

**How far do sections 53 and 56 of the Australian Constitution
secure a financial initiative of the executive?**

Glenn Worthington

Sections 53 and 56 of the Australian Constitution set out the functions of the three elements of parliament, the Crown, the Senate and the House of Representatives, in proposing how public funds are raised and spent. The Senate and the House have disagreed on how far the sections limit the power of the Senate to initiate or amend proposals that may increase the amount of revenue raised and spent by government. The disagreement arises as a result of a practice, which developed through the latter half of the twentieth century, of parliament granting government unspecified amounts to fund programs known as special appropriations. The disagreement can be understood in terms of a dispute over the operation of the financial initiative of the executive and has implications for the character of responsible and representative government at the national level. This paper outlines the constitutional procedure by which the Commonwealth Parliament raises and spends public funds and explores the way in which a financial initiative of the executive secures responsible and representative government within Westminster systems of government. The specific differences between Senate and House understandings of requirements imposed by sections 53 and 56 are then outlined and assessed in terms of how they reflect a financial initiative of the executive and, through this, the character of responsible and representative government in Australia.

Barring a few notable exceptions, little public attention has been paid to the specific requirements under sections 53 and 56.¹ In instances where disagreement between the houses has come to the public's attention, where the House has refused to consider a Senate proposal on the grounds that it may increase a charge on the people, the disagreement may be explained away as a political device reflecting the different complexions and conveniences of non-government and government dominated chambers. Beyond this political dimension, however, lies a more fundamental

¹ See Gabrielle Appleby & John Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate?', *Public Law Review*, 20 (2009). Paul Schoff, 'Charge or burden on the people: The origins and meaning of the third paragraph of section 53 of the Commonwealth Constitution, *Federal*

disagreement about the Constitution. The differing accounts of sections 53 and 56 can be found in statements by the presiding officers and advice of the clerks of each house of parliament, contributions to parliamentary debates by senators and members, reports of parliamentary committees and in *House of Representatives Practice* and *Odgers' Australian Senate Practice*, which are edited by the clerks of the respective chambers.

How the Commonwealth Parliament raises and spends money

The requirements imposed by sections 53 and 56 are part of the mechanism by which public funds are raised and spent by the Commonwealth Government. The Commonwealth Parliament raises money primarily through the imposition of taxation measures and custom and tariff excises. These funds are paid into a Consolidated Revenue Fund.² Any appropriation from the Consolidated Revenue Fund must be done by law.³ Thus all measures to fund government expenditure require the agreement of the three elements of the Parliament. While the concurrence of the three elements is required to spend money (each has the power to veto a proposal), the Constitution provides very specific powers to each in relation to proposing how funds are to be raised and the purposes for which they are to be spent. These powers are set out in sections 53, 54, 55 and 56 of the Constitution and are of such significance to what follows that it is worth representing them here in full.

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

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

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

Law Review, 24(1), (1996), Anne Twomey, 'Senate power in relation to money bills: An historical perspective', *Research Paper No 5*, 1994, Department of the Parliamentary Library.

² The Constitution, Section 81.

³ The Constitution, Section 83.

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 there in. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

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

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of custom or excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

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

At a glance, section 53 specifies that proposals to raise or appropriate money cannot be initiated in the Senate (excepting the imposition of fines, penalties or fees). In effect, section 53 vests in the House of Representatives an exclusive power to initiate proposals to tax and spend. Further, it restrains the Senate from amending proposals to tax or for funds for the ordinary annual services of government and, more generally, any proposal so as to increase any charge or burden on the people. Sections 54 and 55 place limits on the scope of bills and laws that cannot be amended by the Senate. Bills appropriating funds for the ordinary annual services of government and taxation measures must deal only with the specific purpose for which they are proposed. The House is thereby prevented from ‘tacking’ on to a bill that is not subject to amendment by the Senate, measures that the Senate might otherwise amend. Nor can the House hold the Senate to ransom by lumping in unacceptable proposals to tax with bills that also contain acceptable proposals. The House must allow the Senate to consider each proposed tax as an individual item. Section 56 requires that the House receive a message from the Governor-General recommending the purpose of the appropriation in the same parliamentary session that it passes the bill. As the Governor-General acts on ministerial advice, section 56 establishes

ministerial primacy in relation to proposed appropriations. Together, sections 53 and 56 establish a financial initiative of the executive and they require that the government of the day is responsible to parliament primarily through the House of Representatives. Sections 54 and 55 guard the non-executive element of parliament, the Senate, against executive abuse of its financial primacy.

In relation to section 53, the Senate and the House have disagreed on the scope of the limits imposed on the Senate's power to amend bills by the third paragraph; namely that it may not amend any bill so as to increase any burden or charge upon the people. The disagreement revolves around what type of proposal constitutes an appropriation of funds and thus what constitutes a charge on the people. This disagreement takes on a potentially intractable quality when the non-justiciability of section 53 is taken into account. Sir Samuel Griffith, the first Chief Justice of the High Court of Australia, outlined the basis of the non-justiciability of section 53:

Secs. 53 and 54 deal with "proposed laws" – that is, Bills or projects of law still under consideration and not assented to – and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by these sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law.⁴

The judiciary deals with what is law rather than proposals to make law. As section 53 refers to 'proposed laws' rather than 'laws', disagreement over the application or meaning of section 53 cannot be resolved by appeal to an authority beyond the houses themselves. In fact, 'The possible absence of justiciability places ... a greater obligation on the legislature to observe constitutional requirements.'⁵ In other words, the lack of justiciability attaching to section 53 could provide added impetus for parties in disagreement to stick to their guns.

In relation to section 56, differences have arisen between the houses regarding what types of bills are viewed as requiring a message from the Governor-General recommending the purposes of an appropriation. As in the case of section 53, at the root of the difference is disagreement over what constitutes a proposal to appropriate

⁴ Griffith CJ, *Osborne v. Commonwealth*, 12 CLR 321 (31 May 1911).

⁵ Correspondence from Mr I. C. Harris AO, Clerk of the House of Representatives, to Mr Harry Jenkins MP, Speaker of the House of Representatives, 22 September 2008, p. 7.

funds. However in this instance, the difference is manifest in divergent views on the right of private senators (and, some have argued private members)⁶ to propose measures that may increase expenditure. Claims have been made that section 56 does not prohibit a private senator from initiating a proposal that may increase expenditure. An argument has also been mounted that section 56 does not, of itself, restrict private members of the House from initiating proposals that would directly increase expenditure.

The financial initiative of the executive: responsible and representative government

Together, sections 53 and 56 provide for a financial initiative of the executive. They invest an exclusive power in ministers, appointed by the executive, to propose how public funds are spent (section 56) and require that the ministry enjoys the confidence of the House of Representatives in order to fund its government (section 53). The Governor-General's message recommending the purposes of a proposed appropriation required under section 56 is significant because in practice such a recommendation is only available on the advice of a minister.⁷ Historically, the financial initiative of the executive reflects the centuries old practice of the crown calling parliament to grant the funds it requires: the crown seeks and parliament grants or declines the funds. A benefit of adhering to this principle has been identified in:

the results which followed from its absence, of the scramble among members of the Legislature to obtain a share of the public money for their respective constituencies, of the "log rolling", and of the predominance of local interests to the entire neglect of the public interest...⁸

The financial initiative of the executive ensures that public money is provided for purposes that government declares to be public goods. The principle has by no means eliminated accusations of 'log rolling', or 'pork-barrelling' as it is more commonly known.⁹ The charge of pork-barrelling has been directed at governments to indicate

⁶ That is all senators and members who do not belong to the ministry: all senators and members (both government and opposition) who sit on the back and cross benches and opposition front benches.

⁷ Correspondence from Mr I. C. Harris AO, Clerk of the House of Representatives, to Mr Harry Jenkins MP, Speaker of the House of Representatives, 22 September 2008, p. 2.

⁸ J. Quick & R. R. Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, p. 681 citing E. Hearn, *The Government of England*.

⁹ See G. Appleby and J. Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate?', *Public Law Review* 20 (2009), especially pp. 197-198.

cases, for instance, where public funds are alleged to have been spent to maintain support in key electorates. Accusations of allocating public funds to support private or sectional ends merely underpin the importance and desirability of the principles underlying the financial initiative of the executive.

The financial primacy of the lower house provided for under section 53 can be traced at least to the assertion or re-assertion of the rights of the House of Commons following the English civil wars and Restoration of 1660.¹⁰ In 1671 the Commons resolved: ‘That in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords...’¹¹ The lower house amplified the terms of its financial powers in 1678 by declaring its exclusive right to propose how public funds would be spent:

That all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations and qualifications of such grants, which ought not to be changed or altered by the House of Lords.¹²

May associates the claims and practices establishing the financial powers of the Commons with its representative character:

The dominant influence enjoyed by the House of Commons within Parliament may be ascribed principally to its status as an elected assembly, the members of which serve as the chosen representatives of the people. As such the House of Commons possesses the most important power vested in any branch of the legislature, the right of imposing taxes upon the people and of voting money for the public service.¹³

¹⁰ The fourth edition of *May’s Treatise* (1859) traces the financial primacy of the Commons back to 1407 where Henry IV’s ordinance ‘The Indemnity of the Lords and Commons’ stated that ‘grants were “granted by the Commons and assented by the Lords...’, p. 503. But see R. W. Perceval, ‘The Commons Grant, the Lords Assent’, *Parliamentary Affairs*, 1951

¹¹ W. McKay, (ed.), *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, Lexis Nexis, 2004, p. 918.

¹² W. McKay, (ed.), *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, Lexis Nexis, 2004, p. 918. Cf. I. C. Harris, B. C. Wright & P. E. Fowler (eds.), *House of Representatives Practice*, 5th edition, Department of the House of Representatives, 2005, p. 408.

¹³ W. McKay, (ed.), *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, Lexis Nexis, 2004, p. 73.

The exclusive right of the lower house to raise and spend public money is rooted in its being representative of, and therefore accountable to, the public from whom the funds are compelled and on whose behalf they are spent. The financial power of the lower house has made it the primary source of advice to the executive government: the government of the day requires the confidence of the lower house to raise and propose how funds should be spent.¹⁴

It should be noted that the representative basis for financial primacy of the Commons over the Lords does not strictly hold in the Australian context where both houses are elected. The House of Lords lost its power to block legislation, including financial bills, as a result of the Parliament Act 1911. However, the elected character of the Senate provides support for its constitutional power to decline to pass a bill including proposals to tax or appropriate funds. The first edition of the *Australian Senate Practice* explains:

British constitutional law and practice has always recognized that the more directly the Upper House is responsible to the people, the greater the powers to be conferred upon it. Therefore the powers granted to the Upper House have always been in proportion to its elected or nominee nature [for example] ... The Senates of Canada and Australia are the two extremes in constitution – the former the most conservative and the latter the most democratic of all British Upper Houses.¹⁵

The Senate's power to refuse supply to a government diminishes the conventions of responsible government by raising the possibility that a government could be held responsible to two houses of differing political complexion. This occurred in 1974

¹⁴ See I. C. Harris, B. C. Wright & P. E. Fowler (eds.), *House of Representatives Practice*, 5th edition, Department of the House of Representatives, 2005, p. 320:

If the House expressed no confidence in the Prime Minister, convention would require that, having lost the support of the majority of the House of Representatives, the Ministry as a whole should resign, or alternatively the Prime Minister may advise dissolution. The only occasion that a motion of censure of or no confidence in a Prime Minister has been successful was on 11 November 1975, when, following the dismissal of the Whitlam Government, a motion of no confidence in newly commissioned Prime Minister Fraser was agreed to. The terms of the motion also requested the Speaker to advise the Governor-General to call another Member, the former Prime Minister, to form a Government. The sitting was suspended to enable the Speaker to convey the resolution to the Governor-General, but did not resume as the House was dissolved by proclamation of the Governor-General.

¹⁵ Citing Mr Owen Clough (former Clerk of the South African Senate), Paper No S. 1 of 1912, p. 20, of the Parliament of the Union of South Africa, see J. R. Odgers, *Australian Senate Practice*, Government Printing Office, 1953, p. 135.

and 1975.¹⁶ However, the House of Representatives' exclusive power to propose how public funds are to be raised and spent acknowledges that 'the Senate ... is not an equitably representative body in the sense that the House is...'¹⁷ While the Senate may deny funds to government, there has been no suggestion that it propose how funds are to be spent which would amount to active governing. The Senate may be elected but it is based on a gerrymander operating across its electoral divisions (that is the states and territories), whereas the House is more certainly representative of the majority of the Australian electorate.

What is a proposal to appropriate? Section 53 and its third paragraph

The overall effect of section 53 provides the House with the exclusive power to propose measures to raise funds and appropriate from the Consolidated Revenue Fund. *House Practice* and *Odgers'* both acknowledge the breadth of possible interpretations of the third paragraph of section 53, which prohibits the Senate from increasing the burden or charge upon the people. *House Practice* describes the limits of the interpretative spectrum:

At one extreme, almost every [Senate] amendment will cause some degree of "charge or burden upon the people", 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.¹⁸

Odgers' maps similar boundaries. On the one hand:

a very loose interpretation ... could ... lead ... to virtually every amendment becoming a request because virtually every amendment has an impact on an appropriation which exists somewhere.¹⁹

On a loose interpretation, the Senate would have very little scope to amend or initiate any proposed laws in its own right; instead having to request that the House do so in

¹⁶ See I. C. Harris, B. C. Wright & P. E. Fowler (eds.), *House of Representatives Practice*, 5th edition, Department of the House of Representatives, 2005, p. 469 and Gabrielle Appleby & John Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate?', for instance, *Public Law Review*, 20 (2009), pp. 202-203.

¹⁷ I. C. Harris, B. C. Wright & P. E. Fowler (eds.), *House of Representatives Practice*, 5th edition, Department of the House of Representatives, 2005, p. 469.

¹⁸ I. C. Harris, B. C. Wright & P. E. Fowler (eds.), *House of Representatives Practice*, 5th edition, Department of the House of Representatives, 2005, p. 437.

¹⁹ H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 288, cf. p. 294.

accordance with the fourth paragraph of section 53.²⁰ On the other hand: ‘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.’²¹ On this ‘strict interpretation’, the third paragraph would not apply to:

an amendment to a bill which did not itself contain an appropriation but which amended an act which contained an appropriation in such a way as to affect expenditure under the appropriation.²²

Thus, restraints imposed upon the Senate by the third paragraph would be limited to amending bills that directly provide for appropriations in a way that would increase the amount appropriated.

In 1994, following a series of disagreements between the Senate and the House in relation to the applicability of the third paragraph, each house referred the matter of the interpretation and application of the third paragraph of section 53 to its standing committee on legal and constitutional affairs.²³ The House of Representatives committee presented its report in November 1995.²⁴ The penultimate recommendation captures the thrust of the report:

that 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.²⁵

In presenting the report the Chair summarised the Committee’s findings:

The broad policy of section 53 is often shortened to a simple formula, that section 53 supports the financial initiative of the House of Representatives. Within the section, the general language of the third paragraph ensures that the

²⁰ 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 there in. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

²¹ H. Evans, ed., *Odgers’ Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 288.

²² H. Evans, ed., *Odgers’ Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 287.

²³ House of Representatives, *Votes and Proceedings*, 24 March 1994, p. 903 and Senate, *Senate Journals*, 4 May 1994, p. 1585.

²⁴ House of Representatives, *Votes and Proceedings*, 30 November 1995, p. 2680.

²⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, *The Third Paragraph of Section 53 of the Constitution*, Recommendation 12.

policy is not applied in a narrow or technical manner. It prevents a bill escaping the net of the broad policy on a technicality.²⁶

The committee took the view that any proposal that could increase expenditure, and thus the possible amount appropriated, should not be initiated in the Senate. The report has received no response to date and thus cannot be said to reflect the view of the House.

The House has supported a moderate version of the committee's view of the third paragraph. Instead of focusing on the possibility of increasing expenditure, it has invoked probability and intentionality by declaring that 'a bill which is intended to have the effect, and which would, if enacted, have the effect of increasing expenditure should be introduced in the House of Representatives.'²⁷ *House Practice* reiterates:

In examining any such question [on the applicability of the third paragraph], the better course is to ask what the probable, expected or intended practical consequences of the proposed amendment.²⁸

This understanding suggests that a proposal that increases expenditure necessarily increases the amount appropriated from the Consolidated Revenue Fund and thus should be treated as a proposal to increase the burden on the people. A proposal to increase expenditure amounts to a proposed increase in the amount appropriated. The House and the committee agreed that that an increase in expenditure should be understood as an increase in the amount appropriated and thus ought to originate in the House. They disagreed, however, on the grounds for viewing a proposal as increasing expenditure. The committee argued that any possible increase should be understood as an increase whereas the House has preferred to refer to a probable or intentional increase.

In May 1996, the Senate Legal and Constitutional References Committee recommended that the inquiry into the third paragraph be discontinued and that the Senate Procedure Committee be tasked with examining the feasibility of establishing

²⁶ House of Representatives, *Official Hansard*, 30 November 1995, p. 4199.

²⁷ House of Representatives, *Votes and Proceedings*, 23 September 2008, p. 554.

²⁸ I. C. Harris, B. C. Wright & P. E. Fowler (eds.), *House of Representatives Practice*, 5th edition, Department of the House of Representatives, 2005, p. 437.

a compact between the houses on the operation of the third paragraph.²⁹ The Senate adopted the report and the Procedure Committee's report on section 53 of the Constitution was presented in November 1996.³⁰ The Senate Procedure Committee's report observed of the House committee's position:

A fundamental problem ... is a tendency to see the third paragraph through Westminster-system spectacles. There is an underlying assumption that section 53 of the Constitution puts in place an only slightly modified House of Commons/House of Lords relationship, whereby the upper house cannot amend any measure involving money.³¹

The significant point at which the Australian Constitution diverges from the arrangement at Westminster is the upper house's power to block a financial bill.³²

The key Senate committee recommendation proposed that the third paragraph applies

in respect of appropriations only if such bills contain appropriations or amend acts which contain appropriations ... and does not apply to bills originating in the Senate.³³

The Senate committee report argued that a consequence of any less-than-strict interpretation of the third paragraph 'would be that more and more amendments would become requests, to a point where there would be very little scope for amendments at all.'³⁴ Under a loose interpretation of the third paragraph, the Senate could effectively lose its power to initiate or amend any legislation.

The committee invoked John Quick and Robert Garran's authoritative commentary on the Australian Constitution in support of a strict interpretation of the third paragraph.³⁵ Quick and Garran stated:

This provision may be described as a limitation on the reserved power of the Senate to amend money bills, other than tax bills and annual appropriation

²⁹ Senate, *Senate Journals*, 29 May 1996, pp. 259-60.

³⁰ Senate, *Senate Journals*, 4 November 1996, p. 836.

³¹ Senate Standing Committee on Procedure, *First Report of 1996: Section 53 of the Constitution: Incorporation into the Standing orders of Continuing and sessional Orders*, November 1996, p. 2.

³² For instance, all appropriation is required to be done by an act of law. See the Constitution, Section 83

³³ Senate Standing Committee on Procedure, *First Report of 1996: Section 53 of the Constitution: Incorporation into the Standing orders of Continuing and Sessional Orders*, November 1996, p. 7.

³⁴ Senate Standing Committee on Procedure, *First Report of 1996: Section 53 of the Constitution: Incorporation into the Standing orders of Continuing and Sessional Orders*, November 1996, p. 2.

³⁵ Senate Standing Committee on Procedure, *First Report of 1996: Section 53 of the Constitution: Incorporation into the Standing orders of Continuing and Sessional Orders*, November 1996, p. 3.

bills ... [Under section 53] the Senate may amend two kinds of expenditure bills, viz: those for permanent and extraordinary appropriations ... The Senate may amend such money bills so as to reduce the total amount of expenditure or change the method, object, and destination of the expenditure, but not to increase the total expenditure originated by the House Of Representatives.³⁶

Quick and Garran limit the application of the third paragraph to money bills that is bills that directly raise appropriations. *Odgers'* has developed Quick and Garran's account into a 'general principle' underlying section 53; namely that the Senate may 'not initiate by way of amendment that which it may not initiate by way of its own bill.'³⁷ Section 53 explicitly prohibits the Senate from initiating bills appropriating funds or imposing taxation. Senate amendment of taxation bills and bills appropriating funds for the ordinary annual services of government is also explicitly prohibited. The prohibition on amending appropriation bills (other than for the ordinary annual services of government) so as to increase the appropriation is to be found in the third paragraph. On this understanding, although the terms of the third paragraph impose a general restriction against the Senate amending *any* bill that increases *any* charge or burden upon the people, it should be understood as only prohibiting Senate amendment of any appropriation bill so as to directly increase an appropriation. Thus, *Odgers'* maintains that:

an amendment to a bill ... should not be regarded as increasing a proposed charge or burden unless the amendment would clearly, necessarily and directly cause an increase in expenditure under the appropriation.³⁸

Senate alterations that increase a rate of payment or introduce or broaden a category of recipients for payments are, on this understanding, permissible as long as the amendment is not to a bill that makes the appropriation.

Odgers' supports a strict interpretation of the third paragraph with reference to the nature and increased use of special appropriations. Special appropriation bills are 'bills appropriating money for special purposes, including bills which make

³⁶ J. Quick & R. R. Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, p. 671.

³⁷ H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 284.

³⁸ H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 293.

continuing and indefinite appropriations...'³⁹ *Odgers*' explains the use of special appropriations in terms of the difficulty of determining the financial impact that a measure may have:

The provisions [of a bill funded by special appropriation] 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. The 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 legislation.⁴⁰

Odgers' argues that a similar degree of uncertainty should be accorded any proposed amendment of measures funded by special appropriations:

This uncertainty ... has the effect of making it difficult to determine whether any particular amendment to 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.⁴¹

However, the amount a proposed measure may increase expenditure has a far greater deal of uncertainty than the fact that it is likely to increase expenditure at all.

Additionally, *Odgers*' claims the very nature of special appropriation presents problems for the application of the third paragraph:

Amendments which result in increases of expenditure from funds not yet appropriated or which authorise ministers to take action which may result in increased expenditure are not treated as requests...⁴²

³⁹ H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 272.

⁴⁰ H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 288. *Odgers*' (pp. 287-8) makes the following observation on the use of special appropriations:

These features are called unfortunate because, apart from complicating the interpretation [of the third paragraph], they also amount to a removal of appropriation and expenditure from parliamentary control and supervision.

While the point is fair, it should be noted that the Senate has an equal hand with the House in passing special appropriations.

⁴¹ H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 288.

⁴² H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 292.

On *Odgers'* view, the third paragraph should not apply where a proposed amendment would increase expenditure of funds that are appropriated in a measure that is not the direct object of the amendment or where the funds are yet to be appropriated.

Quick and Garran made no comment on the applicability of the third paragraph to a measure that might indirectly increase expenditure under a special appropriation because:

it is not likely that a policy of special appropriations will be largely favoured, because it removes expenditure from the annual supervision and control of Parliament.⁴³

However, the use of special appropriations increased dramatically through the first century of federation. Gordon Reid and Martyn Forrest noted that until the 1943 National Welfare Bill, special or permanent appropriations were 'relatively small'.⁴⁴ In 1965-66 standing appropriations constituted 44 per cent of the government's annual expenditure, and had increased to 68 per cent by 1985-86. This trend has continued:

In 2002-03, more than \$223 billion was spent from the [Consolidated Revenue Fund] under the authority of Special Appropriations. This represented more than 80 per cent of all appropriation drawings for the year.⁴⁵

An example of the type of proposal available to the Senate under the strict interpretation of the third paragraph but declared unconstitutional on the House's understanding can be found in the *Urgent Relief for Single Aged Pensioners Bill 2008*.⁴⁶ The bill sought to amend the *Social Security Act 1991* and the *Veteran's Entitlement Act 1986* to increase the single age pension, the single age service pension and the Widow B pension by \$30 per week. Clerks of the Senate and the House of Representatives provided very different advice on the constitutional propriety of the bill. The Clerk of the Senate advised the Leader of the Opposition in the Senate that

⁴³ J. Quick & R. R. Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, p. 670.

⁴⁴ G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988: Ten Perspectives*, Melbourne, Melbourne University Press, 1989, pp. 351-2.

⁴⁵ Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No. 15, 2004-05, p. 11.

⁴⁶ Senate, *Journals of the Senate*, 22 September 2008, pp. 889, 897 and 899.

‘There is no barrier to the introduction of such a bill in the Senate.’⁴⁷ In debate on the committee stage of the bill, the Manager of Opposition Business in the Senate argued:

a bill to increase the rate of age pensions does not need to contain an appropriation of money ... Age pensions and other entitlements under the Social Security Act 1991 are automatically paid under a special appropriation of indefinite duration and unlimited amount ... Any increase in pensions is paid for under that appropriation without any necessity for any further appropriation to be made.⁴⁸

The Clerk of the House advised the Speaker that ‘it is entirely for the Senate what business is transacted there and what views are taken there about the constitutional framework and restrictions’. However, should the bill be transmitted to the House, members’ attention should be drawn to a number of issues relating to the ‘role and rights of the House of Representatives within the constitutional framework.’⁴⁹ The day following its passage through the Senate, the House received a message transmitting the bill.⁵⁰ The Speaker presented a copy of the Clerk’s advice and the House resolved that it:

- (1) notes the statement of the Speaker concerning the constitutional issues associated with this bill;
- (2) is of the opinion that a bill which is intended to have the effect, and which would, if enacted, have the effect of increasing expenditure under a standing appropriation:
 - (a) should be introduced in the House of Representatives; and
 - (b) would require a message from the Governor- General in accordance with section 56 of the Constitution; and
- (3) believes that it is not in accordance with the constitutional provisions concerning the powers of the houses in respect of legislation as they have been applied in the House for such a measure to have originated in the Senate, and therefore declines to consider the Urgent Relief for Single Age Pensioners Bill transmitted from the Senate.⁵¹

⁴⁷ Correspondence from Mr H. Evans, Clerk of the Senate, to Senator the Hon N. Minchin, Leader of the Opposition in the Senate, 15 September 2008, p. 1.

⁴⁸ Senate, *Official Hansard*, 22 September 2008, p. 5252.

⁴⁹ Correspondence from Mr I. C. Harris AO, Clerk of the House of Representatives, to Mr Harry Jenkins MP, Speaker of the House of Representatives, 22 September 2008, pp. 6-7.

⁵⁰ House of Representatives, *Votes and Proceedings*, 2008, p. 553.

⁵¹ House of Representatives, *Votes and Proceedings*, 23 September 2008, p. 554.

The following year the *Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Bill 2009* was introduced into the House.⁵² Among other measures this bill, provided for:

a one-off increase in the single rate of pension of \$30 a week. The increase will apply to the Age Pension, Disability Support Pension (DSP), Service Pension, Carer Payment, Wife Pension, Widow B Pension and Income Support Supplement.⁵³

The bill received assent on 29 June 2009. On a political level, the disagreement between the houses was over the timing and categories of welfare payments to be increased. However, underlying the political dimension was a dispute concerning the powers of the Senate to propose such a measure.

Three differing accounts of the scope of the third paragraph of section 53 have been canvassed. The first presented in the House Committee on Legal and Constitutional Affairs report on the third paragraph proposes that the paragraph should be understood as restricting the Senate from any action that could possibly increase expenditure. The second account presented in the advice of the Clerk of the House and the resolutions of the House suggests that the third paragraph should be understood as restricting the Senate from actions that intentionally or will probably increase expenditure. The third presented in advice from the Clerk of the Senate and the report of Senate Procedure Committee on the third paragraph suggests that the paragraph should be understood as restricting the Senate from making amendments that directly and necessarily increase the amount appropriated. The first and third understandings conform to the loose and strict understandings of the third paragraph as outlined in *Odgers'*. The second interpretation charts a middle path where each proposal is understood in terms of its probable consequences for expenditure. It suggests that a specific proposal can reasonably be understood in terms of its probable increase in expenditure (even if the precise amount by which expenditure might increase remains unknown) and thus the amount to be appropriated. If as a result of a Senate proposal the amount appropriated is likely to be higher than it otherwise would

⁵² House of Representatives, *Votes and Proceedings*, 15 June 2009, p. 1116.

⁵³ Social Security and Other Legislation Amendment Bill (Pension Reform and Other 2009 Budget Measures) 200, *Bills Digests No. 179*, 23 June 2009, Parliamentary Library, Department of Parliamentary Services, p. 7.

have been, the proposal should be communicated by way of request rather than amendment or initiated in the House.

Gabrielle Appleby and John Williams have argued that:

The alternative tests offered by the clerks of the two Houses can be criticised on a number of grounds. First, all proposed tests lack any textual support from within the *Constitution*, and moreover they distract attention from the constitutional text. Secondly, they lack the requisite clarity, coherency and operability to be useful in application. Thirdly, there would appear to be no accepted precedent and no agreed convention. Finally, even if there were a convention, it is binding only to the degree that both houses accept that they are bound by it. To date there has been little or no agreement.⁵⁴

Appleby and Williams' first and second grounds propose a number of criteria on which to assess the various views of the third paragraph. It should be noted, however, that textual faithfulness, clarity and coherency, and operability do not necessarily support any one of the three cases outlined.

In support of their first ground, Appleby and Williams point out that the Constitution is silent on any distinction between direct and indirect increase of charge or intended and unintended consequences of a proposed measure.⁵⁵ The Constitution simply states that the Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. This observation supports an understanding that would prohibit the Senate from any proposal that would result in any increase in the amount appropriated. A consideration of constitutional text would appear to recommend the view proposed by the House of Representatives Committee on Legal and Constitutional Affairs restricting the Senate from any measure that could make any increase in the charge legally possible. However, *Odgers'* and *House Practice* have both expressed concerns about 'loose' interpretations of the third paragraph. Attributing a broad ranging scope to the third paragraph could restrict the Senate from proposing almost any amendment or initiating almost any bill. It may also appear to be at odds with (at least the spirit) of the final paragraph of section 53 which provides

⁵⁴ G. Appleby and J. Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate?', for instance, *Public Law Review* 20 (2009), p. 210.

⁵⁵ G. Appleby and J. Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate?', *Public Law Review* 20 (2009), pp. 208-210.

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

Appleby and Williams' second ground for finding the views of the two clerks' wanting refers to 'a lack of clarity, coherency and operability to be useful in application.' However, clarity and operability are not necessarily consistent virtues. Of the three views canvassed in the current paper, the Senate view is perhaps the most clear and the House of Representatives view is most practical and operable. On the one hand, *Odgers'* development of a general principle that restricts the operation of the third paragraph to proposed laws that directly and explicitly make appropriations or impose taxation measures draws clear bounds on the restrictions it imposes. However, taking into account the increasing prevalence of funding measures through special appropriations, the principle is not so operable as may appear at first glance. *Odgers'* principle either allows significant trampling of the financial initiative of the executive or requires the cessation of funding by special appropriation. A position that compromises the financial initiative of the executive diminishes responsible and representative government and could not be deemed consistent with the words of the third paragraph. Furthermore, requiring an end to funding by special appropriation is not practicable for the purposes of government (although, as is argued in *Odgers'* may be very practicable in terms of parliamentary scrutiny of government). Given current practices, the Senate view, while clear, is problematic on grounds of operability and useful application. On the other hand, the House view may not be so entirely clear – it recommends a case by case consideration of proposals rather than the imposition of a general principle – but its appeal lies in its operability. While the third paragraph makes no reference to the intention of a Senate amendment, a reasonable and entirely practical basis for consideration of the applicability of the third paragraph would be the probable outcome of a proposed measure in terms of it increasing expenditure and thus the amount appropriated.

In short, Appleby and Williams' first two grounds for testing the desirability of contending interpretations of the third paragraph do not recommend support for a single position. The actual text of the Constitution must be taken into consideration as providing a framework for the operation of any inter-mural arrangement regarding the passage of financial legislation; it is for the houses to agree within the framework

whether they prefer clarity or operability. The question remains; which of the three criteria should be settled upon as the most appropriate understanding of the third paragraph; clarity or operability? The practical requirements attaching to the business of government and the desirability of the financial initiative of the executive may recommend considerations of operability over other criteria. Finally, in the absence of an agreed test, disagreement will continue on a case by case basis.

Is section 56 an effective bar to log rolling?

Disagreement between the Senate and the House regarding the limits imposed on the Senate's power by section 53 is reflected in differing views concerning the application of section 56. *House Practice* and *Odgers'* agree that the requirement that 'a message from the Governor-General be received by the House in which the bill originated' refers 'for all practical purposes, [to] the House of Representatives.'⁵⁶ *Odgers'* explains that:

As appropriation bills must originate in the House of Representatives, the section applies in practice only to that House, and Governor-General's messages of this kind are not produced in the Senate.⁵⁷

Accordingly, Senate Standing Orders do not provide for receipt of messages from the Governor-General recommending an appropriation. So, both houses agree that the House of Representatives is the house referred to in section 56.

Different practices arise, once again, as a result of disagreement over what constitutes an appropriation and therefore what sorts of measures require a message from the Governor-General. As seen in the previous section, *Odgers'* argues that the Senate may propose an amendment that could increase expenditure from a special appropriation. However, the Senate has no provision for receipt of a message from the Governor-General. The application of section 56 is limited, on this understanding to appropriation bills 'strictly' understood as bills that explicitly provide for an appropriation of funds, which the Senate may not initiate or amend so as to increase

⁵⁶ H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 277.

⁵⁷ H. Evans, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p. 453.

the amount appropriated. Senate arrangements contrast with procedures of the House set out under Standing Order 180:

- (a) All proposals for the appropriation of revenue or moneys require a message to the House from the Governor-General recommending the purpose of the appropriation in accordance with section 56 of the Constitution.
- (b) For an Appropriation or Supply Bill, the message must be announced before the bill is introduced.
- (c) For other bills appropriating revenue or moneys, a Minister may introduce the bill and the bill may be proceeded with before the message is announced...⁵⁸

The specification at clause (c) of ‘other bills appropriating revenue or moneys’ refers to bills intended or likely to increase expenditure. A proposal to increase expenditure thus requires a message from the Governor-General:

If a bill is intended or expected to increase expenditure under a standing appropriation ... a message under section 56 of the Constitution recommending an appropriation for the purposes of the measure proposed to be made by the bill is sought from the Governor-General...⁵⁹

Under House procedures any measure that is expected to increase expenditure requires a message from the Governor-General. This was the case with the passage of the *Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Bill 2009* referred to above.⁶⁰

The practical significance of the requirement of a Governor-General’s message is that it is ‘only available on the recommendation of members of the executive’, that is ministers.⁶¹ Thus, House standing orders effectively limit the initiation of proposals that would increase expenditure, whether directly or indirectly, to ministers. This contrasts with the situation in the Senate where any proposed measure that does not directly or necessarily increase expenditure is permitted equally to private senators and senators who are ministers. While it is not for either house to reflect on the

⁵⁸ House of Representatives, *Standing and Sessional Orders as at 1 December 2008*.

⁵⁹ Correspondence from Mr I. C. Harris AO, Clerk of the House of Representatives, to Mr Harry Jenkins MP, Speaker of the House of Representatives, 22 September 2008, p. 2.

⁶⁰ House of Representatives, *Votes and Proceedings*, 17 June 2009, p. 1132.

⁶¹ Correspondence from Mr I. C. Harris AO, Clerk of the House of Representatives, to Mr Harry Jenkins MP, Speaker of the House of Representatives, 22 September 2008, p. 2.

internal procedures and operations of the other, a proposal that has been initiated by a private senator that is judged likely to increase expenditure is unlikely to be well received in a chamber where the right of a private members to make such proposals is seen as infringing the financial initiative of the executive.

Thus, the disagreement between the Senate and the House on the applicability of section 56 to measures that may indirectly increase an appropriation translates into a difference concerning the right of private senators and members to propose measures that would likely increase expenditure. Gordon Reid and Martyn Forrest have argued that the Constitution imposes no prohibition on private:

members ... moving amendments to “proposed laws appropriating revenue or moneys”, but merely made it mandatory that “A vote, resolution or proposed law” with such intent “*shall not be passed* unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General.” ... [Furthermore] the Constitution ‘did not, in any of its sections, place restraints of any kind upon members of the House, introducing or amending taxing legislation...’⁶²

Reid and Forrest have identified the origins of the restriction on private members’ rights, not in the Constitution, but in amendments to House standing orders in 1963.⁶³ They argue that the amended procedures effectively removed the right of private members to introduce proposals that might increase an appropriation. The post 1963 regime, which continues under Standing Order 180, provides that “shall not be passed” ... really meant “shall not be introduced”.⁶⁴ The Constitution is silent on matters of the introduction of measures to appropriate funds without a message from the Governor-General – the prohibition is on the passing of such measures.

Reid and Forrest imply that private members could introduce amendments to increase expenditure prior to the 1963 amendment of the standing orders; however, this suggestion is questionable. The original arrangements for dealing with financial bills adopted in 1901 provided that:

⁶² G. S. Reid & M. Forrest, *Australia’s Commonwealth Parliament 1901-1988: Ten Perspectives*, (Melbourne University Press, 1989), p. 159.

⁶³ G. S. Reid & M. Forrest, *Australia’s Commonwealth Parliament 1901-1988: Ten Perspectives*, (Melbourne University Press, 1989), p. 158.

⁶⁴ G. S. Reid & M. Forrest, *Australia’s Commonwealth Parliament 1901-1988: Ten Perspectives*, (Melbourne University Press, 1989), p. 159.

If any motion be made in the house for any public aid or charge upon the people, the consideration and debate thereof may not be presently entered upon, but shall be adjourned till such further day as the House shall think fit to appoint, and then it shall be referred to a Committee of the whole House before any resolution or vote of the House do pass thereon.⁶⁵

Standing orders 171 and 247 specified that in committee of the whole house:

No amendment for the imposition or the increase of a tax rate or duty shall be proposed by any non-official [that is private] members in any Committee on any Bill.

[And]

No amendment whereby the charge upon the people will be increased may be made to any such resolution, unless such charge so increased shall not exceed the charge already existing by virtue of any Act of Parliament.⁶⁶

While Reid and Forrest are correct in pointing out that the Constitution does not prohibit a private member from proposing increases to appropriation or taxation measures, it is incorrect to identify 1963 as the point at which private members lost this right. Standing orders of the House have always prohibited private members from amending appropriation proposals so as to increase expenditure. As such, House standing orders have always ensured that the financial initiative of the executive has prevailed through a ministerial mandate in these matters.

It could be argued that allowing private members the right to initiate measures to increase expenditure is not inconsistent with the financial initiative of the executive given the ultimate requirement under section 56. A successful private members motion to increase expenditure would still require a message from the Governor-General and would thus be subject to ministerial sanction. However, rather than viewing the standing orders as taking away members' rights to initiate proposals that increase expenditure, a more explicable view may be that they ensure the House's time is not wasted on matters that would not receive the required Governor-General's message. There is little point allowing initiation of a matter that is not able to be passed.

⁶⁵ House of Representatives, *Standing Orders*, (1901), Standing Order 243.

⁶⁶ House of Representatives, *Standing Orders*, (1901), Standing Orders 171 and 247.

Conclusion

Disagreements between the Senate and the House on the application of sections 53 and 56 of the Constitution boil down to a difference over what type of proposals should be understood as appropriations. The Senate reserves the right to propose measures that may or are likely to increase expenditure, and therefore the amount appropriated, as long as the proposal does not itself initiate or directly amend an appropriation. On this understanding, so long as the Senate does not propose directly increasing an appropriation the proposal falls outside of the financial initiative of the executive and is available. The House takes the view that any proposal that is likely to increase expenditure and therefore the amount appropriated falls within the financial initiative of the executive and thus requires to be initiated by a minister in the House of Representatives and be accompanied by a message recommending the purposes of the appropriation from the Governor-General.

Section 53 of the Constitution has been found to be non-justiciable and therefore the scope of the limitations it imposes on the Senate is a matter for the houses to agree without appeal to an external authority. However, the non-justiciability of section 53 does not preclude observations being made relating to which of the views sits most comfortably with the Constitution and their consequences in terms of the financial initiative of the executive and responsible and representative government. Appleby and Williams have found support for the House view in the Constitution:

Reference is not made to laws including an appropriation clause, but laws appropriating revenue. Its purpose and context require it to be read as to include any law which would increase appropriation – whether expressly by the inclusion of an appropriation clause or incidentally by increasing expenditures under a standing appropriation.⁶⁷

The wider scope of application of the section 53 favoured by the House is supported by the general language of the third paragraph, namely the prohibition of Senate amendment of *any* proposed law so as to increase *any* proposed charge or burden on the people. The general language of the third paragraph is uncharacteristically sloppy

⁶⁷ G. Appleby and J. Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate?', *Public Law Review* 20 (2009), pp. 211-212.

if the Senate is only restricted from amending appropriation bills so as to increase the charge.

Insofar as the views of the Senate and the House impact upon the financial initiative of the executive and the requirements of responsible and representative government, the Senate's strict interpretation of section 53 would allow it to make proposals that would increase expenditure and thus the amount appropriated. This understanding diminishes responsible government by allowing private senators to propose measures that would likely increase the expenditure of funds for purposes beyond those deemed necessary or recommended by executive government. Such a position would compromise perhaps the most often cited advantage of the financial initiative of the executive, that public funds are raised only for purposes required by the executive government with the consequent diminution of opportunities to 'log roll' or 'pork barrel'. The Senate view also raises questions of responsible and representative government. The power of the Senate to decline supply has already provoked the situations in 1974 and 1975 when the government found itself held to account by two elements of parliament, each with disparate political complexions. The power to increase expenditure claimed by the Senate would extend its ability to hold governments responsible by declining supply. The ability to increase expenditure is a claim (however qualified) to a financial initiative. This is tantamount to claiming a function to govern. Government through the Senate has implications for the character of representative government in Australia in so far as this house is constituted by a significant gerrymander.

