

## *Senate amendments and requests*

### PROCEDURE FOLLOWING SENATE CONSIDERATION

The standing orders of both Houses establish procedures for dealing with amendments made to a bill by the other House. The amendment procedures, and provision for negotiation by message, are designed to cover every contingency, but in the event of the negotiations between the Houses finally failing, the bill may be laid aside, or, in the case of a bill which originated in the House of Representatives, resort may be had to the procedures of section 57 of the Constitution.

#### *Limitations on Senate power of amendment*

Section 53 of the Constitution, as well as limiting the rights of the Senate in the initiation of legislation (*see below*), provides that the Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue for the ordinary annual services of the Government. Nor may the Senate amend any proposed law so as to increase any proposed charge or burden on the people. However, the Senate may, at any stage, return to the House any proposed law which the Senate may not amend, requesting the omission or amendment of any items or provisions therein. It further provides that, except as provided in the section, the Senate has equal power with the House in respect of all proposed laws.

#### *Certain amendments viewed as initiation*

Views taken in the Senate in relation to amendments and requests in 2003 and 2012 had regard to the restriction in section 53 that ‘Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate’. In respect to bills dealing with but not imposing taxation, it was held that a Senator could not propose that the Senate request an amendment which would add additional materials to those to be included in a scheme of taxation, or which would increase tariff rates on certain items; the making of such requests was seen as the equivalent of the Senate initiating an imposition of tax.<sup>1</sup> A similar view has been taken in respect to appropriation. Although noting precedents to the contrary, *Odgers* states that the better view is that the Senate should not make requests for the insertion of appropriation provisions in bills originating in the House, seeing such action as turning a bill into an appropriation bill.<sup>2</sup>

#### *Agreement by Senate without amendment or requests*

Should the Senate agree to a bill without amendment, or without requests in the case of those bills which the Senate may not amend, the bill is accordingly certified by the Clerk of the Senate and returned to the House by message. The terms of the message are not announced to the House in full, the Speaker merely stating ‘I have received a message

<sup>1</sup> Statement by President Hogg, J 2010–13/2294 (19.3.2012); and *see Odgers*, 14th edn, pp. 417.

<sup>2</sup> *Odgers*, 14th edn, p. 399, citing statement by President Calvert, S. Deb. (16.9.2003) 15275.

from the Senate returning the [short title] without amendment (or requests, as appropriate)'. The message is announced at a convenient time between items of business. When a message is received notifying Senate agreement to a bill, the final step in the legislative process is for the bill to be forwarded to the Governor-General for assent.

On occasion the Senate has included extraneous matter in a message returning a bill without amendment, for example:

- adding as a rider a protest against the inclusion in the bill of provisions similar to those in a bill passed by the Senate and transmitted for concurrence of the House, and declaring the matter not to be regarded as a precedent;<sup>3</sup>
- acquainting the House of a resolution agreed to by the Senate referring a matter related to the subject of the bill to the (then) Joint Committee of Public Accounts for inquiry and report;<sup>4</sup>
- requesting the concurrence of the House in a Senate resolution on aspects of the same subject matter as the bill.<sup>5</sup>

After announcing the latter message, the Speaker noted that the message sought to include in the legislative process on a bill other matters not necessary for the enactment of the measure and accordingly he did not propose to call for a motion on the resolution.<sup>6</sup>

### Senate amendments

When a bill which the Senate may amend is amended by the Senate, a schedule of the amendments is prepared indicating where the amendments occur in the bill and detailing the amendments. This schedule is attached to the bill, certified by the Clerk of the Senate and transmitted to the House by message. Several related bills have been returned with amendments under cover of the one message and the amendments to each bill have been considered separately.<sup>7</sup> An amendment to the title of a bill is normally mentioned in a Senate message.<sup>8</sup>

The standing orders provide that if a House bill is returned from the Senate with amendments, the amendments shall be made available to Members and a time set for the House to consider them.<sup>9</sup> The amendments are printed as a schedule; the bill is not reprinted with the amendments incorporated. A suggestion that a bill be reprinted incorporating Senate amendments has been rejected.<sup>10</sup> In practice a printed stock of the schedule of Senate amendments accompanies the message, in which case the consideration of the Senate's amendments may take place immediately.<sup>11</sup> It may not, however, suit the convenience of the House to proceed immediately with consideration of the amendments and a Minister (or Parliamentary Secretary) may move that the amendments be taken into consideration at the next sitting or at a later hour.<sup>12</sup>

Procedures for the consideration of Senate amendments are similar to those applying during the consideration in detail stage—speeches are limited to five minutes and the

3 VP 1920–21/471 (26.11.1920).

4 VP 1996–98/2533 (27.11.1997).

5 VP 1996–98/2151 (22.10.1997).

6 H.R. Deb. (22.10.1997) 9444; *and see* H.R. Deb. (6.3.2000) 13975–6.

7 VP 1932–34/350–2 (30.9.1932).

8 E.g. VP 1993–96/1845 (1.3.1995).

9 S.O. 158(a).

10 H.R. Deb. (20.6.1950) 4517–18.

11 E.g. VP 2016–18/437 (1.12.2016).

12 E.g. VP 2013–16/1747 (25.11.2015).

number of times a Member may speak is not restricted, and a motion moved (including an amendment) need not be seconded.<sup>13</sup>

It was originally the practice for Senate amendments to be taken clause by clause. However, it is now established practice for multiple amendments to a bill to be taken together, by the Minister or Parliamentary Secretary in charge of the bill moving that the amendments be agreed to or that the amendments be disagreed to. If the Minister is prepared to accept only some of the amendments, they are grouped accordingly and the relevant motion moved in respect of each group. A motion may be moved separately in respect of an individual amendment—for example, if the Minister is aware that Members desire a separate vote on a particular matter. Whether amendments are to be taken together or separately is decided by arrangements of which the Chair has no knowledge; he or she puts the question on the proposed order or grouping in accordance with the motion moved.<sup>14</sup> If the proposed order or grouping is challenged, a motion may be moved—for example, that the amendments be considered together and one question put on them.<sup>15</sup> By agreement of the House, the amendments may be considered in specified groups and a specified order other than their numerical order.<sup>16</sup> When the House's consideration of Senate amendments has been subject to a guillotine motion, the grouping of amendments has been determined by the decision of the House on the allotment of time.<sup>17</sup> Standing orders have been suspended to permit Senate amendments to related bills (under cover of separate messages) to be considered together and for one motion to be moved in respect of all the amendments.<sup>18</sup>

A Senate amendment may be agreed to with or without amendment, agreed to with a consequential amendment,<sup>19</sup> agreed to in part with a consequential amendment,<sup>20</sup> agreed to with a modification, agreed to with a modification and a consequential amendment,<sup>21</sup> disagreed to,<sup>22</sup> or disagreed to but an amendment made in its place.<sup>23</sup> An amendment to a Senate amendment may be made, as long as it is relevant to the Senate amendment.<sup>24</sup> A motion to agree to a Senate amendment has been withdrawn, by leave.<sup>25</sup>

As an alternative to the House considering Senate amendments, consideration may be postponed, or the bill may be laid aside.<sup>26</sup>

When the House agrees without amendment to Senate amendments to a House bill, a message is sent to the Senate (without the bill) informing it that the House has agreed to the amendment made by the Senate in the bill.<sup>27</sup>

If amendments to Senate amendments are agreed to by the House, the House sends a message returning the bill with a schedule of the House amendments and asking the

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13 S.O. 159.

14 H.R. Deb. (8.12.1987) 3004–5; E.g. VP 1998–2001/510–11 (12.5.1999), VP 2013–16/381 (18.3.2014).

15 VP 1998–2001/2004 (7.12.2000). Standing orders may also be suspended in these circumstances, VP 2004–07/1986–7 (20.6.2007).

16 VP 1974–75/483 (20.2.1975); VP 1996–98/2968–9 (8–9.4.1998); *and see* VP 2002–04/672, 678 (12.12.2002).

17 VP 1993–96/1886 (2.3.1995).

18 VP 1998–2001/658 (24.6.1999) (4 bills), 684 (29.6.1999) (7 bills), 699–700 (30.6.1999) (4 bills).

19 VP 1974–75/837 (19.8.1975); VP 1996–98/1267 (6.3.1997).

20 VP 1906/159 (30.10.1906).

21 VP 1909/222–3 (4.12.1909).

22 VP 1996–98/289 (24.6.1996); VP 1998–2001/176 (3.12.1998).

23 VP 1993–96/849–54 (22.3.1994); VP 1998–2001/510 (12.5.1999); VP 2002–04/457 (25.9.2002) (motion to disagree to Senate amendments and make other amendments in their place moved by opposition Member and agreed to).

24 S.O. 158(b)(ii). E.g. VP 1990–93/1107–10 (5.11.1991); VP 1996–98/3149 (25.6.1998).

25 VP 1910/84 (23.8.1910).

26 S.O. 158(b). A new bill may be introduced in place of a bill laid aside—Committee of Public Accounts Bill (No.2) 1913, VP 1913/215 (16.12.1913), H.R. Deb. (16.12.1913) 4505–7.

27 S.O. 161(a). E.g. J 1996–98/360 (20.6.1996); J 1998–2001/2257 (9.12.1999).

Senate to agree to the House amendments.<sup>28</sup> The schedule contains reference to each amendment of the Senate which has been amended by the House, and is certified by the Clerk. The message also indicates that the House desires the reconsideration of the bill by the Senate in respect of any amendments disagreed to.<sup>29</sup> If a Senate amendment has been disagreed to and no amendment made in its place, a message is sent to the Senate informing it that the House has disagreed to the amendment for the reasons (*see below*) indicated in a schedule annexed to the bill and desires the reconsideration by the Senate of the bill in respect of the amendment.<sup>30</sup> It has not been the practice to send messages to the Senate when bills have been laid aside.

For proceedings in case of continued disagreement—that is, when the Senate insists on amendments disagreed to by the House—*see* page 462. The Senate has agreed not to insist on amendments disagreed to by the House, but has made a further amendment which has been agreed to by the House.<sup>31</sup>

### *Further and non-relevant amendments by House*

No amendment may be moved to an amendment of the Senate that is not relevant to the Senate amendment. A further amendment may not be moved to the bill unless the amendment is relevant to or consequent on the Senate amendment.<sup>32</sup> When it has been argued that proposed government amendments at this stage are beyond the scope permitted, the Chair has had regard to advice from the responsible Minister. It is noted that government amendments are drafted by the Office of Parliamentary Counsel, and that OPC staff are aware of the requirements of the standing orders.<sup>33</sup>

Standing orders have been suspended to enable a Minister to move an amendment which was not relevant to Senate amendments being considered. Such an amendment has been made, following the suspension of standing orders, prior to<sup>34</sup> and after<sup>35</sup> consideration of the Senate's amendments, and after the consideration of Senate requests.<sup>36</sup> Where standing orders have been suspended in these circumstances, the Minister moves 'That in the message returning the bill to the Senate, the Senate be requested to reconsider the bill in respect of the amendment made by the House to [clause specified].'<sup>37</sup>

### *Rescission of agreement to Senate amendments*

A resolution adopting a (former) committee of the whole report agreeing to Senate amendments to a bill has been rescinded on motion following the suspension of standing orders. This action followed a message from the Senate informing the House of errors in the Senate schedule of amendments on the bill previously transmitted to the House and considered by Members. The corrected schedule of amendments was then considered and

28 S.O. 161(b).

29 E.g. J 1974–75/752 (4.6.1975); J 1993–96/2344 (20.10.1994).

30 S.O. 161(c); J 1974–75/752 (4.6.1975); VP 1996–98/289–91 (24.6.1996); J 1996–98/387 (25.6.1996), 431 (27.6.1996) (reasons not recorded in Journals).

31 VP 2002–04/1396 (4.12.2003).

32 S.O. 160. E.g. VP 2004–07/1502 (18.10.2006) (amendment ruled out of order); VP 2004–07/1819 (28.3.2007) (amendment in order).

33 *And see* H.R. Deb. (18.10.2006) 49 (objection raised).

34 VP 1973–74/249–51 (31.5.1973); VP 1993–96/2680–6 (30.11.1995); VP 1996–98/3202–3 (2.7.1998); VP 2002–04/1367–8 (3.12.2003).

35 VP 1973–74/268 (21.8.1973).

36 VP 1998–2001/777–8 (12.8.1999).

37 VP 1974–75/490 (25.2.1975); VP 1993–96/2686 (30.11.1995); VP 1998–2001/778 (12.8.1999).

agreed to.<sup>38</sup> On 8 June 2000, standing orders having been suspended, the House rescinded a resolution agreeing to Senate amendments in order to allow an amendment to be moved to one of the Senate amendments that had previously been agreed to.<sup>39</sup>

### *Reconsideration of Senate amendments—rescission of resolution to lay bill aside*

Following the suspension of standing orders, the resolution to lay a bill aside has been rescinded to permit Senate amendments previously rejected by the House to be reconsidered. The suspension of standing orders also provided for further non-relevant amendments to be moved by a Minister, for one motion to be moved in respect of all the amendments, and for time limits for the debate and for Members' speeches.<sup>40</sup>

### **Reasons**

When the House disagrees to a Senate amendment to a bill, a Member (usually the relevant Minister) must move the motion 'That the amendment(s) be disagreed to' and present to the House written reasons for the House not agreeing to the amendments.<sup>41</sup>

The requirement for reasons also applies in the case of Senate bills if the House disagrees to any amendments made by the Senate to amendments of the House.<sup>42</sup> In practice reasons are not given when a Senate amendment is disagreed to in cases where the House then makes a substitute amendment. There is no requirement for reasons when Senate *requests* for amendment are not agreed to.

After presenting the reasons, copies of which are circulated, the Minister moves that they be adopted by the House. An amendment cannot be moved to the reasons, as the question before the Chair is that the reasons be adopted,<sup>43</sup> but an amendment has been moved to that question.<sup>44</sup> The reasons are included with the message returning the bill to the Senate.

The former practice of appointing a committee to draw up reasons was discontinued in 1998.<sup>45</sup>

### **Senate requests for amendments**

Section 53 of the Constitution reads, in part:

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. (*paragraph 2*)

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. (*paragraph 3*)

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 or Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modification. (*paragraph 4*)

Senate standing orders<sup>46</sup> supplement the constitutional expression 'at any stage' by providing that requests may be made:

38 VP 1990–92/1645–54 (19.8.1992) (amendments not passed by the Senate had mistakenly been included in the schedule).

39 VP 1998–2001/1520, 1526 (8.6.2000).

40 VP 1996–98/3202 (2.7.1998) (Native Title Amendment Bill 1997 [No. 2]).

41 S.O. 161(c).

42 S.O. 170(b).

43 H.R. Deb. (8.12.1983) 3557–8.

44 VP 1913/204 (11.12.1913).

45 VP 1996–98/3170 (30.6.1998).

46 Senate S.O. 140.

- on the motion for the first reading;
- in committee after the second reading has been agreed to;
- on consideration of any message from the House referring to the bill; or
- on the third reading of the bill.

In practice requests are normally made during the Senate committee (detail) stage.

Upon the adoption of the report from a committee recommending the Senate make a request, a message is sent to the House returning the bill and requesting the House itself to make the desired amendment to the bill as indicated in a schedule annexed to the bill. Agreement must thus be reached with respect to the amendment requested before the bill proceeds to the third reading stage in the Senate.<sup>47</sup>

Standing orders have been suspended to permit Senate requests for amendments to related bills (under cover of separate messages) to be considered together, for messages from the Governor-General recommending appropriation for the purposes of all the requested amendments to be announced together, and for one motion to be moved in respect of all the requested amendments.<sup>48</sup>

### **Bills which the Senate may amend, in parts, and must request, in parts**

In considering a bill which constitutionally it is capable of amending, the Senate may nevertheless have to request amendments in respect of certain parts of the bill. For example, the Social Security Legislation Amendment Bill (No.1) 1995, a special appropriation bill, was capable of amendment by the Senate but not so as to increase any proposed charge or burden on the people. In the Senate the bill was reported with amendments and a request.<sup>49</sup>

In such instances the message returning the bill to the House indicates a request for amendment, set out in a schedule, and informs the House that the amendments, set out in another schedule, have been made to the bill. As, in such a case, the bill, having been reported with a request, has not proceeded to the third reading stage in the Senate, the House can consider only the request. Although the detail of the Senate amendments has been included in the material circulated to Members, such amendments are not in fact considered unless and until the bill is eventually returned to the House after the resolution of the request.

If the requested amendment is to be made, a Governor-General's message recommending an appropriation for the purposes of the amendment is announced to the House, the requested amendment made<sup>50</sup> and the Senate informed accordingly by message, whereupon the bill is read a third time.<sup>51</sup> The bill is returned to the House indicating that the Senate has agreed to the bill as amended by the House at the request of the Senate and the House's agreement to any further amendments is sought and may be obtained.<sup>52</sup>

A Senate request may be considered at the same time as Senate amendments if the request is made after the bill's third reading in the Senate. Such a situation could occur

47 *Odgers*, 14th edn, p. 369.

48 VP 1998–2001/684 (29.6.1999) (4 bills; the motion also extended the speech time-limits for the leading speakers).

49 J 1993–96/3723–4 (29.8.1995).

50 E.g. VP 2004–07/2150 (19.9.2007).

51 E.g. J 2004–07/4467 (20.9.2007).

52 E.g. VP 2004–07/2162 (20.9.2007).

during negotiation by message over Senate amendments that the House has disagreed to.<sup>53</sup>

### Senate amendments which, in the view of the House, should be made as requests

From time to time the Senate makes an ‘amendment’ to a bill, when, after being briefed on the matter, the Speaker may conclude that there are reasons to believe that the Senate proposal should have been sent to the House as a request for an amendment. In such cases, prior to the consideration of the Senate message, it is usual for the Chair to make a statement drawing the House’s attention to the constitutional significance of the purported amendment, and for the House then to agree to a resolution stating its attitude to the matter. Action taken by the House on these occasions has included:

- declining to consider the purported amendment and informing the Senate that it would consider a request for the amendment;
- disagreeing to the purported amendment and laying the bill aside;
- disagreeing to the purported amendment but then itself proceeding to make amendments in the same terms as those disagreed to (in specific circumstances, *see* ‘Amendments requiring a Governor-General’s message’ at page 452);
- in order not to delay the legislation, resolving to refrain from the determination of its constitutional rights and considering and agreeing to the amendment;
- making no objection in view of uncertainties of interpretation.

Appendix 18 lists bills where the House has objected to or queried Senate ‘amendments’ and gives a summary of the actions and positions of the two Houses in relation to each bill.

Senate standing orders make provision for amendments returned by the House in these circumstances to be changed to requests.<sup>54</sup>

### *Increases in proposed charges or burdens on the people*

Paragraph 3 of section 53 of the Constitution states that the Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. The precise meaning of ‘proposed charge or burden’ has not been conclusively determined, nor agreed between the Houses. The Senate’s decisions in relation to its power of amendment were questioned on this ground in relation to the following bills:

- Sugar Bounty [Bonus] Bill 1903
- Financial Emergency Bill 1932
- States Grants (Tertiary Education Assistance) Bill 1981
- States Grants (Technical and Further Education Assistance) Bill 1988
- Social Security Legislation Amendment Bill (No. 4) 1991
- Local Government (Financial Assistance) Amendment Bill 1992
- Social Security Amendment Bill 1993
- Taxation Laws Amendment Bill (No. 2) 1993

<sup>53</sup> E.g. in the case of the Commonwealth Inscribed Stock Amendment Bill 2013, the Senate requested an amendment in place of an amendment disagreed to by the House, and also made further amendments. In this case the requested amendment was made by the House, the Senate amendments agreed to and a message was returned to the Senate advising it of the House’s actions, VP 2013–16/184-7 (9.12.2013), J 2013–16/316 (10.12.2013); no further action was taken in the Senate in respect of the bill and the bill was sent for assent.

<sup>54</sup> Senate S.O. 130.

- Taxation Laws Amendment Bill (No. 4) 1993
- Student Assistance Amendment Bill 1994
- Taxation Laws Amendment Bill (No. 3) 1994
- Income Tax Rates Amendment (Family Tax Initiative) Bill 1996
- Taxation Laws Amendment (Research and Development) Bill 2001.  
(See also bills listed under ‘Amendments requiring a Governor-General’s message’ at page 452.)

Difficult questions of interpretation can arise in this area. At one extreme, almost every amendment will cause some degree of ‘charge or burden on the people’,<sup>55</sup> whilst at the other extreme it may be felt that unless an amendment ‘necessarily, clearly and directly’ causes an increased ‘charge or burden’ it is available to the Senate. It is considered that neither position is appropriate and that, in examining any such question, the better course is to ask what are the probable, expected or intended practical consequences of the proposed amendment. It has been considered that a Senate alteration which would reduce ‘savings’ from the level proposed in a bill can be made as an amendment where the alteration would not lead to expenditure beyond that provided under the existing law—that is, where expenditure would not be greater than under the status quo.<sup>56</sup> Such conclusions are consistent with the view that the maximum reasonable discretion should be extended in favour of Senate rights.

The Speaker is briefed on these matters whenever necessary. Sometimes a statement is made,<sup>57</sup> on other occasions it may be concluded that no statement is necessary.

### *Inquiries into the interpretation and application of the 3rd paragraph of s. 53*

In 1994 the question of the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution was referred by each House to its respective Standing Committee on Legal and Constitutional Affairs. The Senate reference was partly transferred to its Procedure Committee in May 1996. In November 1995 the House committee, having earlier circulated and received comments on an exposure report, presented a comprehensive final report, canvassing in detail the issues involved and recommending, inter alia, that there should be a compact concerning the interpretation and application of the provisions of paragraph 3 between the Houses. Among other things, the committee recommended that:

- the third paragraph of section 53 should be regarded as applicable to proposed laws relating to appropriation and expenditure (other than proposed laws appropriating revenue or moneys for the ordinary annual services of Government);
- the third paragraph should continue to apply to a bill containing a standing appropriation where a Senate alteration to it would increase expenditure under the appropriation;
- where a bill does not contain an appropriation, the Senate should not amend it to increase expenditure out of a standing appropriation, whether or not the bill itself affects expenditure under the appropriation;

55 In *The State of Western Australia v. The Commonwealth* (Matter No. P4 of 1994) the High Court heard submissions on s. 53. It was argued that the *Native Title Act 1993* was invalid, it being claimed that s. 53 had been contravened because the Senate had amended the bill in ways which would involve a burden on the people. One of the amendments was to establish a parliamentary committee, and it was argued that this would involve administrative and other expenses. While the Court did not hold that s. 53 was justiciable, it commented that none of the Senate amendments appeared to increase a charge or burden on the people.

56 E.g. VP 1996–98/937 (2.12.1996) (expenditure measure); VP 1996–98/916–7 (21.11.1996) (taxation measure).

57 E.g. VP 2008–10/620–1 (16.10.2008) (cases cited in Appendix 18).

- a bill which increases expenditure under a standing appropriation should not be originated in the Senate;
- the third paragraph should be regarded as applicable to tax and tax related measures;<sup>58</sup>
- fines, penalties, licence fees and fees for services should not be regarded as charges or burdens on the people for the purposes of the third paragraph;
- bills which affect the tax base or tax rates should be originated in the House of Representatives;
- the third paragraph applies to all Senate amendments which would increase a charge or burden on the people, including amendments which would increase a tax rate or expand a tax base regardless of whether the bill originated in the Senate or the House;
- where a bill does not itself propose a charge or burden, the Senate should not amend the bill to increase the rate or incidence of taxation;
- for the purposes of determining whether an alteration moved in the Senate to a bill increases a proposed charge or burden, the alteration should continue to be compared to the existing level of the charge or burden and not the level of the charge or burden proposed by the bill;
- a request should be required where an alteration to a bill is moved in the Senate which will make an increase in the expenditure available under an appropriation or the total tax or charge payable legally possible;
- the Houses should negotiate a procedure which would allow the Senate to make requests for amendments to bills originated in the Senate where the third paragraph prohibits a Senate amendment, the procedure being based on the provisions of the fourth paragraph of section 53 and the subject of a compact between the Houses.<sup>59</sup>

In November 1996 the Senate Procedure Committee reported on the matter, proposing the terms of an agreement for the interpretation and application of the third paragraph, including provisions to the effect that:

- the paragraph should apply to bills in respect of appropriations only if such bills contain appropriations, or amend Acts which do so in such a way as to affect expenditure under the appropriation, and that it should not apply to bills originating in the Senate;
- government ‘amending’ bills which increase expenditure should contain a clause appropriating the additional money and be classified as appropriation bills and be first introduced in the House;
- where a government bill originating in the House amends an Act containing such an appropriation—before the moving of each proposed Senate amendment to such a bill, the responsible Senate Minister should state the Government’s view as to whether the amendment would affect expenditure from the appropriation and give reasons for that view;
- a Senate amendment stated by a Minister to have the effect of increasing expenditure from such an appropriation would be moved as a request;

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58 See also, for example, views of Sir Kenneth Bailey, Sir Robert Garran (April 1950) and Attorney-General Duffy (Opinion 90/15078, November 1990).

59 House of Representatives Standing Committee on Legal and Constitutional Affairs, *The third paragraph of section 53 of the Constitution: final report*, November 1995; PP 307 (1995).

- a similar approach in respect of bills ‘involving’ taxation—a proposed Senate amendment would be moved as a request where the Minister stated that it would raise the level of taxation;
- a bill which increases the level of taxation or the amount of tax payable by taxpayers should be classified as a bill ‘imposing’ taxation—and therefore be first introduced in the House and not able to be amended by the Senate. (The committee recognised that if this provision was adopted the procedure in relation to bills ‘involving’ taxation would rarely be invoked.)<sup>60</sup>

Notes commenting on the Senate committee’s proposals were presented to the House on 2 December 1996.<sup>61</sup> These notes drew attention to a number of matters, including the fact that the procedures recommended by the committee for the consideration of Senate alterations did not seem to cover ‘non-amending’ bills—that is, ‘original bills which contained a special appropriation clause’. It was pointed out that Senate alterations to such bills which led to increased expenditure were caught by the constitutional provision, yet the Senate committee’s proposals seemed not to allow for them. It was also pointed out that the report was silent on the question of the test or criteria to be applied to proposed Senate alterations.

Since the House and Senate committee reports on the 3rd paragraph of section 53, the House has sometimes shown its preference to avoid delaying the business of the Parliament with debates on the matter. On occasions when the Chair has drawn the attention of the House to Senate amendments where the position was unclear, the House has thought it appropriate not to take any objection. This position was taken in respect of the following bills:

- Social Security Legislation Amendment (Newly Arrived Resident’s Waiting Period and Other Measures) Bill 1996
- Telecommunications Bill 1996
- Taxation Laws Amendment (Trust Loss and Other Deductions Bill) 1997
- Telecommunications (Consumer Protection and Service Standards) Bill 1999
- Telecommunications (Universal Service Levy) Amendment Bill 1999
- New Business Tax System (Thin Capitalisation) Bill 2001.

### *Amendments requiring a Governor-General’s message*

Section 56 provides that a proposed appropriation must be recommended by a message from the Governor-General to the House in which the proposal originates. To accommodate this requirement, which precludes a message to the House for the purpose of a Senate amendment, the House has disagreed to purported Senate amendments and, after the announcement of a Governor-General’s message recommending appropriation, proceeded to make amendments in the same terms, requesting the Senate’s concurrence. This action was taken in respect of the following bills:

- Social Security and Veterans’ Affairs Legislation Amendment (Family and Other Measures) Bill 1997
- Ballast Waters Research and Development Funding Levy Collection Bill 1997
- Child Support Legislation Amendment Bill 1998

<sup>60</sup> Senate Procedure Committee, *Section 53 of the Constitution / Incorporation into the standing orders of continuing and sessional orders*, November 1996.

<sup>61</sup> VP 1996–98/937 (2.12.1996).

- New Business Tax System (Miscellaneous) Bill 1999
- Higher Education Legislation Amendment (2005 Budget Measures) Bill 2005 (*see below*)
- National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2007
- Medical Research Future Fund Bill 2015
- Northern Australia Infrastructure Facility Bill 2016 (*see below*).

Speaking in response to the Chair's statement in relation to the first of these bills, the Minister stated that the section 56 requirement for the Governor-General's message could not be dismissed as a mere procedural matter, and that it was fundamental to the preservation of the financial initiative of the Executive Government.<sup>62</sup>

### *Variation of the destination of an appropriation*

In 1907 a ruling of the President of the Senate was given to the effect that the Senate did not have the power to make amendments which altered the destination of an appropriation.<sup>63</sup> In subsequent years the House objected to Senate amendments to two bills on this ground:

- Manufactures Encouragement Bill 1908
- Appropriation (Works and Buildings) Bill 1910–11.

In the case of the Higher Education Legislation Amendment (2005 Budget Measures) Bill 2005 the Senate made amendments which would have had the effect of moving expenditure between financial years. The view was taken in the House that this would amount to a change in the destination of an appropriation; and that where expenditure was transferred in such circumstances the proposed appropriation needed to be recommended by a message from the Governor-General. The House disagreed to the Senate amendments and, after the required message had been announced, made its own amendments in their place.<sup>64</sup> Before the Senate considered (and agreed to) the House amendments the Chairman of Committees read a statement explaining that the amendments had been moved by the Government in the Senate as amendments on the basis of 'the well-established principle that amendments in the Senate may re-allocate appropriations without increasing the amount of expenditure'.<sup>65</sup> A similar view was taken by the House in the case of the Northern Australia Infrastructure Facility Bill 2016, when Senate amendments expanded the area defined as 'Northern Australia', even though the bill had a cap on the total appropriation available.<sup>66</sup>

### *Bills imposing fees amounting to taxation*

Section 53 of the Constitution, which prevents the Senate from amending bills imposing taxation, makes the proviso that a bill shall not be taken to impose taxation by reason only of its containing provisions for the payment of fees for licences or services. However, impositions described as fees or charges may in fact amount to taxation and there have been occasions when the Senate's treatment of such bills has been questioned.<sup>67</sup> In these cases the Senate did not agree with the bills' classification by

62 H.R. Deb. (1.12.1997) 11660–61. (In each case the Senate agreed to the House's amendments.)

63 S. Deb. (3.10.1907) 4165–7. *Odgers* regards this ruling to be in error (*see* 14th edn, p. 414).

64 VP 2004–07/841 (5.12.2005).

65 S. Deb. (9.12.2005) 45. *See also Quick and Garran*, p. 671.

66 VP 2016/65–6 (3.5.2016). The Senate reaction was also similar, S. Deb. (3.5.2016) 3423–4.

67 For details of bills involved *see* 3rd edition, p. 426.

Parliamentary Counsel as bills imposing taxation, and dealt with them as ‘amendment bills’. The view taken by the Senate was that where there was reasonable doubt whether a bill should be classified as a bill imposing taxation it was proper to lean towards a ruling which preserved the Senate’s amendment power.<sup>68</sup>

In each of these instances the Senate returned the bills concerned to the House ‘without amendment’ and no dispute between the Houses arose. However, the relative constitutional positions of the Houses might require consideration should the Senate in fact amend such a bill.

### Question on requested amendments

The motion moved in the House is ‘That the requested amendments be made’ or ‘That the requested amendments be not made’.

The question ‘That the requested amendments be not made’ may be amended to read ‘That the requested amendments be made’ without being out of order on the grounds of being a direct negative, as the negation of the question ‘That the requested amendments be not made’ would not, in itself, cause the amendments to be made.<sup>69</sup>

However, proposed amendments to the question put by the chair must not infringe the Government’s financial initiative. In the two cases footnoted above the requested amendments sought to decrease a proposed tax; if they had sought to increase a tax, or extend its scope, only a Minister could have moved that they be made.<sup>70</sup> Possible amendments by private Members are also restricted by the need to obtain a Governor-General’s message if the amendment requested by the Senate would need an appropriation.<sup>71</sup> To avoid this issue, on a Minister moving ‘That the requested amendments be not made’ a Member has moved as an amendment ‘That all words after “That” be omitted with a view to substituting the following words: “the House calls on the Government to recommend an appropriation from the Governor-General consistent with the request from the Senate”’.<sup>72</sup>

### Requested amendments made

When the message containing requests is announced to the House, the House may consider the requests immediately, or set a time for considering them.<sup>73</sup> The House may agree to make the requested amendments,<sup>74</sup> with or without its own amendment<sup>75</sup> (which may include modifications of the requested amendment and a consequential amendment<sup>76</sup>).

The House may make amendments requested by the Senate involving appropriation only if a message from the Governor-General recommending an appropriation for the purposes of the amendment or amendments has been received by the House.<sup>77</sup> In one case requested amendments were made before the associated message from the Governor-General had been received, as it had not been realised that a message was

68 *Odgers*, 6th edn, p. 591.

69 VP 1993–96/364 (18.10.1993); VP 2016–18/378–9 (24.11.2016).

70 S.O. 179.

71 S.O. 180.

72 VP 2016–18/433 (1.12.2016).

73 S.O. 165.

74 E.g. VP 1974–75/942–3 (2.10.1975); VP 2008–10/1867 (17.6.2010).

75 E.g. VP 1974–75/910 (10.9.1975); and see Appendix 18, Customs Tariff (British Preference) Bill 1906.

76 E.g. VP 1973–74/642–5 (12.12.1973).

77 E.g. VP 1993–96/2358–9 (31.8.1995); VP 1998–2001/2025 (7.12.2000); VP 2004–07/2150 (19.9.2007).

required.<sup>78</sup> The message was received after the House had adjourned. At the next sitting the Speaker drew attention to the matter, the message was reported and the House then went on to agree to Senate amendments to the bill. It was considered that, although the requirements of the standing orders had not been met, the requirements of the Constitution had.

A schedule of requested amendments made by the House is attached to the bill, which is then returned to the Senate with a message, stating how the House has dealt with the requests and asking the Senate to agree to the bill.<sup>79</sup> The substance of the message is:

The House of Representatives returns to the Senate **a Bill for an Act** [long title], and acquaints the Senate that the House of Representatives has considered the message of the Senate requesting the House to make certain amendments in such Bill.

The House of Representatives has made the requested amendments.

After the reporting of a message from the House advising that the House had made requested amendments, the Senate has recommitted a bill in order to make further requests.<sup>80</sup>

### **Requested amendments not made**

The House may decide not to make the requested amendment,<sup>81</sup> and in this instance a message is sent to the Senate in the following form:

The House of Representatives returns to the Senate **a Bill for an Act** [long title], and acquaints the Senate that the House of Representatives has considered the message of the Senate requesting the House to make an amendment in such Bill.

The House of Representatives has not made the requested amendment.<sup>82</sup>

Reasons for the House not agreeing to take the requested action are not necessary. On the bill's return the Senate may pass it without the requested amendment having been made or may purport to press or insist on its request (*see below*).

If it is unwilling to comply with a Senate request, instead of responding to the request the House may lay the bill aside.<sup>83</sup>

### **Requested amendments not made, but replacement bills introduced**

In 1901 the Consolidated Revenue Bill (No. 1) was ordered to be laid aside following a Senate request that the bill be amended so as to show the items of expenditure. Prime Minister Barton explained that estimates were circulated with the bill but the estimates were not part of the bill in the form of a schedule. He assured the House that there was no attempt to belittle or injure the Senate. The bill having been referred back to the House, and being a House bill, was now at the disposal of the House. A course was proposed which enabled the House to concede to the Senate message but which would put the course of procedure into a correct constitutional channel. A motion 'That the bill be laid aside' having been agreed to, standing orders were suspended to enable a replacement bill, the Consolidated Revenue Bill (No. 2) with scheduled estimates, to be introduced and pass all stages that day.<sup>84</sup>

78 VP 2008–10/1025 (14.5.2009), 1031 (25.5.2009); H.R. Deb. (25.5.2009) 4031.

79 S.O. 165.

80 J 1996–98/434–5 (27.6.1996), 443, 446 (28.6.1996) (the further requests had in fact been negatived when the bill was first considered by the Senate).

81 E.g. VP 1993–96/2429 (27.9.1995); VP 1998–2001/455 (29.3.1999); VP 2008–10/947–8 (17.3.2009).

82 E.g. J 1993–96/3884 (28.9.1995).

83 For examples *see* following section (replacement bills introduced); *see also* VP 1980–83/667–8 (17.11.1981) (House declined to consider purported amendments, bill laid aside). No message is sent to the Senate when a bill is laid aside.

84 H.R. Deb. (14.6.1901) 1174–86; VP 1901–02/61–2 (14.6.1901); *and see* Appendix 18.

On other occasions bills have been laid aside in response to pressed requests (*see below*) and replacement bills introduced and passed incorporating the amendments requested.<sup>85</sup>

### Pressed requests

On occasions the Senate, on receiving a message from the House that the House has not made a requested amendment, has purportedly pressed or insisted upon its request. There has been a difference of opinion as to the constitutionality of the action of the Senate in pressing requests. The House has never conceded the Senate's power to do so. However, while passing a preliminary resolution refraining from determining its constitutional rights or obligations, the House has on most occasions taken the Senate's message into consideration. The arguments of those who advocate the constitutional propriety of pressed requests include the following:<sup>86</sup>

- the term 'at any stage' in section 53 of the Constitution means that the sending of requests is not limited to one occasion;
- there is no prohibition in the Constitution;
- the writers of the Constitution did not intend such a prohibition;
- the Senate could easily circumvent such a prohibition (that is, by slightly modifying the request on each occasion); and
- that the difference between an amendment and request is procedural only.

The alternative constitutional position is expressed by *Quick and Garran*:

There does, however, seem to be a substantial constitutional difference between the power of suggestion and the power of amendment, as regards the responsibility of the two Houses. A short analysis will make this clear. In the case of a bill which the Senate may amend, the Senate equally with the House of Representatives is responsible for the detail. It incorporates its amendments in the bill, passes the bill *as amended*, and returns it to the House of Representatives. If that House does not agree to the amendments, the Senate can "insist on its amendments," and thus force the House of Representatives to take the responsibility of accepting the amendments or of sacrificing the bill; whilst the House of Representatives cannot force the Senate to take a direct vote on the bill in its original form.

On the other hand, in the case of a bill which the Senate may not amend, the House of Representatives alone is responsible for the form of the measure; the Senate cannot strike out or alter a word of it, but can only suggest that the House of Representatives should do so. If that House declines to make the suggested amendment, the Senate is face to face with the responsibility of either passing the bill as it stands or rejecting it as it stands. It cannot shelve that responsibility by insisting on its suggestion, because there is nothing on which to insist. A House which can make an amendment can insist on the amendment which it has made; but a House which can only "request" the other House to make amendments cannot insist upon anything. If its request is not complied with, it can reject the bill, or shelve it; but it must take the full responsibility of its action. This provision therefore is intended to declare the constitutional principles (1) that the House of Representatives is solely responsible for the form of the money bills to which the section relates; (2) that the Senate may request alterations in any such bill; (3) that if such request is not complied with, the Senate must take the full responsibility of accepting or rejecting the bill as it stands.<sup>87</sup>

This view is supported by legal opinion, notably an opinion presented to the House on 16 March 1943,<sup>88</sup> which made the following points:

<sup>85</sup> Appropriation Bill 1903–4; Supply Bill (No. 3) 1916–17.

<sup>86</sup> *See also Odgers*, 14th edn, pp. 373–4.

<sup>87</sup> *Quick and Garran*, pp. 671–2.

<sup>88</sup> *Constitutional opinion on whether the Senate has a right to press a request for the amendment of a money bill*—by Sir Robert Garran, Sir George Knowles, Professor K. H. Bailey and Mr G. B. Castieau, VP 1940–43/514 (16.3.1943) (not ordered to be printed).

- the words ‘at any stage’ in section 53 of the Constitution do not, in a parliamentary context, mean the same thing as ‘at any time and from time to time’; they plainly refer to the recognised stages in the passage of a bill through the Chamber;
- the question is not one of strict law on which the courts will pronounce; it is a matter of constitutional propriety, as between the Houses themselves;
- the question should be answered by reference to general considerations, drawn from the provisions of sections 53 to 57 of the Constitution as a whole;
- the plain implication of the *Quick and Garran* view was that the Senate can make a given request but once at any particular stage of a bill;
- as stated by Sir Harrison Moore, the consequence of the opposite view was that the distinction between the power to request and the power to amend was merely formal;
- Sir Isaac Isaacs indicated that, once the Senate had made a request, its power of suggestion in regard to a matter was exhausted as far as that stage was concerned; it has no right to challenge again the decision of the House in respect to matters in regard to which it has made requests and received a definite answer;<sup>89</sup>
- Sir John Latham stated that the only practical way in which a distinction might be drawn between making a request and amending a bill was by taking the view that a request could be made only once and that, having made it, the Senate has exercised all the rights and privileges allowed by the Constitution;<sup>90</sup>
- a different opinion, expressed in the Senate by Sir Josiah Symon, that the Constitution gave the Senate substantially the power to amend, though in the form of a request<sup>91</sup> meant that the Constitution, in declaring that the Senate might not amend but might request amendments, was contradicting itself, cancelling in the fourth paragraph of section 53 what it had enacted in the second; in respect of this view the opinion presented to the House stated that the Constitution did intend a substantial difference; it was thought clear that the Constitution did not intend to stultify itself by giving back in one clause what it had taken away in another; and
- the essence of the difference between an amendment and a request was that in the case of a request the form of the bill rests solely with the House; to press a request was to insist upon it—which was a contradiction in terms and unconstitutional.

On the 23 occasions<sup>92</sup> on which the Senate has pressed or insisted upon requests for amendments to bills the House has considered and dealt with the Senate messages as summarised below (*see* Appendix 18 for details):

- on ten occasions the pressed requests were accepted, accepted in part and compromise reached over requests not accepted, or alternative amendments made and compromise reached. It has been usual in such circumstances for the House to declare that it is refraining from the determination of its constitutional rights with respect to the messages purporting to press the requests:

Customs Tariff Bill [1902]

Excise Tariff (Spirits) Bill [1906]

Customs Tariff (British Preference) Bill [1906]

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89 H.R. Deb. (3.9.1902) 15691.

90 H.R. Deb. (30.11.1933) 5249.

91 S. Deb. (9.9.1902) 15824.

92 To December 2016.

Customs Tariff Bill [1907]  
Customs Tariff Bill [1921]  
Customs Tariff Bill [1933]  
Income Tax Bill 1943  
Veterans' Entitlements Bill 1985  
States Grants (Schools Assistance) Bill 1988  
Wool Tax (Nos 1 to 5) Amendment Bills 1991;

- on two occasions bills were laid aside and replacement bills were introduced and passed incorporating the amendments requested:
  - Appropriation Bill 1903–4
  - Supply Bill (No. 3) 1916–17;
- on four occasions the pressed requests were not accepted, were not further pressed, and the bills passed by the Senate:
  - Appropriation Bill 1921–22
  - Customs Tariff Bill (1936)
  - Veterans' Affairs Legislation Amendment (Budget Measures) Bill 2000
  - Members of Parliament (Life Gold Pass) Bill 2002;
- on one occasion the House declined to consider the message purporting to press requests, the requests were not further pressed, and the bill was passed by the Senate:
  - Family Assistance Legislation Amendment (Extension of Time Limits) Bill 2003;
- on two occasions the House declined to consider messages purporting to press requests, the orders of the day for consideration of further action in relation to the bills concerned being subsequently discharged:
  - Sales Tax Amendment Bills (Nos 1A to 9A) 1981
  - Dairy Industry Stabilisation Levy Amendment Bill 1985;
- on one occasion the pressed requests were not accepted and the bill was laid aside:
  - Student Assistance Amendment Bill 1994;
- on one occasion the pressed requests were not accepted, were further pressed, and the House declined to consider them further (for more detail *see* page 460):
  - States Grants (Primary and Secondary Education Assistance) Bill 2000;
- on one occasion the pressed requests were not accepted, but the House was dissolved and the bill lapsed before the House message was considered by the Senate:
  - Health Insurance Amendment (Compliance) Bill 2009;
- on one occasion the House was dissolved before the Senate message was considered by the House, and the bill lapsed:
  - States Grants (Primary and Secondary Education Assistance) Amendment Bill (No. 2) 2001.

*Odgers* suggests that in respect to the pressing of requests the Houses have interpreted the rule 'by application'—in effect that the Senate's right to press requests has been established by usage.<sup>93</sup> As against this suggestion the comments of others are relevant, for example:

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<sup>93</sup> *Odgers*, 14th edn, p. 374.

The reality of the situation is that a government has often been prepared to forfeit constitutional niceties for the sake of getting its legislation made. It may be faced with the choice of modification of its proposals or having its bill rejected thereby setting in train the section 57 double dissolution procedure. Often the subject matter of the requests will not warrant this. The somewhat plaintive words of Latham on reiterated Senate requests for the inclusion of certain items in the Customs Tariff in 1933 exemplify this:

The Constitution has provided for such a case (rejection of a bill by the Senate) in section 57, under which this House is placed in a position to force a double dissolution. It appears to me, however, that the three items rabbit traps, spray pumps, and dates, however important they may be, hardly justify a double dissolution.

But this may not always be the attitude adopted. The day could well come when the House of Representatives declines to consider reiterated requests and asserts that the Senate is acting unconstitutionally with the possible consequences, as far as the operation of section 57 is concerned, adverted to previously.<sup>94</sup>

In recent years when a message has been received from the Senate purporting to press requests for amendments, it has been the practice of successive Speakers to make a statement referring to the principles involved and which the House has endorsed, whether declining to consider the message or not. In a 1988 case the Deputy Speaker made the following statement on behalf of the Speaker:

I draw the attention of the House to the constitutional question this message involves. The message purports to repeat the requests for amendments contained in Message No. 274 which the House rejected at its sitting earlier today. The 'right' of the Senate to repeat and thereby press or insist on a request for an amendment has never been accepted by the House of Representatives.

On several previous occasions when a request was pressed on the House by repetition the House had regard to the claim that the public welfare required passage of the legislation which was the subject of the pressed request and gave the pressed request the House's consideration notwithstanding that the House resolved to refrain from determining its constitutional rights. The House so informed the Senate of the terms of its resolution in its message to the Senate in reply.

It is not certain whether the Senate's right to press a request by repetition is justiciable in the courts. However it is a matter of constitutional propriety as between the Houses based on the provisions of sections 53 to 57 of the Constitution. Strong arguments that the Constitution does not give the Senate the right to press a request were advanced by Quick and Garran who were intimately involved in the development of the Constitution. Their views may be found on pages 671–2 of their treatise on the Constitution.

In 1943, some 40 years later, the question was examined by four eminent constitutional lawyers, Garran, Knowles, Bailey and Castieau, who, after considering other learned opinion, summed up the question in the following words:

In our opinion, the Constitution in denying the right of amendment and conferring the right of request intended a substantial difference. In this we respectfully agree with the views expressed by Sir Harrison Moore, Sir Isaac Isaacs and Sir John Latham. We think it clear that the Constitution did not intend to stultify itself by giving back in one clause what it had taken away in another. The essence of the difference between request and amendment is that in the case of a request the right of decision as to the form of the Bill rests solely with the House of Representatives. To press a request is to insist upon it—which is a contradiction in terms, and also in our opinion unconstitutional.

Other more recent legal opinion has been of a similar view, including the opinions of Professors Richardson, Sawyer and Pearce.

I respectfully agree with these opinions, as I had reason to indicate to the House as recently as 11 April 1986. I might also add that my immediate predecessors, Speaker Snedden on 21 October 1981 and Speaker Jenkins on 20 August 1985, also indicated their agreement to these opinions in similar statements.

It rests with the House whether it will consider Message No. 295 insofar as it purports to press the requests that were contained in Message No. 274.

<sup>94</sup> D. Pearce, 'The legislative power of the Senate', in *Commentaries on the Australian Constitution*, Leslie Zines (ed.), Butterworths, Sydney, 1977, p. 130.

In the circumstances of the present case, the House may deem it expedient to pass a resolution, as has been done on occasions in the past, that the public welfare demands the early passage of the legislation and that the House refrains from determining its constitutional rights.<sup>95</sup>

On more recent occasions the Chair has read out shorter statements to similar effect (referring to rather than quoting the opinions of the constitutional experts).<sup>96</sup>

In 1986 the Senate purported to press requests concerning the Veterans' Entitlements Bill 1985. After a statement by the Speaker, the House refrained from determining its constitutional position and considered the message immediately. The Minister indicated that the requested amendments were not acceptable to the Government in the form that they were in but that they would be acceptable in another form, which was indicated in a schedule, if proposed in conjunction with certain other amendments. This course was followed and the Senate subsequently rescinded its requests and requested the House to amend the bill as proposed.<sup>97</sup>

In the case of the States Grants (Primary and Secondary Education Assistance) Bill 2000, the Senate pressed requests which the House had not made and the House again declined to make them. The Senate then further pressed its requests. When the message came before the House on 5 December 2000 the Speaker made a statement noting, *inter alia*, that it was only the second occasion the Senate had further pressed requests (the first being in 1906), that the House had no standing orders covering the situation of pressed requests, suggesting a belief that the House would not in the normal consideration of business require such rules, and that in 1983 the action of pressing requests had been taken to be failure to pass and included in the basis of a double dissolution. The Speaker noted the provisions of the standing orders in respect of Senate amendments, and the fact that it had been considered inappropriate to suspend standing orders to continue the process of disagreement. He also noted that the House should not be taken to have determined its privileges by considering the message, but that it should be open to the House to take whatever course it considered appropriate. The House resolved that it endorse the Speaker's statement, refrain from determining its constitutional rights, decline to consider further the requests and call on the Senate to agree to the bill without requests, amendments or delay. The Senate returned the bill with amendments which were disagreed to by the House and not insisted on by the Senate.<sup>98</sup>

In its 1995 report on the third paragraph of section 53 of the Constitution the Standing Committee on Legal and Constitutional Affairs stated:

The conclusion that pressing requests is unconstitutional (and was not intended to be the practice when the Constitution was drafted) is supported by the literal meaning of the word 'request'. 'Request' can be defined as 'the act of asking for something to be given, or done, especially as a favour or courtesy'. To press and therefore insist on an amendment is to demand and this is not in keeping with the words of the fourth paragraph. The Committee suggests that the fact requests have been pressed in the past does not give the practice validity.<sup>99</sup>

If the House refuses to accede to a request the Senate can press its claim to finality by refusing to pass the bill.

95 VP 1987-90/1012-3 (21.12.1988); *see also* VP 1980-83/613-5 (21.10.1981).

96 E.g. VP 1990-92/921 (21.6.1991); VP 1993-96/1108-9 (27.6.1994); VP 1998-2001/1909 (28.11.2000).

97 VP 1985-87/820-1 (11.4.1986), 831-8 (14.4.1986), 856-8 (16.4.1986).

98 VP 1998-2001/1960-3 (5.12.2000), 2004-17, 2025-6 (7.12.2000).

99 PP 307 (1995) 148.

### *Pressed requests and s. 57 of the Constitution*

The action of pressing requests has been considered to be ‘failure to pass’ in relation to section 57 of the Constitution.<sup>100</sup> In 1981 the House declined to consider messages purporting to press requests for amendments to Sales Tax Amendment Bills (Nos 1A to 9A) 1981, and the bills were discharged. The bills were subsequently reintroduced, passed by the House and then negatived in the Senate at second reading—becoming, *inter alia*, grounds for the 1983 double dissolution (*see* Chapter on ‘Double dissolutions and joint sittings’).

### *Division of a House bill by the Senate*

In June 1995 the Senate sought to divide the Human Services and Health Legislation Amendment Bill (No. 1) 1995 and it returned the measure to the House in the form of two bills, in which it sought the concurrence of the House.<sup>101</sup> Consideration of the Senate message was made an order of the day for the next sitting, but the order was not called on. The Government did, however, later introduce the Human Services and Health Legislation Amendment Bill (No. 3) 1995 and the Therapeutic Goods Amendment Bill 1995, replacing the original proposals and incorporating minor amendments.<sup>102</sup> The bills were passed by the House, although a second reading amendment was moved which, *inter alia*, referred to ‘the incompetent way in which the legislation was originally managed in its passage through the Parliament, so that the original bill was divided by the Senate and thus rendered inoperable’.<sup>103</sup> The Senate passed the Human Services and Health Legislation Amendment Bill (No. 3) on 29 November 1995. The Therapeutic Goods Amendment Bill had not been passed at the time of prorogation of the Parliament and dissolution of the House on 29 January 1996 but the measure was re-introduced and passed early in the 38th Parliament.

On 1 November 2000 a message was reported advising that the Senate had divided the Health Legislation Amendment Bill (No. 4) 1999, one part of which was returned to the House with amendments. Consideration of the message was made an order of the day for the next sitting,<sup>104</sup> but no further action was taken.

On 3 December 2002 a message was reported advising that the Senate had divided the Family and Community Services Legislation Amendment (Australians Working Together and Other Budget Measures) Bill (No. 2) 2002 into two bills and made amendments. The Senate had transmitted one of the proposed bills to the House, and had not completed its consideration of the second proposed bill. The Deputy Speaker made a statement noting that the position of the House was that the division of a bill in the House in which the bill did not originate was not desirable. He also said that he understood that there might be grounds for the Senate action in purporting to divide a House bill being considered to provide the first stage of a failure to pass a bill for the purposes of section 57 of the Constitution. The House endorsed the Deputy Speaker’s statement, declined to consider the Senate message and requested the Senate to reconsider the bill as originally transmitted. The Senate resolved not to insist on the division of the bill, although in doing

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100 *But see Odgers*, 14th edn, pp. 364, 720–1, 755.

101 J 1993–96/3424–5 (9.6.1995); VP 1993–96/2184 (19.6.1995).

102 VP 1993–96/2389–90 (20.9.1995); H.R. Deb. (28.9.1995) 1942–5.

103 VP 1993–96/2435 (28.9.1995).

104 VP 1998–2001/1843 (1.11.2000). The Senate had amended the excised part of the original bill with enacting words and provisions for titles and commencement and then postponed further consideration, J 1998–2001/3440 (31.10.2000).

so it reasserted its opinion that the division of any bill by the Senate is a form of amendment of a bill, not different in principle from any other form of amendment.<sup>105</sup>

It is considered that the established rules and practices of the Houses provide ample opportunity for the consideration and amendment of bills by each House and that the division of a bill in the House in which the bill did not originate is highly undesirable.

The House has divided a House bill—*see* ‘Division of a bill’ in the Chapter on ‘Legislation’.

### Proceedings in case of continued disagreement

Standing order 162 deals with subsequent proceedings in the case of continued disagreement. It provides:

- (a) If the Senate returns a House bill insisting on the original Senate amendments to which the House has disagreed, the House may:
  - (i) agree, with or without amendment, to the Senate amendments to which the House had previously disagreed, and make any necessary consequential amendments to the bill; or
  - (ii) insist on its disagreement to the Senate amendments and make any necessary amendments relevant to the rejection of the Senate amendments.
- (b) If the Senate returns a House bill disagreeing to House amendments, the House may:
  - (i) withdraw its amendments and agree to the original Senate amendments;
  - (ii) make further amendments to the bill consequent upon the rejection of its amendments;
  - (iii) make new amendments as alternative to its amendments to which the Senate has disagreed; or
  - (iv) insist on its amendments to which the Senate has disagreed.
- (c) If the Senate returns a House bill with further amendments to the bill or to House amendments, the House may:
  - (i) agree, with or without amendment, to the further Senate amendments, making consequential amendments to the bill, if necessary; or
  - (ii) disagree to the further Senate amendments and insist on its own amendments which the Senate has amended.

There is precedent for the Senate not insisting on its amendments to which the House insisted on disagreeing, but making further amendments, consequent on the rejection of its amendments, and requesting the concurrence of the House in these amendments.<sup>106</sup>

There is also precedent for the Senate not insisting on some rejected amendments but insisting on others, making amendments in place of some not insisted on, not agreeing to a replacement House amendment but agreeing to an alternative and making further amendments. The House agreed with these actions.<sup>107</sup> The Senate has not insisted on an amendment to which the House has disagreed, agreed to amendments made in place of it, agreed to further amendments made by the House, and itself made further amendments (to which the House agreed).<sup>108</sup>

Standing orders have been suspended to enable the immediate consideration of Senate amendments at this stage, the amendments being taken together and time limits being as specified in the motion.<sup>109</sup>

When the requirements of the Senate in the bill have been finally settled, the bill is returned to the Senate with a message informing the Senate accordingly.

<sup>105</sup> H.R. Deb. (3.12.2002) 9485–7; VP 2002–04/599–600 (3.12.2002); J 2002–04/1363 (12.12.2002).

<sup>106</sup> VP 1973–74/640–2 (12.12.1973).

<sup>107</sup> VP 1998–2001/2028 (7.12.2000).

<sup>108</sup> VP 2004–07/1500–02 (18.10.2006), 1516 (19.10.2006).

<sup>109</sup> VP 2004–07/1516 (19.10.2006).

In all situations described in (a) (b) or (c) above, instead of returning the bill to the Senate (that is, if it is decided that further negotiation by message would be pointless), the House may request a conference or order the bill to be laid aside at this point.<sup>110</sup> In the latter case the most recent message from the Senate is ordered to be taken into consideration, usually immediately. A Minister then moves ‘That the House insists on disagreeing to the amendments insisted on by the Senate’, and, when this question is resolved in the affirmative, moves ‘That the bill be laid aside’.<sup>111</sup>

Standing order 162(d) covers situations when a bill is returned to the Senate in accordance with options under (a) (b) or (c) above and the Senate then again returns the bill to the House again disagreeing with any of the requirements of the House. In such cases the standing order gives the House *only* the options of requesting a conference or of ordering the bill to be laid aside.<sup>112</sup> If the House instead wishes to save the bill by agreeing to Senate amendments it has previously insisted on disagreeing to (and again insisted on by the Senate), or wishes to propose alternative amendments, standing orders must be suspended to allow this action. Only positive action is appropriate at this stage—it has been considered that the suspension of standing orders to enable the House to again insist on disagreeing to the Senate amendments should not be permitted.<sup>113</sup>

At every stage, when the House concludes its consideration of Senate amendments to a House bill, the Clerk certifies the bill and any accompanying schedules.<sup>114</sup>

When negotiation by message fails, as an alternative to laying the bill aside the House may request a conference to be held between representatives of the two Houses, as described at page 464. Ultimately, when disagreement between the Houses over legislation originating in the House cannot be resolved, the deadlock may lead to the dissolution of both Houses pursuant to section 57 of the Constitution—as described in the following Chapter on ‘Double dissolutions and joint sittings’.

## SENATE BILLS AMENDED BY HOUSE

If the Senate returns a Senate bill which has been amended by the House with any of the amendments made by the House disagreed to, or further amendments made, together with reasons<sup>115</sup> the message is usually considered immediately.<sup>116</sup> The procedure of the House is then as follows:<sup>117</sup>

- (a) If the Senate disagrees to House amendments to a Senate bill, the House may:
  - (i) insist, or not insist, on its amendments;
  - (ii) make further amendments to the bill consequent upon the rejection of its amendments;
  - (iii) make new amendments alternative to the amendments to which the Senate has disagreed; or
  - (iv) order the bill to be laid aside.
- (b) If the Senate agrees to House amendments with amendments, the House may:
  - (i) agree to the Senate’s amendments, with or without amendment, making any consequential amendments to the bill;
  - (ii) disagree to the Senate’s amendments and insist on its own amendments; or

110 S.O. 162(d).

111 E.g. VP 1974–75/771 (3.6.1975), 827–8 (19.8.1975); VP 1996–98/2658 (4.12.1997).

112 E.g. VP 2008–10/795 (4.12.2008).

113 See statement by Speaker Andrew, VP 1998–2001/1961 (5.12.2000).

114 S.O. 164.

115 S.O. 168. As is the practice of the House, where a House amendment is disagreed to, but another amendment made in place thereof, no reasons are given, e.g. VP 1920–21/389 (21.10.1920); VP 1990–92/1412 (1.4.1992).

116 E.g. VP 1974–75/759–60 (2.6.1975).

117 S.O. 169.

(iii) order the bill to be laid aside.

(c) Except when a bill is laid aside, the House shall inform the Senate by message of its decision under paragraph (a) or (b). On any further return of the bill from the Senate with any of the requirements of the House still disagreed to, the House may order the bill to be laid aside.

The courses of action under (a) have not been interpreted as being mutually exclusive. For example, the House has declared that it did not insist on an amendment before going on to propose an alternative.<sup>118</sup> It has also stated that it insisted on an amendment but proceeded to revise its wording.<sup>119</sup> When a bill is returned to the Senate with any of the amendments made by the Senate on the amendments of the House disagreed to, the message returning the bill to the Senate also contains reasons for the House not agreeing to amendments made by the Senate. The reasons are presented to the House by the Member moving the motion that the amendment(s) be disagreed to.<sup>120</sup> The former practice of appointing a committee to draw up reasons was discontinued in 1998.<sup>121</sup>

If any further amendments are made by the House on the Senate's amendments on the original amendments of the House to a Senate bill, a schedule of further amendments is prepared and certified by the Clerk.<sup>122</sup>

The House may not amend any words of a bill which both Houses have agreed to, unless the words have been the subject of, or directly affected by, some previous amendment; or the proposed House amendment is consequent upon an amendment previously agreed to or made by the House.<sup>123</sup>

If the Senate makes an amendment which is not relevant to the amendments made by the House to a Senate bill, it is necessary for the House to suspend standing orders to enable the amendment to be considered. In the case of the International War Crimes Tribunal Bill 1994 the Senate agreed to all but one of the amendments made by the House, proposed another amendment in place of the one it disagreed to, and made further amendments to the bill and to a related bill. Before the House considered the Senate messages, standing and sessional orders were suspended to enable the further amendments to be considered.<sup>124</sup>

At every stage, when the House concludes its consideration of a Senate bill returned from the Senate after amendment by the House, the Clerk shall certify the bill and any accompanying schedules.<sup>125</sup>

If a Senate bill has returned to the Senate according to the processes outlined above and agreement is still not reached, Senate standing orders give the Senate the options of ordering the bill to be laid aside or of requesting a conference,<sup>126</sup> as described below.

## CONFERENCES

The standing orders of both the House and Senate provide for the holding of conferences between the two Houses.<sup>127</sup> Grounds for conferences are not restricted to resolving disagreements between the Houses over legislation, but to date formal

118 VP 1920–21/139 (4.5.1920).

119 VP 1903/179 (20.10.1903).

120 S.O. 170(b), VP 1913/204 (11.12.1913).

121 VP 1996–98/3170 (30.6.1998).

122 S.O. 170(a).

123 S.O. 172.

124 VP 1993–96/1920–36 (8.3.1995).

125 S.O. 171.

126 Senate S.O. 127.

127 S.O.s 162, 262–6; Senate S.O.s 127, 156–62.

conferences of delegates or managers representing the two Houses have been used only for this purpose.<sup>128</sup> Only two such conferences have ever been held,<sup>129</sup> and it seems unlikely that a formal conference would be used to resolve disagreements between the Houses in contemporary political circumstances. Resolution of disagreements over legislation is more likely to be achieved behind the scenes by Ministers negotiating directly with parties represented in the Senate and individual Senators.

### Unofficial conference

In 1921 an unofficial committee<sup>130</sup> of three Members of each House (also referred to as representatives of the two Houses ‘in conference’) considered an amendment requested by the Senate to the Appropriation Bill 1921–22. The amendment would have reduced a salary increase for the Clerk of the House so as to maintain parity with the Clerk of the Senate. The committee recommended that there should be uniformity in salaries of the chief officers in the Senate and the House of Representatives, and that in the future preparation of the estimates this uniformity should be observed. The House endorsed the recommendations and gave the necessary authority to Mr Speaker to carry them into effect. In view of this the Senate did not press its request for amendment.<sup>131</sup>

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128 For details of proposed conferences of all members of both Houses *see* ‘Joint meetings’ in the Chapter on ‘Order of business and the sitting day’.

129 In 1930 and 1931, requested by the House in relation to Senate amendments to House bills. The only other conference proposed on a bill was in 1950 when the Senate requested a conference on House amendments to a Senate bill, but the House did not agree to the request. A more detailed account of these conferences and the relevant standing orders can be found in the 6th edition (pp. 467–9) and earlier editions.

130 That is, appointed by and reporting to the Government rather than the Houses, *see* S. Deb. (10.12.1921) 14280–1.

131 VP 1920–21/863–4 (9.12.1921); H.R. Deb. (9.12.1921) 14256–61, 14261.

