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CONSTITUTION, SECTION 53

FINANCIAL LEGISLATION

AND THE HOUSES OF THE COMMONWEALTH PARLIAMENT

PAPERS PRESENTED TO THE SENATE AND THE HOUSE OF REPRESENTATIVES

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The Director of Researach
Procedure Office
Senate Department
Parliament House
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Department of the Senate
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FOREWORD

Section 53 of the Constitution makes provision for the powers of the Houses of the Commonwealth Parliament in relation to financial legislation. The section provides that the two Houses have equal powers in relation to all proposed laws (bills), except 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 or 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.

Where the Senate may not amend a bill, it may request the House of Representatives to do so.

These provisions 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 difference 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.

In the application of the procedural limitations, questions of interpretation have arisen.

There is an agreement between the Senate and successive governments as to what constitutes the "ordinary annual services of the government". This agreement has been modified by supplementary agreements from time to time, and the meaning of that provision is fairly settled.

There has been disagreement recently, however, over the question of what constitutes an increase in a "proposed charge or burden on the people". The disagreements have been stated to be disagreements between the Houses, or, more accurately, disagreements between the Senate and the ministry which always controls the House, but in fact they have been disagreements between the Clerks of the Houses, only incidentally involving the members from time to time. The reason for this is that, as a procedural question seldom having any practical political importance, it has not attracted the sustained attention or consideration of members in recent years.

It is agreed that the provision refers to the impact of amendments on appropriations which are not appropriations for the ordinary annual services of the government, but its interpretation is not straightforward because of the way in which legislation appropriating money has been framed by governments in recent times. There are now several Commonwealth statutes which appropriate money of indefinite amounts and for an indefinite time. Some convoluted legislative provisions govern the actual expenditure of money under these appropriations. When amendments are proposed to those provisions, it is often difficult to determine how the amendments would affect the amount of the appropriation, quite apart from the actual expenditure under the appropriation.

In response to this difficulty, as illustrated by a number of pieces of legislation brought forward since 1981, the Clerk of the Senate suggested that an amendment should not be put in the form of a request unless it is clear that the amendment would increase expenditure under the relevant appropriation. This suggestion was made in the hope of achieving some consistency in choosing amendments or requests, rather than out of any wish to defend the powers of the Senate, because, as has been indicated, the question is purely procedural. The officers of the House of Representatives, however, treating the matter as one of preserving the powers of that House, have rejected the suggested test and insisted that all cases must be determined on their merits, an approach which has led to inconsistencies in the past.
This disagreement has had the effect of having one bill returned to the Senate for an amendment to be converted into a request. As has been indicated, that is the maximum effect the disagreement can have.

The issues raised, however, have had the merit of drawing attention to a much more serious matter: the erosion of parliamentary control over expenditure by recent legislation.

This volume brings together the various papers prepared by the Clerk of the Senate and by the Office of the Clerk of the House of Representatives on the question, and two earlier relevant

papers. However unimportant and esoteric the matter may seem, its context, as suggested, is worthy of some serious consideration, and it is hoped that this collection will be useful to those who may wish to give it that consideration.

Harry Evans

22 March 1993

CONSTITUTION, SECTION 53 — AMENDMENTS AND REQUESTS — DISAGREEMENTS BETWEEN THE HOUSES

Since 1981 there have been several disagreements between the Senate and the House of Representatives as to whether certain Senate amendments made to certain bills should have been put in the form of requests to the House of Representatives to make the amendments, because of one of the provisions contained in section 53 of the Constitution. Resolutions have been passed by the House of Representatives expressing the view that Senate amendments should have taken the form of requests.

On 6 March 1989 and again on 25 June 1992 papers were tabled in the Senate containing detailed analyses of the matters in issue and the rationale of the advices which had been provided to Senators. Surprisingly, these documents appear not to have been brought to the attention of members of the House of Representatives, and the decisions of the House have been made without regard to the matters raised in those documents. The House has acted on statements by the Speaker without debate of the issues, unlike the Senate which has on several occasions debated the issues, with a variety of views being expressed.

In the most recent case of disagreement, relating to the *Local Government (Financial Assistance) Amendment Bill 1992*, during the debate in the House of Representatives the Rt. Hon. Ian Sinclair, MP, expressed a wish "to have an opportunity to understand why the Clerks in the other place believe the resolution [amendment] to have been within the Senate's powers" (*House of Representatives Debates*, 24/6/92, p. 3804). It is regrettable that the House has not been given that opportunity hitherto.

This paper represents a further attempt to set out the issues involved in the hope that future determinations of the Houses will be made with an awareness of those issues.

Constitutional provisions

Section 53 of the Constitution imposes three conditions upon the Senate:

(a) the Senate may not amend a bill imposing taxation;

(b) the Senate may not amend a bill appropriating money for the ordinary annual services of the Government; and

(c) the Senate may not amend a bill so as to increase any proposed charge or burden on the people.

Section 53 also provides that where the Senate may not amend a bill, it may request the House of Representatives to make the amendment, and, in its last paragraph, that apart from these limitations the Senate has equal powers with the House of Representatives in respect of all bills.

It is limitation (c) which is in issue. The assertion by the House of Representatives that an amendment is contrary to that limitation is essentially an assertion that the amendment should have been put in the form of a request that the House of Representatives make the amendment rather than an amendment made to the bill by the Senate.

Interpretation of the relevant provision

The relevant provision of section 53 involves some questions of interpretation. The application of the provision has been much discussed in the Senate in the past, and, in particular, was the subject of an extensive debate in the Senate in 1903.

It is clear from the past expositions that the relevant provision refers to appropriations, that is, proposed or actual statutory authorisations of the expenditure of Commonwealth money. An amendment to a bill which would increase a proposed charge or burden on the people is one which would increase expenditure under the bill out of money proposed to be appropriated for that purpose. This interpretation is usually stated in abbreviated form to the effect that an amendment which would increase an appropriation should be a request.

That shorthand formulation, however, can be highly misleading, and is probably the source of some of the misunderstandings of the issues in the past. The relevant provision does *not* say that

the Senate may not amend a bill so as to increase an appropriation. The framers of the Constitution could easily have said that if that is what they had meant or intended. In referring to an increase in a "proposed charge or burden", the provision is clearly not referring simply to an increase in an appropriation but to the actual effect of an amendment on government expenditure required to be paid out of government revenue.

It is clear therefore that, in order for a request to be required instead of an amendment, three conditions must be met:

(a) the constitutional provision refers to a *proposed* charge or burden, therefore there must be an appropriation proposed in relation to the provision in the bill which is the subject of the amendment;

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

(c) an amendment must have the effect of necessarily, clearly and directly increasing expenditure under an appropriation, because, as was pointed out in the debate in the Senate in 1903, unless this principle is applied, virtually every amendment would have to take the form of a request, because virtually any legislative provision may be shown to involve the Commonwealth in expenditure ultimately.

Thus, in determining whether a proposed amendment should take the form of a request, it is necessary to examine the legislative provision in question and the proposed amendment to determine whether the amendment would involve an increase in expenditure, and particularly to determine whether it would of necessity, clearly and directly involve such an increase in expenditure. This involves making a judgement in relation to each amendment.

Source of difficulties of interpretation

On the basis of the foregoing 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 interpretation of the provision, however, has 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 of the amending bills will increase the expenditure under the appropriation. This determination is further complicated by the fact that these standing appropriations are often also appropriations of indefinite amount.

Indefinite appropriations. The Parliament passes 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.

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 its logical conclusion, but it does indicate the difficulty of drawing clear lines in the application of the relevant provision if the three suggested conditions are not strictly applied.

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 discussed 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 officeholders 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 30 per cent of total government expenditure is now subject to annual parliamentary scrutiny and approval in the annual appropriation bills. The remaining 70 per cent of government expenditure has escaped from parliamentary control through the use of these types of provisions. The following figures 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%
1991-92 (est)	72%.

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.

It is ironical that the House of Representatives should be constantly urged to make pronouncements on whether Senate amendments should be requests when it has, over the years, agreed to legislative provisions whereby a far more important issue, parliamentary control and supervision of expenditure, has been seriously neglected.

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 24% of government expenditure.

Past cases of disagreement

The following are the four cases since 1981 in respect of which it could be said that there was disagreement between the two Houses in relation to amendments and requests, and they illustrate some of the issues of interpretation.

States Grants (Tertiary Education Assistance) Bill 1981. This bill contained a provision whereby a minister was empowered 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.

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. The 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 been 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, and the Office of Parliamentary Counsel, which had prepared the government amendments, changed its view as to whether a request was required.

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. The Senate's 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.

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 appeared to have been accepted by the Office of Parliamentary Counsel hitherto, and is illustrated, for example, by government amendments moved in the Senate to the *Social Security Legislation Amendment Bill 1990*.

These cases indicate the problems of interpretation which arise under the kinds of provisions to which reference has been made. All of them involved assessing the impact of amendments on standing indefinite appropriations which were affected by the bills in question. In none of these cases could it be said that the Senate's amendments would necessarily, clearly and directly lead to increased expenditure under an appropriation.

Other amendments involving standing appropriations

Because there are many statutes containing standing and indefinite appropriations, and those statutes are frequently amended by bills which are the subject of amendments moved in the Senate, there are many amendments in respect of which it could be argued that requests are required, if the test of a necessary, clear and direct increase in expenditure is abandoned. Virtually every amendment to such an amending bill could have an indirect impact on expenditure under the bill, and a claim could therefore be made that every amendment should take the form of a request.

For the purpose of this paper a study was undertaken of bills which contained standing appropriations, or which amended acts with standing appropriations, and which were amended by the Senate, in this and the previous Parliaments (i.e., since mid-1987). Eight bills were identified as having been the subject of Senate amendments (in some cases multiple amendments) which were the same in principle as the amendments that were the subject of disagreement, and which, according to the pronouncements made in the House of Representatives in the recent cases of disagreement, should certainly have been requests. These amendments included a government amendment to the *States Grants (Schools Assistance) Amendment Bill 1990* which empowered a minister to authorise additional payments to the states.

This study shows either that the interpretation of the constitutional provision by the House's advisers has been remarkably confused and inconsistent, or that a new and more restrictive interpretation is now being applied.

It is suspected that most of these kinds of amendments are dealt with by the House of Representatives without any suggestion that they should be requests because usually their form does not direct attention to the fact that they may involve expenditure. The amendment to the *Local Government (Financial Assistance) Amendment Bill 1992* probably would not have attracted attention as possibly requiring a request except for the fact that it involved altering a figure for a sum of money in the bill. An amendment which had the same effect, that is, altering the limits within which a ministerial determination affecting the calculation of a payment could be made, but which did not involve altering a sum of money, would probably not have been noticed, as the example of the *States Grants (Schools Assistance) Amendment Bill 1990* suggests.

The case of the *Social Security Legislation Amendment Bill (No. 4) 1991* illustrates the statement that, unless the principle of a necessary, clear and direct impact on expenditure being required for a request is adhered to, virtually all amendments to bills amending acts with standing appropriations could be regarded as requiring requests. The Office of Parliamentary Counsel, having decided that the government amendment in question should have been a request, suggested that where there are requests among related amendments (which is somewhat procedurally difficult because the Houses have to deal with them separately) all the amendments should be turned into requests! This indicates that if the principle is abandoned it becomes impossible to keep any rational distinction between amendments and requests.

The question of a Governor-General's message

From time to time during consideration of these matters, for example, in the Speaker's statement on the *Social Security Legislation Amendment Bill (No. 4) 1991*, it has been suggested that, if an amendment to a bill would, if moved in the House of Representatives, require a Governor-General's message under section 56 of the Constitution, this means that the amendment of the bill should take the form of a request. In the 1989 paper, however, it was pointed out that the production of a Governor-General's message is not a proper test, and that there has been at least one case identified in which a Governor-General's message was produced when it was clear that no message was required, this being conceded by the responsible minister in the Senate. It was stated in that instance that a message had been produced not on any positive determination that it was required but simply as precaution by the Office of Parliamentary Counsel. That Office produces Governor-General's messages without much consideration as to whether they are required. A stock of signed blank messages is kept and a message filled in when thought to be required. The views of the Office are therefore not a good guide in interpreting the relevant constitutional provision. It has been pointed out that, in the case of the *Social Security Legislation Amendment Bill (No. 4) 1991*, the amendments in dispute were moved by the government and were drafted by the Office of Parliamentary Counsel. As was pointed out in the material tabled in the Senate on 25 June 1992, government amendments were circulated by the Office of Parliamentary Counsel to the *Customs Tariff Amendment Bill 1992*, a bill which imposed taxation and which the Senate therefore clearly could not amend. The question of whether requests are required therefore cannot be determined by the way in which Governor-General's messages and government amendments are produced.

A procedural question

In debate in the Senate on the *States Grants (Technical and Further Education Assistance) Bill 1988* (*Senate Debates*, 21/12/88, p. 4809), a Senator indicated that if the question of whether the

disputed amendment should have been a request were the only difference of opinion between the Senate and the House of Representatives, he might agree to send the amendment back to the House of Representatives as a request. It is suggested, as it was suggested in the 1989 paper, that this is an approach which is appropriate to the matter at issue. As has already been indicated, the judgement as to whether an amendment should be a request is often not easy to make, and in the past, in cases of doubt or dispute, the Senate and Senators moving amendments have sometimes deferred to the actual or possible views of the government by putting amendments in the form of requests.

More importantly, this approach is appropriate because the difference between an amendment and a request is one of procedural form only, and does not substantively affect the powers of either House. If an amendment is made in the form of a request this affects only the procedural process whereby the bill is dealt with between the two Houses, in that the amendment is actually made by the House of Representatives and not by the Senate, and the Senate then agrees to the bill as amended at its request. This requires the bill to be returned to the House when the request is made and then returned to the Senate again for the Senate to agree to the bill when the requested amendment is made. In the past the question of whether government amendments to bills in the Senate should be in the form of requests has often been determined by a desire to avoid the inconvenience of the amended bill having to be returned to the Senate.

As was also pointed out in the 1989 paper, neither House has been consistent on the question of when requests are required. The House of Representatives has agreed without question to amendments which certainly should have been requests, and the Senate has made requests which certainly should have been amendments, regardless of whether one applies the principles set out in this paper or follows the past pronouncements of the Speaker. The apparent acceptance of the principle relating to Senate amendments which affect restrictions on entitlements occurred only after there had been inconsistent treatment of such amendments. This absence of consistency in the past reinforces what has been said about a flexible approach to the matter.

Disagreements between the Houses, as was suggested in the 1988 debate in the Senate, should be directed to substantive questions of legislative policy and not to the procedural question.

Although the question of amendments as against requests is a purely procedural question, as a constitutionally-mandated procedure it deserves to be properly interpreted. As has been indicated, unless the principles set out in this paper are followed, the distinction between amendments and requests will be confused, it will be impossible to draw a clear line between them to determine difficult cases, and more and more amendments will be turned into requests

because of their apprehended indirect effect on expenditure, to the inconvenience of the Houses, the unnecessary complication of their procedures, and the distortion of the constitutional provision.

If, as suggested earlier in this paper, the past inconsistency is due not to confusion but to the House's advisers recently adhering to a new and more restrictive interpretation of the provision, that interpretation should be made clear.

Even after careful consideration of the principles here set out the Houses may arrive at different conclusions in particular cases. If the principles are observed, however, at least the confusion, inconvenience and distortion of the constitutional provision will be avoided.

(Harry Evans)

CONSIDERATION OF EDUCATION BILLS

AMENDMENTS AND REQUESTS

THE LEGISLATIVE PROCESS IN THE PARLIAMENT OF THE COMMONWEALTH

AMENDMENTS AND REQUESTS

A BACKGROUND PAPER

AMENDMENTS AND REQUESTS

HOUSE OF REPRESENTATIVES PAPER

In June of this year there was a disagreement between the Houses over whether a certain Senate amendment should have been a request, in respect of the Local Government (Financial Assistance) Amendment Bill 1992, and on 18 August a further paper on the subject of amendments and requests was tabled in the Senate. Earlier papers dated 1981 and 1989 were tabled on 6 March 1989. The most recent paper analysed the constitutional point in issue, suggested principles on which it should be interpreted, examined the sources of the difficulties of interpretation as illustrated by the past cases of disagreement, looked at the past inconsistencies in the application of the constitutional provision, and suggested that adoption of the proposed principles would avoid future confusion.

On 9 November 1992 the Speaker tabled in the House of Representatives a paper on the subject, which is largely a response to the Senate papers and which gives expression to the view taken by the House's advisers. The following observations are made on that paper.

Unfortunately, the House paper does not help to resolve the relevant issues. It proceeds by way of setting up and knocking down a number of straw men, arguments which are represented as the arguments in the Senate papers, but which are not in fact advanced in those papers. In particular, it misrepresents the central question in issue, whether a necessary, clear and direct effect on expenditure should be required before a request is contemplated.

Before proceeding to that central issue, I note in passing some of the subsidiary straw men set up by the House paper.

- Both the Speaker's statement on presenting the paper and the summary at the front of the paper suggest that part of the Senate argument is that beneficiaries of some proposed benefit may not apply for it. Such an argument was not advanced in any of the Senate papers. It has not been claimed that a request may be eschewed simply on the basis that beneficiaries may not apply for benefits.

- Much is made (eg., at pp 14-15) of the outcome of the 1903 debate in the Senate, as if that refuted the view taken in the Senate papers. On the contrary, the 1981 Senate paper made it clear that, although the view preferred in the relatively simple case in 1903 was that a charge or burden meant an increase in an appropriation, this did not dispose of the potential difficulties in the relationship of appropriations and expenditure which were raised in the debate at that time, and which have become more pertinent in the context of

modern government drafting practices and complex provisions impinging on expenditure out of standing appropriations.

- It is suggested (at p 10) that the Senate papers dispute that simple increases in the size of ordinary appropriations should be requests. In none of the Senate papers is any such simplistic argument advanced. The Senate papers, on the contrary, suggest that an increase in an appropriation is a necessary but not a sufficient condition for a request. An impact on expenditure of simple increases of ordinary appropriations may readily be determined. Amendments increasing ordinary appropriations are now never moved. Those kinds of amendments are not the problem.

- References are made throughout the House paper to the position of the Senate papers as requiring a demonstration of an increase of expenditure as a matter of "logic". It is not clear what the House paper believes this word to mean, but it is not used in any of the Senate papers, which do not advance any proposition that there must be some logical demonstration of an increase in expenditure, but rest on an analysis of particular provisions.

Turning to the central issue, the need for a necessary, clear and direct effect on expenditure to be demonstrated, the House paper represents the argument of the Senate papers as involving a choice between that position and virtually every amendment becoming a request, and says that this is a false dichotomy. This is a misunderstanding of the point made in the Senate papers. That point is that, without such a principle to guide us through the intricacies of contemporary legislation, we will tend to slide into a position of more and more amendments becoming requests, particularly as the House's advisers become more conscious of the question and make ad hoc decisions in each particular case. As the Senate papers suggested, whether there is an insistence by the House on a request depends largely on whether its advisers detect possible implications for expenditure in Senate amendments. With those advisers now sensitising their noses to scents of money, and lacking any principle on which to determine difficult cases, there will be more and more insistences that amendments become requests. The suggested principle of a necessary, clear and direct effect on expenditure is required by the types of legislation often amended in the Senate, because many provisions have possible, but difficult to determine, impacts on appropriations and expenditure. It would be a different matter if the House paper suggested some contrary principle on which to determine difficult cases, but it suggests no principle at all, a point to which I shall return.

The case of the Social Security Legislation Amendment Bill (No. 4) 1992 is discussed (at p 14) as if it were a question of beneficiaries not applying for benefits. On the contrary, because of the nature of the legislative provisions, it was entirely unclear, as press reports subsequently indicated, whether there would be any beneficiaries at all, or whether the intended class of

beneficiaries was in fact an empty class, because of the convoluted and uncertain way in which membership of the class was determined.

In this connection, the argument in the House paper that regard must be had to the expectations of the legislators in making an amendment founders on this case, because this bill shows that, in the context of the sorts of provisions under consideration, expectations are often a poor guide to actual effects. Expressions of expectations are usually directed to policy hopes rather than the question of the actual effect on expenditure. The government insists on putting forward legislative proposals of this sort, without any real idea of the cost, generating perhaps entirely misplaced expectations, and then requires the Senate to act as if there were precise knowledge of the actual effect.

The House paper avoids any reference to the fact that the amendments to this bill were *government* amendments. This, and other matters referred to in the 1992 Senate paper, indicate that the government's and House's advisers have simply been confused on the distinction between amendments and requests.

The House paper complacently accepts, at p 15, that the Houses will continue to pass legislation the financial impact of which is basically not known. It would be more helpful for the attention of members to be drawn to the suggestion of the 1992 Senate paper that legislating be done more carefully. As long as the Houses persist, in effect, in legislating carelessly at the direction of government the problem in relation to amendments and requests will persist as the least important consequence. The most important consequence is almost complete absence of parliamentary control over expenditure.

The theme of the House paper is simply that all cases must be "determined on their merits". This is a recipe for further confusion, inconsistencies and disputes. As the last Senate paper suggests, the lack of any principle to determine difficult cases simply results in ad hoc decisions and ludicrous inconsistencies, as exactly similar cases are determined in different ways. The eight earlier cases referred to at p 10 of the Senate paper are embarrassing for the ad hoc approach. Those cases indicate the confusion generated by "deciding cases on their merits".

There is probably another basis for this view that all cases should be "determined on their merits". Without any guiding principle the House's advisers are able to insist on their view prevailing in particular cases without regard to the inconsistencies which result. My conversations with House officers about disputed cases invariably end with a statement along the lines of "Well, we will advise the Speaker to rule our way, which he will, and the government will support him". In other words, their view must always prevail, whatever it may be and regardless of any reasoning.

The great difficulty in obtaining any reasonable resolution of this matter is that the House and its members never actually consider it. Mr Sinclair started to consider it in the House in June, but was stopped. Nor is any thought given to the complex legislative provisions which give rise to the problem or to the total neglect of parliamentary control over expenditure involved in those provisions. As a long-serving and senior member of the House said recently, "the House of Representatives is simply not doing its job. It is not examining legislation." (Mr J.J. Carlton, MP, House of Representatives *Hansard*, 12/11/92, p 3305).

The Speaker has indicated that he intends to follow the "approach" set out in the House paper, and, as this is simply determining cases ad hoc, this means that further disputes are bound to arise, because it is impossible to predict whether the House's or the government's advisers will detect a scent of money in particular amendments and which way they will jump. One possible way of avoiding disputes is to have all Senate amendments in the form of requests whenever there is a faint scent of money, and hope that the consequent inconvenience to the government of having Senate amendments constantly returned to the Senate will bring the government's advisers around to adopting some appropriate principles. As the 1992 paper indicates, cases in the past have often been determined simply by the desire to avoid that inconvenience. Such a process might also direct attention to proper control of expenditure, which is the real solution to the problem.

(Harry Evans)

THE SENATE

AMENDMENT OF TAXATION AND APPROPRIATION LEGISLATION

Section 53 of the Constitution imposes three limitations upon the powers of the Senate to amend legislation, as follows:

(a) the Senate may not amend a bill imposing taxation;

(b) the Senate may not amend a bill appropriating money for the ordinary annual services of the government; and

(c) the Senate may not amend a bill so as to increase any charge or burden on the people.

Section 53 also provides that where the Senate may not amend a bill it may request the House of Representatives to make the amendment. The distinction between making an amendment and making a request for an amendment is purely procedural, in that the Senate can decline to pass a bill until the House agrees to a request, as it can in the case of an amendment. Section 53 also provides, in its last paragraph, that apart from these limitations the Senate has equal powers with the House of Representatives in respect of bills.

Limitation (a) applies only to bills which impose taxation. Legislation dealing with taxation consists of bills which actually impose the taxation (by the use of the words "tax is imposed" or similar words) and bills which do not impose taxation but which make provision in relation to the levying and collection of taxation. In relation to income tax, for example, there are the income tax bills which actually impose income tax and the income tax assessment bills which deal with such things as exemptions from income tax. Similarly, sales tax is dealt with in sales tax bills and sales tax (exemptions and classifications) bills, the former actually imposing the tax and the latter dealing with the categories of goods on which the tax falls and exemptions from tax.

The reason for taxation legislation being divided between different bills in this way is to be found in section 55 of the Constitution, which provides that laws imposing taxation must deal only with the imposition of taxation and only with one subject of taxation in each law. Because

it refers to laws rather than bills, section 55 is clearly justiciable and has been the subject of judicial interpretation.

Thus the Senate may not amend bills which provide for the imposition of income tax or sales tax but can amend the associated bills which deal with the other matters relating to those taxes. By amending an income tax assessment bill or a sales tax (exemptions and classifications) bill the Senate may alter the incidence of taxation, with the result of freeing some persons or objects from taxation or making some persons or objects subject to taxation, but such amendments are permissible because they are not amendments to the actual imposition of taxation. If the Senate wishes to amend a bill imposing taxation the amendment must be made by way of a request to the House of Representatives.

Judgments of the High Court on section 55 lead to the conclusion that the government's drafters have been, and are, overcautious in strictly limiting the bills which impose taxation to the provisions which actually impose the tax and putting everything else into the other bills. Much of the material now in the income tax assessment legislation and the sales tax (exemptions and classifications) legislation could be validly included in the acts which impose the taxation. This situation, however, does not affect the moving of amendments in the Senate or the conclusions here set out. If a bill does not contain the actual imposition of taxation, it may be amended.

Appropriation bills are similarly divided into appropriation bills for the ordinary annual services of the government and bills which are for services other than the ordinary annual services of the government. Section 54 of the Constitution provides that the two categories of appropriations are to be contained in separate bills. Those appropriation bills which are for the ordinary annual services (usually Appropriation Bills (No. 1) and (No. 3) in each year) are not amendable by the Senate, but the other appropriation bills can be the subject of amendment by the Senate. Like section 53 but unlike section 55, section 54 refers to "proposed laws", ie., bills, and it is therefore considered to be not justiciable. Its interpretation and application is a matter for the two Houses. Section 53 may be regarded as justiciable in part, in so far as its last paragraph requires that laws must be passed by both Houses.

In relation to the prohibition on the Senate amending a bill so as to increase any proposed charge or burden on the people, it has long been accepted that this means that the Senate cannot amend any bill in such a way as to directly increase expenditure under an appropriation, either an appropriation proposed to be made in the bill or an appropriation made by an act which is proposed to be amended by the bill.* Any amendments which would have that effect must be made by way of request. Many amendments made by the Senate may indirectly have the effect

of increasing government expenditure under appropriations, just as some amendments may have the effect of altering the incidence of taxation. The prohibition does not arise, however, unless an amendment relates directly to an actual appropriation proposed in the bill in question or contained in an act proposed to be amended by the bill.

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* The basis of this interpretation, expounded in debate in the Senate in 1903, is that the "charge or burden" provision must refer to appropriations because it cannot refer to taxation measures (ie., bills imposing taxation), which cannot be amended in any case. There is, however, at least one circumstance in which the provision may apply to taxation measures. A bill which abolishes a tax or reduces it cannot be regarded as a bill imposing taxation and is therefore a bill amendable by the Senate. If the Senate were to amend such a bill to retain the tax or levy it at a rate higher than that proposed, however, such an amendment may be regarded as contrary to the "charge or burden" provision unless put in the form of a request.

"SUPPLY"

There is a great deal of confusion about the processes by which the Parliament appropriates money for the operations of government and the terminology applying to those processes.

In particular, 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.

"Supply"

Strictly speaking, supply is the money granted by the Parliament in the two supply bills which are usually passed in April-May of each year, and which appropriate funds for the operations of government during 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 and are passed in October-November.

The term "supply" may be loosely applied to all of the annual appropriation bills, that is the main annual appropriation bills passed in October-November, the additional appropriation bills passed in April-May and the 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 (see below).

The funds appropriated by the supply bills are divided between two bills to separate the provisions which are amendable by the Senate from those which are not amendable by the Senate (see under "Money Bills" below).

"Money 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 consists of the two main appropriation bills passed in October-November and the additional appropriation bills passed in April-May, but also any other bills which appropriate money. There are many bills which appropriate money for particular purposes, and, in most 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 (see "Tax Bills" below).

The annual appropriation bills and the supply bills 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 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.)

"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. 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".

"Budget Measures"

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 Confusion of Concepts

The conceptual confusion surrounding these categories of bills occurs because of two factors.

First, the above terms are used as if they were interchangeable without any regard to the distinction between them.

Secondly, the above terms are 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, although the other classifications referred to above may occasionally be employed legitimately to characterise particular bills.

It is an easy matter to distinguish between the two useful categories of bills. 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 states that tax is imposed at a specified rate upon a specified subject. Any bill which does not contain such a clause is not a tax bill.

Powers of the Senate

Discussion of the various categories of financial measures usually takes place in the context of the powers of the Senate.

Section 53 imposes only three limits upon the powers of the Senate, as follows:

(a) the Senate may not amend any bill imposing taxation;

(b) the Senate may not amend any bill appropriating money for the ordinary annual services of the government; and

(c) the Senate may not amend any bill so as to increase any proposed charge or burden on the people.

Section 53 provides that where the Senate may not amend a bill it may request the House of Representatives to make the amendment, and, in its last paragraph, that the Senate may reject any bill.

Limitations (a) and (b) are clear because they relate to definite categories of bills.

Limitation (c), however, requires interpretation. The phrase "any proposed charge or burden on the people" has traditionally been taken to refer to appropriation bills or to bills which amend, directly or indirectly, appropriation provisions in statutes, and the limitation has been taken to mean that the Senate may not amend such a bill in any way which would directly increase expenditure under the appropriation involved.

Where the Senate cannot amend a bill, it may request the House of Representatives to make amendments. The distinction between amendments and requests is purely procedural. In practical terms the distinction is of no consequence, because when the Senate makes requests the bill is returned to the House of Representatives as with amendments, and does not pass until the two Houses have agreed in relation to the requests.

"Vital Measures"

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 the 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.

Harry Evans

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