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CHAPTER 17

FINANCIAL LEGISLATION

Fundamental to the system of government in New South Wales is the capacity of the Executive to impose taxation for the purposes of raising revenue and to appropriate that revenue for the provision of public services and the implementation of government policies. Both taxation and appropriation require the legislative authority of the Parliament through the passage of 'money bills'.

The chapter examines the public accounts, types of money bills and the powers of the Council in relation to money bills.

THE PUBLIC ACCOUNTS

The New South Wales Government has traditionally operated a fund system for managing its public accounts. The current public accounts are the Consolidated Fund and the Special Deposits Account.[1]

The Consolidated Fund

The Consolidated Fund is the main State fund.[2] It is established under section 39 of the *Constitution Act 1902*:

> **39 Consolidated Fund**
>
> (1) Except as otherwise provided by or in accordance with any Act, all public moneys (including securities and all revenue, loans and other moneys whatsoever) collected, received or held by any person for or on behalf of the State shall form one Consolidated Fund.
>
> (2) Without limiting the generality of subsection (1), all territorial, casual and other revenues of the Crown (including all royalties), from whatever source arising, within New South Wales, and as to the disposal of which the Crown may otherwise be entitled absolutely, conditionally or in any other way shall form part of the Consolidated Fund.

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1 Until 1982, the public accounts comprised of the Consolidated Revenue Account, the General Loan Account and the Special Deposits Accounts. In 1982, the Consolidated Revenue Account and the General Loan Account were consolidated and renamed the Consolidated Fund. See the discussion later in this chapter under the heading 'Capital works appropriations'.

2 For background to the Consolidated Fund see Twomey, *The Constitution of New South Wales*, p 562.

The Consolidated Fund is the account into which the government deposits state taxes and duties, royalties, fines and penalties, some regulatory fees, Commonwealth grants and income from Crown assets such as from the lease of crown land.

Section 45 of the *Constitution Act 1902* in turn provides that the Consolidated Fund may 'be appropriated to such specific purposes as may be prescribed by any Act on that behalf'. As such, the Consolidated Fund is the account from which the government withdraws the money it requires to cover its expenditure including the salaries of ministers and public sector employees, other recurrent expenses and capital works. Such appropriations require an act of Parliament.[3]

The Special Deposits Account

The *Constitution Act 1902* does not require that all revenue received by the government be paid into the Consolidated Fund.[4] The Parliament may legislate to establish separate funds, such as the Special Deposits Account.

Section 4.15 of the *Government Sector Finance Act 2018* provides that:

> (2) The Special Deposits Account is to consist of:
>
> (a) all accounts of money that the Treasurer is, under statutory authority, required to hold otherwise than for or on account of the Consolidated Fund, and
>
> (b) all accounts of money that are directed or authorised to be paid to the Special Deposits Account by or under legislation.

In reality, the Special Deposits Account is made up of sub-accounts held in the name of various government authorities. As contemplated under section 4.15 above, there are a number of statutes which establish these sub-accounts within the Special Deposits Account.[5]

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3 In addition to section 45 of the *Constitution Act 1902*, which refers to appropriation to such specific purposes 'as may be prescribed by any Act in that behalf', section 4.6(1) of the *Government Sector Finance Act 2018* provides that '[m]oney must not be paid out of the Consolidated Fund except under the authority of an Act'. Section 4.10 of the *Government Sector Finance Act 2018* in turn determines the circumstances in which payments from the Consolidated Fund lapse. Section 4.7 of the *Government Sector Finance Act 2018* provides authority for the appropriation to the responsible minister of a Government Sector Finance agency of 'deemed appropriation money', sometimes referred to as own-source monies. See also Twomey, *op cit*, pp 545-546.

4 As indicated above, section 39(1) of the *Constitution Act 1902* states that '*Except as otherwise provided by or in accordance with any Act*, all public moneys (including securities and all revenue, loans and other moneys whatsoever) collected, received or held by any person for or on behalf of the State shall form one Consolidated Fund. (Emphasis added).

5 See for example *Restart NSW Fund Act 2011*, section 5; *Victims Rights and Support Act 2013*, section 14; *Social and Affordable Housing NSW Fund Act 2016*, section 4.

In addition, under section 4.17 of the *Government Sector Finance Act 2018*, a government sector finance agency may, in circumstances permitted by regulations, establish and operate a working account in the Special Deposits Account in respect of the working account money received by the agency. Such money does not include money appropriated to the agency under an annual appropriation act.

Section 4.16 sets out the records and other information that the responsible manager must keep in respect of an account in the Special Deposit Account.

MONEY BILLS

The term 'money bills' refers to two types of bills: appropriation bills appropriating public funds and taxation bills imposing a tax, rate or impost.

Appropriation bills

Appropriation bills appropriate public funds from the Consolidated Fund.[6] No particular words are required for an appropriation by Parliament in an appropriation bill so long as the intention is clear. It is a matter of discerning the intention of the provision.[7]

There are two basic types of appropriation bills: the annual appropriation bills (together with temporary supply bills) and special (or standing) appropriation bills.

The annual appropriation bills

There are currently two annual appropriation bills introduced into the Parliament each year:

- The main appropriation bill, which includes appropriations for the recurrent services of the government as well as appropriations for capital works.[8] The bill is divided into separate sections making appropriations to each minister for the purposes of both recurrent

6 See the discussion under the heading 'The Consolidated Fund'. As indicated, section 45 of the *Constitution Act 1902* provides that the Consolidated Fund may 'be appropriated to such specific purposes as may be prescribed by any Act on that behalf'. However, section 45 only applies to appropriations from the Consolidated Fund. Payments from other funds held in public accounts, notably the Special Deposits Account, are administered under a series of sub-accounts set out be legislation or instruments; *Government Sector Finance Act 2018*, s 16(1).

7 Twomey, *op cit*, p 542.

8 This contrasts with the situation in the Commonwealth, where the annual appropriation bill has been split since 1965 into two bills: the first for the ordinary annual services of government (which may not be amended by the Senate), and the second for the construction of public works and buildings, capital expenditure and grants to the States (which may be amended by the Senate).

services and capital works.[9] It also includes an 'Advance to the Treasurer', to be used for unforeseen and urgent expenditure.[10] This amount is available for both recurrent services and capital works.

- The cognate Appropriation (Parliament) Bill, which contains the appropriations for the recurrent services of the Parliament for the forthcoming financial year as well as appropriations for capital works.[11]

As required under constitutional arrangements discussed below, the annual Appropriation Bill and Appropriation (Parliament) Bill, together with any other cognate money bills, are introduced by the Treasurer in the Legislative Assembly, usually in advance of each financial year, to provide for expenditure in that year.[12] The key events in the annual budgetary process are set out in Appendix X.[13]

The sum appropriated by the Parliament in an appropriation bill must be a specific amount: either a precise figure, or a figure that can be calculated by reference to a specific formula. The 1993 decision of the High Court in *Northern Suburbs General Cemetery Trust v Commonwealth* makes it clear that there is no scope for the government to appropriate an open ended sum.[14]

Section 45 of the *Constitution Act 1902* also requires that an appropriation bill be for 'such specific purposes as may be prescribed by any Act on that behalf'. In *Brown v West*,[15] the High Court determined, in relation to the Commonwealth, that a bill appropriating revenue or moneys is one that contains specific words appropriating the Consolidated Fund or other public revenue for the specific purpose or purposes set out in the bill. In their joint judgement, Justices Mason, Brennan, Deane, Dawson

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9 Division 4.1 of of Part 2 of the *Government Sector Finance Act 2018* sets out the information that must be provided in the budget papers.

10 Details of the funds expended under the Advance to the Treasurer are subsequently included in the Appropriation Bill of the following financial year, or in a Budget variation bill enacted before the end of the financial year. This ensures that the expenditure ultimately has the approval of Parliament.

11 Before 1993, appropriations for the recurrent services and capital works of the Parliament were included in the general Appropriation Bill. However, since 1993 (with the exception of 2011-2012) appropriations for the legislature have been included in the separate, but cognate, Appropriation (Parliament) Bill. The separate bill was introduced in response to the memorandum of understanding, commonly known as the Charter of Reform, of 31 October 1991 between Premier Greiner and three non-aligned independents in the Legislative Assembly. The Charter specifically required: 'Making the annual appropriation for the Legislature a separate Bill'.

12 Section 4.4 of the *Government Sector Finance Act 2018* requires the budget to be presented to the Parliament before the end of the previous financial year unless the Assembly is not sitting in the two months before that date or there is an election in the financial year before the budget year. In such cases, the budget papers are to be tabled as soon as possible within the budget year.

13 See also Chapter 10 (The Conduct of Proceedings) for discussion of the budget estimates take note debate, and Chapter X (Committees) for discussion of the budget estimates process.

14 *Northern Suburbs General Cemetery Trust v Commonwealth* (1993) 176 CLR 555 per Brennan J at 582.

15 (1990) 91 ALR 197.

and Toohey explained the necessity for such bills to specify the purpose for which the money is to be expended:

> Historically, the need of the Executive Government to seek annual appropriations of the Consolidated Revenue Fund 'for the service of the year' or 'in respect of the year' has been the means, and it remains one of the critical means, by which the Parliament retains an ultimate control over the public purse strings …
>
> An appropriation, whether annual or standing, must designate the purpose or purposes for which the moneys appropriated might be expended. The principle was stated by Latham CJ in *Attorney General (Vic) v Commonwealth,* at 253:
>
> … there cannot be appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose.
>
> And see *New South Wales v Commonwealth* ('the *Surplus Revenue* Case') (1908) 7 CLR at 200, where Isaacs J said:
>
> 'Appropriation of money to a Commonwealth purpose' means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of *some purpose which either the Constitution has itself declared, or Parliament has lawfully determined*, shall be carried out. (emphasis added.)
>
> The principle is of long standing, having its origin in the vote of 'an enormous supply' in 1665 which was subjected to a statutory proviso requiring that the money raised should be applicable only to the purposes of the Dutch war: see Hallam, *Constitutional History of England*, new ed (1884), vol ii, p 357; and Taswell-Langmead's *English Constitutional History*, 11th ed (ed TFT Plucknett) (1960), pp 428-429.[16]

Historically, appropriation bills in New South Wales itemised expenditure and its purpose in some detail. However, in 1982 the government phased in a system of 'program' budgeting, under which funds were appropriated for particular programs rather than for specific purposes. This changed again in 1998 to appropriations made to a minister in relation to specific departments and agencies. In his report to Parliament in 1998, the Auditor General observed:

> There is a concern however, that the Parliament, seemingly without appreciating the matter, freely ceded to the Government further powers relating to Parliament's constitutional obligation to hold the Government accountable for its use of taxpayers' funds and resources.[17]

As stated by Twomey, the changes have provided greater flexibility for ministers in the administration of their agencies, with freedom to move funds between programs. But they also mean reduced scrutiny and oversight of expenditure.[18]

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16 *Brown v West* (1990) 91 ALR 197 at 204-205.

17 New South Wales Auditor-General's Report to Parliament for 1998, p 9.

18 Twomey, *op cit*, p 544. See also GPSC 1, *Appropriation and Expenditure*, Report 13, December 2000. It is notable that similar concerns about the transparency of appropriations have been raised in the Commonwealth Parliament, notably following the decision in *Combet v Commonwealth* (2005)

The annual budget appropriation bills, when passed by both Houses and assented to by the Governor, become the law authorising the expenditure of the sums shown in the estimates for the financial year.[19] As indicated earlier, with certain exceptions, the authority for the appropriation expires on 30 June of that financial year.[20] Today, payments made out of the Consolidated Fund under the authority of an appropriation bill are administered by the Treasury.

If an appropriation bill is not enacted before the end of a financial year, for example if delayed after an election, section 4.10 of the *Government Sector Finance Act 2018* provides that the Treasurer may authorise payment from the Consolidated Fund for up to three months of an amount not exceeding one quarter of the previous annual appropriations, adjusted for changes in consumer prices as provided by regulation.

Where an urgent need for additional funds arises during a financial year, for example to deal with a natural disaster, section 4.13 of the *Government Sector Finance Act 2018* further provides that the 'Treasurer may, with the approval of the Governor, determine that additional money is to be paid out of the Consolidated Fund during the annual reporting period for the NSW Government in anticipation of appropriation by Parliament if it is required to meet any exigencies of Government'.

In previous years, it was the practice for the government towards the end of a financial year to also introduce an Appropriation (Budget Variations) Bill. The bill included adjustments to the 'Advance to the Treasurer' for that financial year, and also appropriated certain additional sums of money from the Consolidated Fund for recurrent services in accordance with section 22 of the *Public Finance and Audit Act 1983*, the forerunner to section 4.13 of the *Government Sector Finance Act 2018*. In recent years, however, these items have been captured in the appropriation bill introduced in advance of the next financial year.

Special (or standing) appropriation bills

Standing appropriation bills are bills which provide for ongoing appropriations from the Consolidated Fund, until such time as Parliament may legislate further. Such bills are used where it is not appropriate or necessary for Parliament to debate an ongoing appropriation each year in the budget bill.

An example of a standing appropriation is the *Parliamentary Remuneration Act 1989*. This Act includes provisions relating to the remuneration to be paid to members of Parliament, ministers and the holders of certain offices in Parliament. It is a permanent appropriation because it is convenient that it continue to apply over the

80 ALJR 247 concerning the legality of government expenditure on advertising. See also the discussion in the first edition of *New South Wales Legislative Council Practice*, pp 398 – 400.

19 *Government Sector Finance Act 2018*, s 4.6(1).

20 *Government Sector Finance Act 2018*, s 4.10.

long term without being revisited at the commencement of each financial year through new legislation.

As was observed previously, in the decision in *Brown v West*,[21] the High Court noted that the annual appropriation process is one of the key mechanisms by which the Parliament retains control over public finances. Special appropriations, to the extent that they remove annual scrutiny by the Parliament of appropriations, weaken the control of the Parliament over public revenue.

Deemed appropriation

In 2018, the *Government Sector Finance Act* introduced a further mechanism for permitting expenditure of money from the Consolidated Fund, the concept of deemed appropriations. Regulations made under this statute define what constitutes deemed appropriation money. A deemed appropriation provides for the responsible minister for a GSF agency to be given an appropriation out of the Consolidated Fund, at the time the agency receives or recovers money of a kind prescribed by the regulations. Unlike an appropriation under an annual Appropriation Act, which lapses at the end of the financial year, a deemed appropriation will not lapse unless the regulations specify otherwise.[22]

Taxation bills

Taxation bills are the 'flip side' of appropriation bills. A bill to appropriate revenue is meaningless if the Government does not have means of raising revenue to fund that appropriation.[23]

It is a 'fundamental principle of public law that no tax can be levied by the government without parliamentary authority, a principle which traces back to the *Bill of Rights 1688 (Imp)*'.[24]

THE POWERS OF THE COUNCIL CONCERNING MONEY BILLS UNDER THE *CONSTITUTION ACT 1902*

The Council's powers concerning money bills have been disputed since the beginning of responsible government in New South Wales in 1856. The Assembly places a wide interpretation on the provisions of the *Constitution Act 1902* concerning money bills, in particular the requirements of section 5A dealing with deadlocks over appropriation bills 'for the ordinary annual services of the

21 (1990) 91 ALR 197.

22 *Government Sector Finance Act 2018*, section 4.7.

23 Twomey, *op cit,* p548.

24 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, per Mason CJ at 69. See also Twomey, *op cit*, pp 548-549.

Government', section 5 dealing with the initiation of money bills, and section 46 concerning messages from the Governor in relation to money bills.

By contrast, the Council has adopted a much narrower construction of the provisions of the *Constitution Act 1902*. While the financial prerogative undoubtedly rests with the executive government in the Assembly, the Council does not admit any limitations on its powers in relation to money bills other than as follows: such bills must originate in the Assembly under section 5; the Council may only suggest by message to the Assembly amendment to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government' under section 5A; and such a bill may be presented by the Assembly to the Governor for assent under section 5A, notwithstanding that the Council has not consented to the bill. Deadlocks between the Houses on all other matters concerning money bills are dealt with under section 5B of the *Constitution Act 1902*. This is discussed further below.

Ultimately, however, in the absence of statutory interpretation by the courts, the view taken by each House about the constitutional framework regulating money bills is a matter for each House.

Sections 5A and 5B: Disagreement and deadlock between the Houses

Sections 5A and 5B of the *Constitution Act 1902* came into force in 1933 following approval by the electors at a referendum.[25] Together, they deal with disagreement and deadlock between the two Houses on bills, both money bills and other bills. Prior to the enactment of section 5A, the passage of the annual appropriation bills was routinely delayed in the Council, causing considerable frustrations to government.[26]

Section 5A deals with disagreement and deadlock between the Houses on any bill 'appropriating revenue or moneys for the ordinary annual services of the Government'. Section 5A(1) provides:

> **5A Disagreement between the two Houses—appropriation for annual services**
>
> (1) If the Legislative Assembly passes any Bill appropriating revenue or moneys for the ordinary annual services of the Government and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor for the signification of His Majesty's pleasure thereon, and shall become an Act of the Legislature upon the Royal Assent

25 The Act that inserted sections 5A and 5B into the *Constitution Act 1902*, the *Constitution Amendment (Legislative Council) Act 1932*, was approved by the electors in accordance with section 7A of the *Constitution Act 1902* on 13 May 1933 and assented to on 22 June 1933.

26 Twomey, *op cit* p 564

> being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill. (underlining added)[27]

The effect of section 5A(1) is that while it is open to the Council to reject, fail to pass or suggest any amendment[28] to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government',[29] notwithstanding the actions of the Council, the Assembly may direct that such bill, with or without any amendments suggested by the Council, be presented to the Governor for assent.

Section 5A(2) further provides that the Council is taken to have failed to have passed a bill 'appropriating revenue or moneys for the ordinary annual services of the Government' if it is not returned to the Assembly within one month after its transmission to the Council and the session continues during such period.[30] The effect of this section is to prevent the Council, by inactivity, frustrating the wishes of the Assembly in respect of any such bill.[31]

Since its insertion into the *Constitution Act 1902* in 1933, the general consensus has been that section 5A applies solely to the appropriation bills put forward each year in the budget, although that position is subject to some important caveats.[32]

Section 5B of the *Constitution Act 1902* deals with disagreement and deadlock between the Houses on all other bills; that is to say, all bills to which section 5A does not apply. This includes all other money bills.[33] There is no restriction on the Council amending or rejecting such bills.

The meaning of 'a message suggesting any amendment'

As cited above, section 5A(1) of the *Constitution Act 1902* provides that the Assembly, on passing a bill 'appropriating revenue or moneys for the ordinary annual services of the Government', may receive from the Council 'a message suggesting any amendment to which the Legislative Assembly does not agree'.

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27 For background to section 5A, see Twomey, *op cit*, pp 249-254.

28 See the discussion below under the heading 'The meaning of "a message suggesting any amendment"'.

29 See the discussion below under the heading 'The meaning of "for the ordinary annual services of the Government"'.

30 That is to say, the Parliament is not prorogued.

31 See Twomey, *op cit*, p 564

32 There is a very strong argument that parliamentary appropriations, now included in a separate annual appropriation (parliament) bill cognate with the annual appropriation bill, are not appropriations 'for the ordinary annual services of the Government'. See the discussion below under the heading 'Parliamentary appropriations'. There is also a strong argument that appropriations for capital works, now included in the annual appropriation bill introduced at budget time, are not appropriations 'for the ordinary annual services of the Government'. See the discussion below under the heading 'Appropriations for capital works'.

33 Section 5B of the *Constitution Act 1902* is discussed in more detail in Chapter X (The Legislative Process) under the heading 'Bills under section 5B of the *Constitution Act 1902*'.

This wording of section 5A(1), which does not explicitly give the Council the power to amend or suggest amendments to a bill 'for the ordinary annual services of the Government', appears to be a consequence of the compromise reached in 1932 by the Stevens Ministry in bringing to the Parliament the Constitution Amendment (Legislative Council) Bill 1932 which inserted section 5A into the *Constitution Act 1902*. The precursor to section 5A contained in the Bavin Ministry's Constitution (Further Amendment) Bill 1929 was worded in clearer terms:

> The Legislative Council may at any stage return to the Legislative Assembly any Bill which the Council may not amend, suggesting by message the amendment of any provision therein, whether by the omission of any item or otherwise.

As enacted, the wording of section 5A(1) in relation to amendments differs significantly from the wording of section 5B. Where section 5A(1) refers to a bill returned with '*a message suggesting* any amendment to which the Legislative Assembly does not agree' (emphasis added), section 5B refers to 'any Bill other than a Bill to which section 5A applies' returned with 'any amendment to which the Legislative Assembly does not agree'.

This subtle but important difference of language clearly contemplates that the Council may directly amend a bill to which section 5B applies, whereas it may only suggest by message an amendment to a bill to which section 5A applies.

This interpretation of the constraint on the power of the Council to amend a bill 'for the ordinary annual services of the Government' is consistent with the relationship that existed between the Houses concerning appropriation bills prior to the enactment of section 5A. On those occasions prior to 1933 when the Council felt dissatisfaction with an appropriation bill forwarded to it by the Assembly, it included in the message returning the bill to the Assembly a paragraph expressing the Council's point of discontent.[34]

The matter has arisen only once since section 5A was enacted. In 1996, when the Council amended the Appropriation (Parliament) Bill 1996, to which section 5A was interpreted (likely mistakenly) as applying, the amendment in the message returned to the Assembly was expressed as a 'suggested amendment'.[35]

<u>The meaning of 'for the ordinary annual services of the Government'</u>

As cited above, section 5A(1) of the *Constitution Act 1902* is expressed as applying only to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government'. This expression has its origins in the so-called Compact of 1857

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34 See for example *Minutes*, NSW Legislative Council, 21 December 1894, p 126; 20 December 1904, p 123; 5 December 1905, pp 174-175.

35 *Minutes*, NSW Legislative Council, 26 June 1996, pp 274-275.

between the Government and Legislative Council of South Australia.[36] It was then picked up in section 53 of the Commonwealth Constitution at federation, and in turn in section 5A in 1933.[37] As stated by the Attorney General, the Hon Henry Manning, during debate in the Council on the Constitution Amendment (Legislative Council) Bill 1932 which inserted section 5A into the *Constitution Act 1902*:

> … the phrase 'appropriating revenue or moneys for the ordinary annual services of the Government' has been carefully selected and is deemed to have a special meaning.[38]

The meaning of 'for the ordinary annual services of the Government' is not defined in the *Constitution Act 1902*. However, the Solicitor General and Crown Solicitor have both cited with approval the following broad definition offered by Sir Kenneth Bailey KC, Solicitor General of Australia, in relation to the equivalent Commonwealth provision:

> In my opinion, … the ordinary annual services of the government should be taken to be those services provided or maintained within any year which the Government may, in light of its powers and authority, reasonably be expected to provide or maintain as the occasion requires through the Departments of the Public Service and State agencies and instrumentalities.[39]

Twomey elaborates on that definition by observing that the phrase covers services that the government is permitted or required to provide by legislation, as well as those provided to fulfil its policies.[40]

Odgers notes that the interpretation of the expression at the Commonwealth level was substantially settled in 1965 as part of an agreement referred to as the Compact of 1965. Since then, however, the Senate has on several occasions revisited the matter to affirm the agreed application of the terms of the Compact.[41]

In 2010, Council members of the Joint Select Committee on Parliamentary Procedure adopted the same broad definition. However, they also proposed that the Procedure Committee examine the merits of the Council passing a resolution, similar to the Senate resolution, concerning its understanding of what constitutes

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36 The South Australian Compact of 1857 referred to the 'ordinary annual expense of the Government'.

37 See *Odgers*, 14th edn, p 386. See also Twomey, *op cit*, p 565.

38 *Hansard*, NSW Legislative Council, 21 September 1932, p 406.

39 Cited in Solicitor General, 'Parliament Management Bill and the "Ordinary Annual Services of the Government"', Advice 92/50, p 2. Crown Solicitor, 'Supplementary Advice: Section 5A of the Constitution Act 1902', 30 September 1996, cited in Auditor General's Report to Parliament 1996, Volume 2, p 441. See also Twomey, *op cit*, p 565.

40 See Twomey, *op cit*, p 565.

41 *Odgers*, 14th edn, pp 386-390.

an appropriation bill 'for the ordinary annual services of the Government'.[42] To date the House has not acted on this proposal.

Further guidance as to the meaning of 'the ordinary annual services of the Government' is provided below.

Appropriations for capital works

Appropriations for capital works are clearly distinct from appropriations 'for the ordinary annual services of the Government'. As such, there is a strong argument that capital works appropriations do not fall within the meaning of section 5A of the *Constitution Act 1902*, and that a bill containing appropriations for capital works may be directly amended by the Council. However, at a practical level, the Council is in a somewhat uncertain position as capital works appropriations are now included as part of the annual budget appropriation bill.

At the Commonwealth level the position is far clearer. The expression 'the ordinary annual services of the government', as it appears in sections 53 and 54 of the Commonwealth Constitution, was understood by its framers to refer to the annual appropriations which were necessary for the continuing expenses of government, as distinct from major projects not part of the continuing and settled operations of government.[43] *Odgers* traces in detail the so-called Compact of 1965, when the Commonwealth Government agreed as a matter of practice that there would be a separate capital works appropriation bill, not to be regarded as part of the ordinary annual services of the government, and therefore subject to amendment by the Senate. The matter has been considered by the Senate on many occasions since.[44]

There is no such arrangement in New South Wales. Before 1982, the recurrent and capital budgets were managed from two separate funds, the Consolidated Revenue Fund and the General Loan Account. The difference between the two accounts was described in 1982 by the Leader of the Opposition in the Council, the Hon Lloyd Lange, as follows:

> The [General] Loan Account provides for capital works which, by and large, are spread over a period of years and not just for the ordinary annual services such as wages of teachers or hospital staff. Ordinary annual services, of course, are those that occur each year, need to be funded and expended each year, and do not have a life longer than one year.[45]

Under the arrangements in place prior to 1982, it was understood that bills appropriating revenue for capital works from the General Loan Account were not

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42 Joint Select Committee on Parliamentary Procedure, 'Reforms to parliamentary processes and procedures', October 2010, p 57.

43 *Odgers*, 14th edn, p 386.

44 For details, see *Odgers*, 14th edn, pp 386 – 391. See also the discussion in Twomey, *op cit*, pp 566 – 567.

45 *Hansard*, NSW Legislative Council, 25 August 1982, p 458.

'for the ordinary annual services of the Government' and were therefore not subject to section 5A of the *Constitution Act 1902*.

However, in 1982 the two funds were merged on the recommendation of the Wilenski Review of Public Administration in New South Wales to bring capital and recurrent budgets closer together.[46] During debate on the bills proposing the merger of the two funds,[47] Mr Lange argued that the merger would have the effect of curtailing the powers of the Council to deal with capital appropriations by bringing the bill relating to the capital account within the annual budget bill to which section 5A applied:

> The flow-on effect of these bills is to include in what is essentially a section 5A money bill what we and a number of eminent authorities regard as a section 5B bill and to put them together as a single bill.[48]

By contrast, the Leader of the Government in the Council, the Hon Paul Landa, indicated that recurrent and capital appropriations would continue to be clearly distinguished, and that the Solicitor General had advised that the merger of the funds would not alter the powers of the Council:

> The powers of this House will continue in existence unaltered by the bills now before the House, so that only those provisions dealing with the type of appropriation covered by section 5A of the Act can be brought into force without being passed by this House, and all other provisions require either to be passed by this House or to be put to a referendum.[49]

Despite the advice of the Solicitor General, at a practical level the merger of the funds and the presentation of a single annual appropriation bill to Parliament containing reference to both recurrent expenses (to which section 5A clearly applies) and capital expenditure (to which as outlined above section 5A does not apply) places the Council in a difficult position.

The matter arose again in July and August 1996, when the Auditor-General sought advice from the Crown Solicitor whether, *inter alia*, appropriations for non-recurrent capital items, and appropriations for policies and programs which are new for the year in question, could be classed as being outside the scope of 'ordinary annual services'. In his advice, the Crown Solicitor concluded that both categories of appropriations are included within the meaning of 'the ordinary annual services of the Government' and are therefore subject to section 5A, but

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46 Wilenski P, *Review of New South Wales Government Administration: Direction for Change – Interim Report*, November 1977; see also Wilenski P, *Review of New South Wales Government Administration: Further Report – Unfinished Agenda*, May 1982.

47 The Constitution (Consolidated Fund) Amendment Bill and Audit (Consolidated Fund) Amendment Bill.

48 *Hansard*, NSW Legislative Council, 25 August 1982, p 458.

49 *Hansard*, NSW Legislative Council, 25 August 1982, p 456.

acknowledged argument based on the Commonwealth arrangements to the contrary.[50]

In 2010, Council members on the Joint Select Committee on Parliamentary Procedure reasserted the view, consistent with the advice of the Solicitor General in 1982, but contrary to the advice of the Crown Solicitor in 1996, that appropriations for capital works do not form part of 'the ordinary annual services of the Government'.[51]

Should the inclusion of capital works appropriations in the annual budget appropriation bill ever be challenged in the courts, the question would arise, whether the capital works appropriations had been 'tacked' on to an appropriation bill 'for the ordinary annual services of the Government' within the meaning of section 5A(3) of the *Constitution Act 1902*. 'Tacking' is discussed further below.[52]

Parliamentary appropriations

It is doubtful that parliamentary appropriations, routinely presented in the annual Appropriation (Parliament) Bill, are appropriations 'for the ordinary annual services of the Government', and as such fall within the meaning of section 5A of the *Constitution Act 1902*.

Of note is section 24B(3) of the *Constitution Act 1902*, inserted into the *Constitution Act* in 1995 by the *Constitution (Fixed Term Parliaments) Amendment Act 1993* as part of the move to fixed four-year parliaments in New South Wales. It provides for the dissolution of the Assembly by the Governor during a four-year term of Parliament upon rejection of an appropriation bill 'for the ordinary annual services of the Government', but specifically excludes 'a Bill which appropriates revenue or moneys for the Legislature only' from its application:

> (3) The Legislative Assembly may be dissolved if it:
>
> (a) rejects a Bill which appropriates revenue or moneys for the ordinary annual services of the Government, or
>
> (b) fails to pass such a Bill before the time that the Governor considers that the appropriation is required.
>
> **This subsection does not apply to a Bill which appropriates revenue or moneys for the Legislature only**. (emphasis added)

This explicit exclusion of 'a Bill which appropriates revenue or moneys for the Legislature only' from the application of this section is a clear indication by the

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50 Crown Solicitor's Advice to the Auditor-General, 'Supplementary Advice Section 5A Constitution Act 1902', 30 September 1996, cited in *Auditor-General's Report to Parliament*, Vol 2, 1996, pp 430-441.

51 Joint Select Committee on Parliamentary Procedure. 'Reforms to parliamentary processes and procedures', October 2010, p 57.

52 See the discussion under the heading 'Tacking'.

Parliament that it does not see parliamentary appropriations as falling within the ambit of appropriations 'for the ordinary annual services of the Government'. Nor does the Parliament regard rejection of such a bill by the Assembly as a ground for the dissolution of the Assembly.

It is particularly significant to note that this exclusion of parliamentary appropriation from the operation of section 24B was adopted as an amendment to the *Constitution (Fixed Term Parliaments) Amendment Act 1993*.[53] The amendment was moved in the Assembly by the independent Member for the South Coast, Mr Hatton, and was the only amendment to the bill in either House. In moving the amendment, Mr Hatton observed:

> … the question of a separate appropriation for the Parliament is vital to its independence from the Executive Government. … It is important that Parliament itself be in control of its own budget, otherwise Executive Government could stifle the independent and proper workings of the Parliament itself, of which Executive Government is a creature.[54]

The question as to whether parliamentary appropriations are appropriations 'for the ordinary annual services of the Government' subsequently arose again in June 1996. On 26 June 1996, the Council sought an amendment to the Appropriation (Parliament) Bill 1996 to insert an additional appropriation to establish a President's Contingency Fund to fund committees appointed by the Legislative Council.[55] Despite the clear intent of the Parliament in enacting section 24B(3) only three years earlier, both the Leader of the Government and the Leader of the Opposition seemingly adopted a position that the bill was subject to the provisions of section 5A of the *Constitution Act 1902*.[56] In addition, when the bill was returned to the Assembly, the amendment was expressed as a 'suggested amendment' consistent with the wording of section 5A.[57]

The message returning the bill was reported in the Assembly the next day, at which time the Assembly disagreed to the suggested amendment and returned the following message to the Council:

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53 The amendment was adopted by the Legislative Assembly on 18 November 1992.

54 *Hansard*, NSW Legislative Assembly, 17 November 1992, p 9039.

55 The full amendment was as follows: 'In addition to the sums appropriated by sections 4 and 5, this Act appropriates such sum as may be necessary to establish a President's Contingency Fund to be used solely to fund any committees appointed by the Legislative Council to deal with matters referred to any committee additional to the normal work of the standing committees appointed by the House.' See *Minutes*, NSW Legislative Council, 26 June 1996, pp 274-275. Arguably, this amendment, containing as it did an open-ended appropriation for an indeterminate sum of money, contravened the common law requirement that the sum appropriated in an appropriation bill must be specific: either a precise figure, or a figure that can be calculated by reference to a specific formula. See the discussion previously under the heading 'The annual appropriation bills'. This point was made by the Treasurer, the Hon Michael Egan, in debate on the amendment: *Hansard*, NSW Legislative Council, 26 June 1996, p 3711.

56 *Hansard*, NSW Legislative Council, 26 June 1996, p 3712.

57 *Minutes*, NSW Legislative Council, 26 June 1996, pp 274-275.

> The Legislative Assembly having had under consideration the Legislative Council Message of 26 June, 1996, relating to a suggested amendment to the Appropriation (Parliament) Bill, 1996, informs the Legislative Council that it does not agree to the suggested amendment and further that pursuant to section 5A of the Constitution Act, 1902, proposes to forthwith transmit the Bill together with the Appropriation Bill and other cognate Bills to His Excellency the Governor for Royal Assent.[58]

The bill was subsequently presented by the Assembly to the Governor and received royal assent the next day, that is 28 June 1996.[59] The actions of the Assembly in this regard were not contested by the Council in court.

On 5 July 1996, the Auditor-General sought advice from the Crown Solicitor as to whether section 5A was applicable to an appropriation bill for the Legislature, noting that the Legislature may not be part of the Government for the purposes of this section. In his opinion dated 19 August 1996, the Crown Solicitor took the view that while the Supreme Court would likely be prepared to rule upon the matter, there was no reason in the meantime to depart from a previous opinion expressed by the Solicitor General, Keith Mason QC, in 1992.[60] That opinion acknowledged the view that Parliament is clearly 'not the tool of the Government', and that the Government 'does not provide services through the Legislature', but argued that appropriations for the Parliament have been treated as part of the ordinary annual services of the Government since that phrase first entered the *Constitution Act* in 1933 when section 5A was enacted.[61]

This argument, expressed in 1992, largely relates to the period from 1933 to 1978 when the Council was indirectly elected. It also predates the adoption of section 24B(3) in 1995. Should the matter arise again, it seems likely that additional considerations to those before the Solicitor General in 1992 would arise. While the *Constitution Act 1902* does not include a written separation of powers between the Legislature and the Executive, it is abundantly clear that the modern Legislative Council is not run as part of the services of the government and should not be regarded as such.

At the Commonwealth level, it is clear that parliamentary appropriations are not part of the ordinary annual services of the government. In May 1980 a select Committee of the Senate was appointed to inquire into and report upon the Commonwealth Parliament's control of its appropriations and staffing. The Committee re-affirmed the Senate position that Parliament is not an ordinary annual service of the Government and that such classification is inconsistent with

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58 *Minutes*, NSW Legislative Council, 11 September 1996, p 289.

59 This is the only time that section 5A has been employed, even if it was incorrectly employed, since its insertion into the *Constitution Act 1902* in 1933.

60 Crown Solicitor's Advice to the Auditor General, 'Section 5A Constitution Act 1902', 19 August 1996, cited in *Auditor-General's Report to Parliament*, 1996, Vol 2, p 433.

61 Solicitor General, 'Parliament Management Bill and the "Ordinary Annual Services of the Government"', Advice 92/50, pp 3-4.

the concept of the separation of powers and the supremacy of Parliament.[62] Subsequently, the Commonwealth Government agreed to the provision of a separate Parliamentary Appropriation Bill which would not be treated as part of the ordinary annual services of the government, but with the government retaining control over the total amount of funds appropriated to the Parliament.[63]

The position in Victoria is even clearer. Section 65(1) of the *Constitution Act 1975* (Vic) expressly provides that the annual appropriation bill 'for the ordinary annual services of the Government' 'does not include a Bill to appropriate money for appropriations for or relating to the Parliament.'

Special (or standing) appropriations

Special (or standing) appropriations in a special (or standing) appropriation bill are not appropriations 'for the ordinary annual services of the Government', and as such do not fall within the meaning of section 5A of the *Constitution Act 1902*. In *Brown v West* in 1990 the High Court made it clear that standing appropriations are not part of the annual appropriations process.[64] As discussed previously, however, as a matter of practice, the funds used to satisfy special appropriations are now usually appropriated through the annual appropriation bill.[65]

Taxation bills

Taxation bills are not bills 'appropriating revenue or money for the ordinary annual services of the Government', and as such do not fall within the meaning of section 5A of the *Constitution Act 1902*. Accordingly they may be directly amended by the Council, with any disagreement or deadlock between the Houses to be resolved in accordance with the provisions of section 5B of the *Constitution Act 1902*.

Historically, taxation bills were a major point of contention between the two Houses, particularly during the 1890s, culminating in the Council's defeat of the Reid Ministry's Land and Income Tax Assessment Bill on 20 June 1895,[66] which precipitated a general election and the holding of a free conference. However, a more pragmatic and less confrontational relationship appeared to develop between the Houses in the first decades of the 20th century. According to Clune and Griffith, both Houses appeared to tread an increasingly cautious path, with the Council 'acknowledging that responsibility for financial matters should rest with the elected

62 Report of the Select Committee on Parliament's Appropriation and Staffing, Parliamentary Paper no 151 of 1981.

63 Crown Solicitor's Advice to the Auditor General, 'Section 5A Constitution Act 1902', 19 August 1996, cited in *Auditor-General's Report to Parliament*, 1996, Vol 2, pp 432-433. See also *Odgers*, 14th edn, pp 420-422.

64 *Brown v West* (1990) 169 CLR 196 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

65 See the discussion under the heading 'Special (or standing) appropriation bills'. See also Twomey, *op cit*, pp 540-541, 565.

66 *Minutes*, NSW Legislative Council, 20 June 1895, p 238.

Lower House, and the Assembly less eager to force a constitutional crisis by insisting on its privileges'.[67]

The adoption of sections 5A and 5B of the *Constitution Act 1902* in 1933 put the status of taxation bills on a clearer basis. During debate on the Constitution Amendment (Legislative Council) Bill 1932 which inserted sections 5A and 5B into the *Constitution Act 1902*, the Attorney General, the Hon Henry Manning, emphasised that section 5A(1) was intended to be limited to appropriation bills 'for the ordinary annual services of the Government' only and not to extend to other types of money bills, such as taxation bills, which were clearly intended to fall under the provisions of section 5B:

> I should like to point out … the essential difference between a bill appropriating revenue or moneys for the ordinary annual services of the Government and a taxation measure … An Appropriation Bill appropriates money for the ordinary services of the Crown, whereas a taxation bill does not appropriate money, but merely affirms that there shall be charged, levied, collected and paid a tax upon the incomes or whatever it may be of certain individuals. It may provide that incomes from personal exertion or incomes from property shall be subject to a tax. But it does not appropriate any money derived from such tax. That money is paid into consolidated revenue, and an Act of Parliament is required to appropriate it for the annual services of the Crown. [T]he language used in proposed new s 5A(1) has been employed for the express purpose of differentiating between those two things.[68]

This understanding was reiterated some years later by the Premier, the Hon William McKell, when speaking in the Assembly on the second reading of the Constitution (Legislative Council Reform) Bill 1943:

> In the constitution of most countries, which even claim to be democratic, the powers of the Second Chamber in relation to bills imposing taxation are rigidly limited, but not so in New South Wales. Here there are two classifications only – an 'appropriation bill' and 'any other bill', and the Legislative Council's powers in relation to taxation bills, whether they fix a rate of tax or provide the method of assessment and collection, are the same as in the case of ordinary legislation; they all fall within section 5B.[69]

When the Constitution (Legislative Council Reform) Bill 1943 was forwarded to the Council for concurrence, the Minister of Justice and Vice-President of the Executive Council, the Hon Reg Downing, observed:

> Section 5A sets out that the Legislative Council may delay an appropriation bill for one month, but if the bill is not accepted at the end of that period it goes for the Royal Assent. All other measures are dealt with under section 5B, under which the Legislative Council can defy the Legislative Assembly … The only bill over which the Legislative Assembly was given complete power was an

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67 For a detailed discussion of conflict between the Houses, particularly over taxation bills, see D.Clune and G.Griffith, *Decision and Deliberation*, pp 78-82.

68 *Hansard*, NSW Legislative Council, 28 September 1932, p 588.

69 *Hansard,* NSW Legislative Assembly, 11 November 1943, p 735.

> Appropriation Bill, not a Money Bill … In New South Wales today taxation bills fall with ordinary policy legislation into the category of 'other bills', governed by the provisions of section 5B.[70]

Since the adoption of section 5B in 1933, taxation bills have been amended in the Council on a number of occasions. For example, in November 1939 and November 1952, the Council amended the stamp duties amendment bills of those years.[71]

On 24 June 2015, a point of order was taken by a government member in committee of the whole on the Small Business Grants (Employment Incentive) Bill that proposed amendments should be ruled out of order as they purported to amend a taxation bill. The Chair of Committees, the Honourable Trevor Khan, in an extensive ruling canvassing previous instances, did not uphold the point of order and allowed the amendments to be moved. The amendments were subsequently defeated.[72]

Most recently, on 22 June 2017, on the initiative of the Government, the Council amended the State Revenue and Other Legislation (Budget Measures) Bill 2017, part of the package of annual budget bills.[73]

There have also been occasions when amendments to taxation bills have been moved in the Council without success.[74]

Tacking

The restrictions on the power of the Council in relation to appropriation bills 'for the ordinary annual services of the Government' under section 5A of the *Constitution Act 1902* brings with it a temptation for the executive government to include in such bills other measures. This procedure is described as 'tacking', meaning the 'tacking' of extraneous provisions onto such a bill.

To prevent 'tacking', section 5A(3) of the *Constitution Act 1902* provides that if a bill which is subject to the provision of section 5A becomes law under the section, then any provision in the Act dealing with 'any matter other than such appropriation shall be of no effect'. This provision clearly contemplates that it is for the courts to determine whether or not a provision is of 'no effect'.[75]

The restriction on tacking applies only to appropriation bills 'for the ordinary annual services of the Government'. The fact that it was not thought necessary in

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70 *Hansard*, NSW Legislative Council, 30 November 1943, pp 1115-1116.

71 *Minutes*, NSW Legislative Council, 2 November 1939, pp 304-305; 13 November 1952, p 132.

72 *Hansard,* NSW Legislative Council, 24 June 2015, pp 1727-1728.

73 *Minutes*, NSW Legislative Council, 22 June 2017, pp 1798-1799.

74 See for example the State Revenue and Other Legislation Amendment (Budget Measures) Bill 2008; *Hansard*, NSW Legislative Council, 4 December 2008, pp 12616-12617.

75 Twomey *op cit* p574.

1932 to apply a tacking provision to bills under section 5B not 'for the ordinary annual services of the Government' is a further indication that it was envisaged that the Council should have full powers to amend such bills.

Section 5: Money bills shall originate in the Legislative Assembly

Section 5 of the *Constitution Act 1902* sets out the broad plenary legislative power of the Legislature to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever, subject to the following proviso:

> Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

This section has remained unchanged since the enactment of the *Constitution Act 1902*, and substantially the same since the commencement of responsible government in 1856.[76]

Under the terms of section 5, all bills appropriating public revenue or imposing a new rate, tax or impost must originate in the Assembly. Unlike section 5A adopted in 1933, section 5 applies to all money bills, including all appropriation bills, not just those bills 'appropriating revenue or moneys for the ordinary annual services of the Government'.

The prohibition on money bills originating in the Council in section 5 applies not merely to the introduction of a bill in the Council but the 'origination' of a bill in the Council. Accordingly, it seems clear that the prohibition cannot be avoided by introducing a bill into the Council and then inserting a financial provision by way of an amendment in committee of the whole.[77]

At its adoption in 1855, section 5 reflected, at least in part, the understanding that the Lower House is pre-eminent with respect to money bills. That understanding was based on the historic struggle of the House of Commons in England to wrest control of financial affairs from the Crown, achieved in full with the settlement of the 'Glorious' Revolution of 1689.

However, the extent to which the Assembly was pre-eminent with respect to money bills was contested by the Council in the years after responsible government, and subsequently clarified in 1933 with the adoption of sections 5A and 5B of the *Constitution Act 1902* alongside a new indirectly elected Council. [78]

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76 As originally enacted in the *Constitution Act 1855* the proviso stated: 'Provided, that all Bills for appropriating any Part of the Public Revenue, for imposing any new Rate, Tax, or Impost, subject always to the Limitation contained in Clause Sixty-two of this Act, shall originate in the Legislative Assembly of the said Colony.'

77 See Twomey, *op cit*, pp 555-556.

78 For further discussion, see the heading 'Are the powers of the Council concerning money bills further constrained?'

In more recent times, the application of section 5 arose in the Council in 1989 during debate on the Business Franchise Licences (Tobacco) Further Amendment Bill. In arguing against the power of the Council to amend the money bill which had properly been introduced in the Assembly, the Leader of the Government, the Hon Ted Pickering, relied on advice from the Solicitor General, which stated in part:

> From the late seventeenth century it has been established parliamentary usage that the sole right to initiate money bills rests in the lower House: *Erskine May* 20th ed pp 842ff. This is a reflector of the 'financial initiative of the Crown' to which reference has already been made. Mr Justice Stephen (as he then was) has remarked on the fact that s 53 of the federal Constitution which modifies this principle in some respects gives the Senate powers which are 'unusual in a modern Upper House' (*Victoria v Commonwealth* supra at 168). Unlike the federal Constitution nothing in the *Constitution Act 1902* (NSW) modifies that parliamentary usage.
>
> On the contrary, the State Constitution clearly reflects it and gives it effect in presently relevant circumstances.
>
> Section 5 qualifies the very grant of legislative power to the legislature by providing that 'all Bills for appropriating any part of the public revenue or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly'. That injunction and the centuries of parliamentary and political convention which it embodies would be entirely put to nought if the Council could amend a Bill (of any nature) coming from the Assembly by tacking [on] an appropriation or taxing provision.[79]

The opposition relied on different advice, offered by Jeff Shaw QC, who was later to become a member of the Council and the Attorney General in a future administration. In arguing that amendment of the bill by the Council did not offend section 5 of the *Constitution Act 1902*, Mr Shaw observed:

> Section 5 of the *Constitution Act 1902* requires that bills for appropriating any part of the public revenue or for imposing any new rate, tax or impost shall originate in the Legislative Assembly. In my opinion, the present bill meets that test. It has originated in the Legislative Assembly. But can the Legislative Council amend it so as to, in a sense, appropriate the new tax in a particular way as suggested in the Opposition amendment which was moved in the Lower House? In my view section 5 of the Constitution provides no barrier to such amendment. It only provides that the bill appropriating the public revenue or imposing a new tax or rate of tax shall originate in the Lower House. This has happened.
>
> It seems to me open to the Upper House to amend that revenue or money bill – which has originated in the Lower House – by varying or amending the way in which the new revenue should be used. Such an amendment would not constitute a new bill which must originate in the Lower House. On the contrary, it merely specifies the way in which the newly-collected revenue (the increase in fees) should be utilized by the responsible officer. There seems to me to be a fundamental difference between the notion that a money bill must originate in the Legislative Assembly and another and different notion (which

79 *Hansard*, NSW Legislative Council, 8 August 1989, pp 9526-9528.

> does not find support in the Constitution) to the effect that the Upper House may never amend such a money bill. I would draw a distinction between originating the legislation in the Lower House and the amendment of such an appropriation bill by the Upper House. The latter, I think, is acceptable and possible under the Constitution.
>
> If this is correct, and the Upper House (contrary to the wishes of the Lower House) amends an appropriation bill so as to specify a way in which the increased revenue ought to be used, then the provisions of the *Constitution* pertaining to disagreement between the Houses come into play.[80]

In the event, the amendments were ruled out of order by the Chair of Committees for being outside the leave of the bill-.[81]

While there remain competing interpretations of the meaning of section 5, the position of the Council is that section 5 should be given its plain or literal meaning, that is that all money bills must originate in the Assembly, without reading into it further restrictions on the powers of the Council. This is discussed further below.[82]

Introduction of bills in the Council imposing financial obligations

Section 5 of the *Constitution Act 1902* does not act to prevent the introduction of bills in the Council which in their implementation impose an additional financial obligation or legal liability on the Crown. Where an additional financial obligation or legal liability is imposed, any additional expenditure must be met from an existing appropriation, or from a future appropriation as part of the annual budget process.[83] For it to be otherwise would place large parts of public policy beyond the scope of the Council, thereby destroying its effectiveness as one of the branches of the Legislature.[84] In a significant ruling given in September 2003 in relation to the introduction of the State Arms, Symbols and Emblems Bill 2004, the Deputy President (Ms Fazio) observed:

> [Section 5 of the *Constitution Act 1902*] does not mean that the Legislative Council cannot consider and pass bills that originate in this Chamber and that eventually, somewhere along the line, will incur some expenditure by the Government. Given that the bill does not specify the appropriation of any amount of public revenue I do not consider it to be what is commonly referred

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80 Opinion of Shaw JW QC, quoted in *Hansard,* NSW Legislative Council, 8 August 1989, pp 9507-9508.

81 The reasons given by the Chair were that the amendments were outside the leave of the bill, and that the amendments related to appropriations rather than taxation; *Hansard*, NSW Legislative Council, 8 August 1989, pp 9530, 9531-9532.

82 See the discussion under the heading 'Are the powers of the Council concerning money bills further constrained?'

83 Twomey, *op cit*, p 552.

84 See D.Clune and G.Griffith, *Decision and Deliberation*, p 82. Clune and Griffith ague that this principle was established by W B Dalley, Attorney-General in the Stuart Government, in 1883 in dealing with the Criminal Law Amendment Bill.

> to as a money bill. Accordingly, I find that the introduction of the bill in this Chamber is in order.[85]

It is routine for bills to be introduced in the Council imposing additional financial obligations on the Crown, to be met out of existing or future appropriations. As an example, in May 2016 the Government introduced the Coastal Management Bill 2016 in the Council, which required the establishment of a NSW Coastal Council, with members of the Council entitled to be paid such remuneration as the Minister may determine from time to time.

On some occasions, bills introduced in the Council which have imposed additional financial obligations on the Crown have included specific indication that funding will be made available out of money to be provided by the Parliament:

- In 1993, the Letona Co-operative (Financial Assistance) Bill provided that 'Parliament recommends that the State provide financial assistance to Letona [Co-operative Limited] by means of a grant in the sum of $5,000,000', with such assistance 'to be provided out of money to be provided by Parliament or that is otherwise legally available'. The bill received assent on 25 November 1993.
- In 1996, the Innovation and Productivity Council Bill provided that 'the expenses of the Council in exercising its functions under this Act are to be paid out of money to be provided by Parliament'. The bill received assent on 1 November 1996.

It is important to emphasise, however, that it is not strictly necessary for bills introduced in the Council imposing additional financial obligations on the Crown to contain such provisions.

Bills imposing fees and penalties

It is common for bills to include fees, penalties or fines as part of a statutory framework, and such bills have on occasion been initiated in the Council.

In 1849, the House of Commons adopted a Standing Order (now Standing order 79), based on a resolution passed in 1831, waiving the privilege of the Commons in relation to bills or amendments to bills initiated in the Lords dealing with certain fees and penalties. Rigid enforcement of the rule against the initiation of such money bills in the House of Lords prior to that time had proved unnecessarily inconvenient.[86]

Based on practice in the British Parliament, on 27 June 1872 the Legislative Council resolved:

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85 *Hansard*, NSW Legislative Council, 18 September 2003, p 3566.

86 *Erskine May*, 24th edn, p 788. See also Ruling: Hay, *Minutes*, NSW Legislative Council, 28 Jan 1874, p 90.

> (i) That in the opinion of this House the originating of an Act in this House imposing fees for benefits taken or services rendered under the Act, and in order to secure the execution of such Act, is not at variance with the provisions of the Constitution Act.
>
> (ii) That in the opinion of this House the originating of an Act in this House providing for pecuniary penalties or forfeitures where the object of such penalties and forfeitures is to secure the execution of the Act or the punishment or prevention of offences, is not at variance with the Constitution Act.

On 28 January 1874, on the introduction of the Companies Bill in the Council, President Hay gave a ruling that the intent of the 1872 resolution was to adopt the principles recognised in the Imperial Parliament.[87]

In modern times, it seems likely that fees and penalties, if properly categorised as such, do not amount to taxation for the purposes of section 5 of the *Constitution Act 1902*. As such, bills imposing fees and penalties may be initiated in the Council. However, recent High Court decisions as to what amounts to taxation may have significantly narrowed the scope of this exception with, for instance, business franchise fees being held to amount to taxation.[88]

Section 46: Money bills to be recommended by the Governor or introduced by a minister

Section 46 of the *Constitution Act 1902* provides:

> **46 Money Bills to be recommended by Governor**
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> (1) It shall not be lawful for the Legislative Assembly to originate or pass any vote, resolution, or Bill for the appropriation of any part of the Consolidated Fund, or of any other tax or impost to any purpose which has not been first recommended by a message of the Governor to the said Assembly during the Session in which such vote, resolution, or Bill shall be passed.
>
> (2) A Governor's message is not required under this section or under the Standing Rules and Orders of the Legislative Assembly for a Bill introduced by, or a vote or resolution proposed by, a Minister of the Crown.

Section 46(1) dates back to the *Australian Constitutions Act (No 1) 1842*, which provided:

> … that it shall not be lawful for the said council to pass or for the said Governor to assent to any bill appropriating to the public service any sums or sum of money arising from the sources aforesaid unless the Governor on her Majesty's behalf shall first have recommended to the council to make provision for the specific public service towards which such money is to be appropriated.

87 Ruling: Hay, *Minutes*, NSW Legislative Council, 28 Jan 1874, p 90.

88 See for example the High Court decision in *Ha v New South Wales* (1997) 189 CLR 465.

Section 46(2) was inserted into the *Constitution Act 1902* in 1987[89] to overcome the inconvenience of arranging a message from the Governor for the introduction in the Assembly of every money bill. In modern times, all money bills introduced in the Assembly under section 46 are introduced under section 46(2).

There are two possible interpretations of the meaning of section 46.

The first is that it complements section 5 of the *Constitution Act 1902*. Just as section 5 prevents a money bill originating in the Council, section 46 prevents a bill being returned to the Assembly with an appropriation inserted. As such, it reinforces the understanding from section 5 that the financial initiative is with the Assembly.[90]

The alternate position is that section 46 is designed to prevent private members in the Legislative Assembly seeking to introduce money bills in that House without having first been recommended in a message from the Governor. As such, its intention is again to ensure that the financial prerogative in the Assembly rests with the executive government, but in a very different way to section 5.[91]

These alternate positions are explored further below in relation to amendments to bills in the Council imposing financial obligations on the Crown. In general terms, however, the position of the Council is that section 46 does not impose any additional constraints on the powers of the Council in relation to money bills beyond those already in place under other sections of the *Constitution Act 1902*.

Amendment of bills in the Council imposing financial obligations

Section 46 of the *Constitution Act 1902* does not act to prevent the moving or adoption of amendments to bills in the Council which in their implementation impose additional financial obligations or legal liability on the Crown. It may be argued that all amendments considered by the Council ultimately have financial implications, even if it is only the cost of their preparation and printing. However, there have been various occasions where Council amendments have clearly imposed quite significant additional financial obligations on the Crown.

For example, in 1955 the Council amended the Fire Brigades (Amendment) Bill to provide that the award wages and salaries of firemen or officers of fire brigades would not be reduced.[92]

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89 *Constitution (Amendment) Act 1987*, schedule 1(9).

90 For further discussion, see Twomey, *op cit*, p 558-559. This view of the meaning of section 46 was adopted by the Solicitor General in 1989 in an opinion cited during debate on the Business Franchise Licences (Tobacco) Further Amendment Bill. The opinion is cited in the first edition of *New South Wales Legislative Council Practice*, p 410.

91 J.R.Stevenson, Clerk of the Parliaments, 'Introduction of public bills sponsored by the Government in the Legislative Council', Advice to the Vice-President of the Executive Council, 10 November 1965.

92 See the discussion in the first edition of *New South Wales Legislative Council Practice*, p 407.

In 1963, the Council amended the State Planning Authority Bill to increase the amount of money to be paid by the Treasurer to the General Fund from £100,000 to £250.000. The Attorney General and Leader of the Government in the Council, the Hon Reg Downing, stated that the imposition of a direct obligation on the Crown to pay a certain sum of money was unusual, but did not dispute the constitutional powers of the House to do so:

> I do not deny that, constitutionally, this amendment can be moved in the chamber, but to say the least, it is most unusual. I cannot recall, at the moment, any occasion on which the Legislative Council has imposed a direct liability upon the Crown. In this instance an additional commitment of 150,000 pounds is being imposed by a House that does not bear the responsibility for originating the taxation from which this money is to be secured. This is a direct charge of 150,000 pounds upon Government revenue … I know that many amendments moved here have indirectly incurred expense but I know of no case where a direct obligation has been imposed by this House upon the Crown to pay a certain amount of money — in this case 150,000 pounds. I am not disputing that this House can do it.[93]

In 1969, the Council amended the Aborigines Bill 1969 to provide for the payment of fees to Aboriginal members of the newly established Aborigines Advisory Council and the Consumer Protection Bill 1969 to increase the number of positions on the Consumer Affairs Council. In an unprecedented move, on both occasions, the Assembly obtained a message from the Governor under section 46 before agreeing to the amendments. In its message to the Council both times, the Assembly indicated that the amendments were only agreed to 'upon the request for and receipt of a Message from the Governor recommending additional expenses in connection with the Bill brought about by the Council's amendment' and desired that its actions not be drawn into a precedent by either House.[94]

On the second of these two occasions, both the Leader of the Government in the Council, the Hon John Fuller, and the Leader of the Opposition in the Council, the Hon Reg Downing, made statements, as a matter of privilege, indicating that in their view the Council was perfectly within its rights in amending the bill and that there was no validity in or requirement for the Legislative Assembly's addendum to the message. The Hon John Fuller in particular observed:

> Almost every bill that comes before this Council from the Assembly has expenses associated with it in some way. It is almost impossible to say that a bill has no public expense associated with it. Even if a bill authorizes the employment of one extra individual in the public service it could be said to be to that extent a money bill.
>
> To my mind section 46 of the Constitution Act refers only to the Legislative Assembly. If it is felt that the Legislative Assembly needs a message from the Governor before that House is in a position to proceed with a bill that might be considered a drain on the Consolidated Revenue Fund, that is a matter for

93 *Hansard*, NSW Legislative Council, 20 November 1963, pp 6437-6438.

94 *Minutes*, NSW Legislative Council, 12 March 1969, p 385; 2 April 1969, pp 490-491.

> the Assembly to decide and has nothing to do with the Legislative Council. It is a matter solely relating to the operation of another place. I do not see any necessity for the addendum to the message on this bill.[95]

In more recent times, amendments to bills moved and sometimes agreed to in the Council imposing additional financial obligations on the Crown have included specific indication that funding to implement the amendment be made available out of money to be provided by the Parliament:

- In 2000, the House amended the Dairy Industry Bill 2000 to provide for a Dairy Farmers and Dairy Co-operatives Restructure Scheme with payments under the Scheme to be made out of money to be provided by Parliament or that is otherwise legally available.[96]
- In 2012, the House amended the Marine Pollution Bill 2011 to establish an Oiled Wildlife Care Network, with 'any expenditure under this section .. to be paid out of money to be provided by Parliament'.[97]
- In 2017, the Shooters, Farmers and Fishers Party moved an amendment to the Greyhound Racing Bill 2017 to provide financial assistance to the Greyhound Welfare and Integrity Commission, with the assistance to be funded out of 'money that is lawfully available to the Government of New South Wales', however on this occasion the amendment was negatived.[98]

Nevertheless, it is not strictly necessary for amendments to bills moved in the Council imposing additional financial obligations on the Crown to contain such provisions. Indeed, while almost every amendment moved in the Council has expenses associated with it in some way, very few amendments moved in the Council ever contain such provisions.

ARE THE POWERS OF THE COUNCIL CONCERNING MONEY BILLS FURTHER CONSTRAINED BY CONVENTION?

The *Constitution Act 1902* places certain specific limitations on the powers of the Council in respect of money bills: such bills must originate in the Assembly under section 5; the Council may only suggest by message to the Assembly amendments to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government' under section 5A; and such a bill may be presented by the Assembly to the Governor for assent under section 5A, notwithstanding that the Council has not consented to the bill.

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95 *Hansard*, NSW Legislative Council, 2 April 1969, p 5528.

96 *Minutes*, NSW Legislative Council, 22 June 2000, p 542.

97 *Hansard*, NSW Legislative Council, 23 February 2012, pp 8622-8623.

98 *Minutes*, NSW Legislative Council, 5 April 2017, pp 1522-2533.

However, it has been argued that the powers of the Council in relation to money bills are further constrained by parliamentary convention, to the extent that the Council ought not to amend or reject any money bill. The basis for this argument is the parliamentary convention that the Lower House is pre-eminent with respect to all money bills, a convention inherited from the British Parliament at the establishment of responsible government in 1856.[99]

There is no doubt as to the pre-eminence of the House of Commons with respect to money bills.[100] Under the *Parliament Act 1911* (UK), a money bill not passed by the House of Lords within one month may be presented for Royal Assent and become an Act of Parliament notwithstanding that the Lords has not passed the bill. The *Parliament Act 1911* also makes provision for the Speaker of the House of Commons to certify a bill to be a 'money bill', with such certificate to be conclusive for all purposes; it may not for example be questioned in a court of law.[101] Even before the adoption of these measures in 1911, the pre-eminence of the House of Commons with respect to money bills was firmly established.

However, it is also clear that the powers of the House of Commons with respect to money bills were only partly admitted by the Council at the outset of responsible government in New South Wales in 1856. Clune and Griffith summarise the relationship that developed between the two Houses in relation to money bills between 1856 and 1932 as follows:

> A conveniently loose convention developed permitting the Council to amend machinery bills merely "regulating" taxation, while acquiescing in the substantive power of the Assembly over Money Bills generally. By means of compromise and accommodation between the two Houses, both the spirit and the letter of the constitutional arrangements for responsible government were generally satisfied.[102]

In 1929, President Peden summarised the situation as follows:

> The views taken by this House, and by the Legislative Assembly differ, and have differed, I suppose, almost from the date of responsible government. Broadly speaking, with certain exceptions, like the Appropriation Bill, this House has asserted that it has a right to amend money bills. The Legislative Assembly has asserted that the Council has no right to amend a money bill. How have the controversies been settled? I should be very much inclined to say that the controversies have to a very large extent been settled by the wise and temperate view which this House has taken in regard to the exercise of its strictly legal powers. This House has not considered that it has in fact the full

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99 See for example the discussion in Twomey, *op cit*, pp 531-540.

100 The history of the struggle of the House of Commons for pre-eminence in financial matters is conveniently summarised by Stephen J in *Victoria v The Commonwealth* (1975) 134 CLR 338 at 385 – 386.

101 *Erskine May*, 24th edn, pp 795-796.

102 For detailed discussion of the relationship between the Council and Assembly over money bills prior to 1932, see D.Clune and G.Griffith, *Decision and Deliberation*, pp 75-82. See also the discussion in Twomey, *op cit*, pp 570 – 571.

> measure of power within the mere words of the Constitution; we really have not claimed to have in fact the full legal powers. Is it now almost unthinkable that we should reject an Appropriation Bill?[103]

The relationship between the Houses in respect of money bills was further altered with the adoption of sections 5A and 5B of the *Constitution Act 1902* in 1933, after approval by the electors at a referendum.

Sections 5A and 5B were inserted into the *Constitution Act 1902* at a very tumultuous point in the history of the Council, following Premier Bavin's entrenchment of the Council in 1930 and Premier Lang's second attempt to abolish it between 1930 and 1932. In this context, the reform to the powers of the Council with respect to money bills (and other bills) implemented by sections 5A and 5B, as inserted by the Stevens Ministry, was very deliberate. The reform was introduced concurrent with the changes to the electoral system of the Council: henceforth the reconstituted Council was to consist of 60 indirectly elected members. With the traditional mechanism of 'swamping' the Council no longer available for the resolution of deadlocks between the Houses, another mechanism was necessary. However, in proposing sections 5A and 5B, the conservative Stevens Ministry deliberately chose not to extend to the Legislative Assembly the powers with respect to money bills held by the House of Commons, based on the experience of Premier Lang's time in office. As the Crown Solicitor acknowledged in 1948, the political disputes in New South Wales in the early 1930s meant that the powers traditionally claimed by the House of Commons were not conceded as being appropriate to the Assembly, and the intent of the new sections 5A and 5B was to limit the powers extended to the Assembly over money bills and to confirm certain powers claimed by the Council.[104] The words of the Crown Solicitor in 1948 are instructive:

> In England legislative provision was made in the Parliament Act 1911 to regulate relations between the respective Houses. In that Act a provision was made whereby a Money Bill which had been passed by the House of Commons and sent to the House of Lords but not passed by the latter House within one month was, unless the House of Commons otherwise directed, presented to His Majesty for Royal Assent notwithstanding that the House of Lords had not passed the Bill. A 'Money Bill' was carefully defined, and provision was made for the endorsement on every Money Bill of a certificate of the Speaker of the House of Commons that it was a Money Bill. Such certificate was declared to be conclusive for all purposes and to be not liable to be questioned in any Court of law.
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> When the Constitution Act was amended in 1933 two new Sections – Sections 5A and 5B – were inserted to deal with Bills in respect of which there was a disagreement between the two Houses. It must be assumed, I think, that at the time due consideration was given to the provisions of the Parliament Act. It must also, I think, be accepted that the omission of what are obviously important matters dealt with in the Parliament Act, was deliberate. Because of

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103 *Hansard*, NSW Legislative Council, 26 November 1929, p 1654.

104 Crown Solicitor's Advice, 'Constitution Act: The Attorney-General's memo of the 22 June 1948', 13 October 1948.

> the political disputes at the time the powers traditionally claimed by the House of Commons were not conceded as being appropriate to the Legislative Assembly, and the trend of these new Sections was to limit the powers of the Assembly, and to confirm certain at least of the powers claimed by the Legislative Council. This, in my opinion, is the explanation of the marked differences between Sections 5A and 5B of the Constitution Act and the corresponding provisions of the Parliament Act, and little help can be derived from a consideration of the latter Act. Accordingly, in my opinion, Sections 5A and 5B must be construed as having no direct relation to the Parliament Act, and must be construed as special provisions applicable in New South Wales which were deliberately framed in a form different from the form in which the Parliament Act regulated the relations between the House of Commons and the House of Lords.[105]

In short, the arrangements adopted for the resolution of disputes over money bills by the Parliament in 1933 were specifically adapted for local circumstances, and were deliberately very different to those in the United Kingdom Parliament.

Those arrangements clearly entailed a distinction between money bills appropriating revenue 'for the ordinary annual services of the Government' under section 5A, and all other money bills under section 5B. On 14 September 1932, when the Attorney General, the Hon Henry Manning, moved the second reading of the Constitution Amendment (Legislative Council) Bill in the Legislative Council, Hansard records that he read onto the record the proposed section 5A, on which he commented: 'This is, of course, a bill for the appropriation of money for the annual services of the Crown'. He continued that in regard to other bills, the proposed section 5B would apply, which he then proceeded also to read onto the record.[106]

On 28 September 1932, during subsequent debate of amendments to the bill in committee, Mr Manning further observed:

> There was an endeavour to accurately define the difference between the two classes of bill referred to, and to secure to this House, as far as possible, that there shall be no usurpation by the other Chamber of functions to which under the law it is not entitled. Those two principles have been borne in mind, and in the bill an attempt is made to observe and apply them as far as possible. The language used in the clause has been selected with the greatest possible care, with every attempt to preserve to the Lower Chamber what might be considered to be its proper function while preventing it from usurping a function that it does not constitutionally possess. The attempt has been made, first of all, in the language of new section 5A, subclause (3), describing the bill as 'a bill which appropriates revenue or moneys for the ordinary annual services of the Government'.[107]

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105 Crown Solicitor's Advice, 'Constitution Act: The Attorney-General's memo of the 22 June 1948', 13 October 1948, p 2

106 *Hansard*, NSW Legislative Council, 14 September 1932, p 167.

107 *Hansard*, NSW Legislative Council, 28 September 1932, p 586.

Accordingly, the Council does not admit that the parliamentary convention of the British Parliament that the Lower House is pre-eminent in respect of money bills places any further restriction on its powers concerning money bills. The convention already finds some expression in the *Constitution Act 1902* in section 5, which was first adopted in 1855 at the outset of responsible government in almost identical terms, and also possibly in section 46 of the *Constitution Act 1902*, which dates back even further, to 1842. Significantly however, the convention was never fully accepted by the Council in the years 1856 to 1932, and was modified in important ways in its application to the Houses of Parliament through the adoption of sections 5A and 5B of the *Constitution Act 1902* in 1933.

In the Australian common law tradition, there are two general approaches to the interpretation of legislation, the literal approach and the purposive approach. The literal approach is based on the literal meaning of the words used in the text of legislation; the purposive approach looks at the broader purpose of the legislation and the 'mischief' it is intended to address.[108] In the case of the provisions of the *Constitution Act 1902* in relation to money bills, particularly sections 5A and 5B, the literal meaning of the words, but also the intent of the Parliament behind them, are clear. To attempt to read down the powers of the Council in respect of all money bills based on parliamentary convention contradicts both the very deliberate and precise wording of the *Constitution Act 1902* and the history of relations between the Houses on money bills since 1856.

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108 For further discussion of the literal and purposive approaches to statutory interpretation, see D.Pearce and R.Geddes, *Statutory Interpretation in Australia*, Lexis Nexis Butterworths, 8th ed., 2014, Chapter 2. In New South Wales, section 33 of the *Interpretation Act 1987* specifically requires that in interpreting the provisions of a New South Wales Act, regard is to be had to the object or purpose of the Act.