on the committee of the whole stage, the progress of which is much more uncertain than that of the committees

- there is less pressure on the committees to conclude their main meetings by a deadline.

In 1994, as part of a restructuring of the committee system recommended by the Procedure Committee (see Chapter 16, Committees), the function of scrutinising estimates was transferred to the legislative and general purpose standing committees. These committees examine the estimates in the same way as the estimates committees.

In 2001, on the recommendation of the Procedure Committee, supplementary hearings were confined to the annual appropriation bills, and abolished in respect of the additional appropriation bills. The rationale of this change was that, as the budget cycle had developed, the supplementary hearings for the additional appropriation bills were occurring very near to the main round of the annual appropriation hearings, when unlimited questioning of departments and agencies is possible.

Parliamentary appropriations

The annual and additional appropriations for the Senate department and the other parliamentary departments are contained in bills which are separate from the appropriations for executive departments and agencies, and entitled Appropriation (Parliamentary Departments) Bills.

Until 1982 appropriations for the services of the two Houses of the Parliament were contained in the appropriation bills for the services of the government, and were divided between the bill not amendable by the Senate, containing appropriations for the ordinary annual services of the government, and the amendable bill, containing other appropriations. At various times during discussions in the Senate about the concept of ordinary annual services, it was pointed out that the services of the Houses were not ordinary annual services of the government nor services of the government as such, and it was therefore highly anomalous to have parliamentary appropriations contained in the two appropriation bills in this way.

This point was taken up in the report of the Senate Select Committee on Parliament's Appropriations and Staffing, which was appointed to consider issues relating to the control by the Houses of their own appropriations and staffing, and which reported in 1981 (report of the committee, PP 151/1981). One of the recommendations of the committee was that there be a separate parliamentary appropriations bill. This recommendation was adopted in 1982, and since that time a third annual appropriation bill has been introduced, the Appropriation (Parliamentary Departments) Bill. As this bill is not for the ordinary annual services of the government it is amendable by the Senate.

The select committee also examined the issue of the control by the Houses of their own appropriations, and recommended the establishment of a standing committee with the responsibility of determining the appropriations for the Department of the Senate for inclusion in the parliamentary appropriations bill. This recommendation was adopted by the Senate, and the Standing Committee on Appropriations and Staffing is now established by standing order 19.

The committee is given the task of determining the amounts for inclusion in the parliamentary appropriation bill for the Department of the Senate. The committee accordingly considers draft estimates submitted to the President by the Department of the Senate and determines the amounts which should be appropriated by the Appropriation (Parliamentary Departments) Bill for the Department.

The select committee also suggested amendment of sections 53 and 56 of the Constitution so that the parliamentary appropriation bill could be initiated in either House of the Parliament and passed without a recommendation of the Governor-General. Amendment of the Constitution being a significant and expensive step, this suggestion has not been followed, and the Appropriation (Parliamentary Departments) Bill is initiated in the House of Representatives and passed on a Governor-General's recommendation as with other appropriation bills. This constitutional situation, in effect, gives the executive government control over the contents of the bill as introduced.

Following the establishment of the Appropriations and Staffing Committee, there were some difficulties caused by governments making changes to the figures determined by the Appropriations and Staffing Committee for inclusion in the bill. It was envisaged by the 1981 select committee that the government, through its representation on the Appropriations and Staffing Committee, would submit to that committee any alterations the government considered desirable to the draft estimates. Instead, the government occasionally adopted the practice of examining the estimates as determined by the standing committee and making changes, albeit marginal changes, without further consultation with the committee. This situation was considered by Estimates Committee A in 1985, and, on the recommendation of that committee, the Senate passed a resolution setting down procedures to be followed for the determination of the appropriations for the Senate Department. The relevant parts of the resolution are as follows:

> (b) the estimates of expenditure for the Senate to be included in the Appropriation (Parliamentary Departments) Bill shall continue to be those determined by the Standing Committee on Appropriations and Staffing;
>
> (c) if before the introduction of the Bill the Minister for Finance should, for any reason, wish to vary the details of the estimates determined by the Committee the Minister should consult with the President of the Senate with a view to obtaining the agreement of the Committee to any variation;
>
> (d) in the event of agreement not being reached between the President and the Minister, then the Leader of the Government in the Senate, as a member of the Appropriations and Staffing Committee, be consulted;
>
> (e) the Senate acknowledges that in considering any request from the Minister for Finance the Committee and the Senate would take into consideration the relevant expenditure and staffing policies of the Government of the day; and
>
> (f) in turn the Senate expects the Government of the day to take into consideration the role and responsibilities of the Senate which are not of the Executive Government and which may at times involve conflict with the Executive Government. (*2 December 1985, J.676*)

Following the adoption of that resolution the Appropriations and Staffing Committee had occasion to complain of non-observance by the government of the procedures laid down in the

resolution, and the Senate twice reaffirmed the resolution (30/11/1988, J.1214; 29/11/1989, J.2273). In 1993 it was reported to the Senate and to Estimates Committee F that the Appropriations and Staffing Committee was pursuing with the government the question of compliance with the resolution (19th report of the Standing Committee on Appropriations and Staffing, August 1993, PP 115/1993; Estimates Committee F, Hansard, 26/8/1993, pp F2-F5; also 20th report of the committee, May 1994, PP 473/1994, 1993-94 annual report, PP 473/1994, 22nd report, May 1995, PP 490/1995, annual report 1995-96, August 1996, PP 427/1996). Agreement between the committee and the Minister for Finance on a method for calculating funding for select committees, and changes in government budgeting methods generally, have avoided disagreements in recent years. (See also Chapter 5, Officers of the Senate: Parliamentary Administration, under Senate's Appropriations and Staffing, and Chapter 16, Committees, under Appropriations and Staffing Committee.)

The system recommended by the 1981 select committee was not followed in respect of the determination of appropriations for other parliamentary departments. It was envisaged that an appropriations and staffing committee would also be established in the House of Representatives and would determine appropriations for that House, and that the two committees would meet as a joint committee to determine appropriations for the joint parliamentary departments, the departments (now one department) which provide services for both Houses. The government, however, has not permitted the establishment of such a committee in the House of Representatives, and the appropriations for the other parliamentary department are determined by the President and Speaker subject to veto by the government.