

CHAPTER 13

FINANCIAL LEGISLATION

Under section 5A of the *Constitution Act 1902*, 'any Bill appropriating revenue or moneys for the ordinary annual services of the Government' cannot be blocked by the Council's failure to pass it in a form acceptable to the Assembly. However, there is no limitation on the powers of the Council to amend a money bill other than a 'bill appropriating revenue or moneys for the ordinary annual services of the Government' referred to in section 5A – that is, money bills other than annual appropriation bills.

THE PROVISIONS OF THE *CONSTITUTION ACT 1902*

The Consolidated Fund

Section 39(1) of the *Constitution Act 1902* provides:

Except as otherwise provided by or in accordance with any Act, all public moneys ... collected, received or held by any person for or on behalf of the State shall form one Consolidated Fund.

The Consolidated Fund is the account into which the government deposits taxes, tariffs, excises, fines, fees, loans, income from Crown assets and other revenues once collected, together with transfers from the Commonwealth, and from which it withdraws the money it requires to cover its expenditure.

Expenditure from the Consolidated Fund is classed as being of either a recurrent or capital nature. In general, recurrent expenditure relates to the normal operating costs of government departments and authorities, such as salaries and stores, while capital expenditure normally relates to major spending on construction works such as the building of a school or hospital. The distinction is not always clear, as capital expenditure is sometimes met from recurrent funding.

Appropriation of the Consolidated Fund

Section 5 of the *Constitution Act 1902* states that the legislature has power 'to make laws for the peace, welfare and good government of New South Wales in all cases

whatsoever', 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* in 1902.

The provisions of section 5 should be read in conjunction with sections 45 and 46 of the Act which regulate the appropriation of funds from the Consolidated Fund, and the introduction of bills and resolutions relating to appropriation and taxation bills.

Section 45 provides that the Consolidated Fund may 'be appropriated to such specific purposes as may be prescribed by any Act on that behalf'.

Section 46 further provides:

(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 5A of the *Constitution Act* 1902

As noted in Chapter 2 (The New South Wales Legislative Council), in 1933 a new section 5A was inserted into the *Constitution Act 1902* to limit the powers of the Council in relation to money bills appropriating public revenue for the ordinary annual services of government.¹ Section 5A(1) provides:

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 being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill.

The effect of this section is that while it is open to the Council to reject, fail to pass or suggest amendments to bills appropriating moneys for the ordinary annual services of the government, notwithstanding the actions of the Council, the Assembly

¹ Section 5A, together with ss 5B and 5C, was inserted in the *Constitution Act 1902* by the *Constitution Amendment (Legislative Council) Act 1932*.

may direct that such bills, with or without any amendments suggested by the Council, be presented to the Governor for assent.

However, section 5A applies only to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government'. With respect to all other bills, the mechanism for resolving deadlocks between the two Houses is laid out in section 5B.

Section 5A(2) further provides that the Council is taken to have failed to pass any such bill if it is not returned to the Assembly within one month after transmission to the Council and the session continues. The effect of this provision is to prevent the Council, by inactivity, frustrating the wishes of the Assembly in respect of appropriations for ordinary annual services of the government. For section 5A to apply, however, the session must continue during this period and must not be prorogued.

Under section 5A(3), 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 prevents the Assembly from 'tacking on' to appropriation bills provisions alien to 'ordinary annual services of the Government'.

The meaning of 'ordinary annual services of the Government'

The expression 'ordinary annual services of the Government' contained in section 5A may be taken to denote services annually carried on and provided for by the government; that is, the normal functions for which appropriation of revenue or moneys is required. However, determining what constitutes the 'ordinary annual services of the Government' is somewhat problematic.

Advice from the Crown Solicitor dated October 1948² indicates that the provision of a special grant towards the cost of erecting a building could not be accepted as part of the ordinary annual services of a government. Nor could provision for an increase in the rate of salaries which are to be paid out of moneys provided by Parliament, as it is not in itself an appropriation. It is more difficult to determine whether an appropriation made to cover the costs of some new instrumentality would constitute an ordinary annual service. Again, advice from the Crown Solicitor suggests that if a bill authorising the establishment of the instrumentality had already been passed by both Houses when the appropriation was introduced, it would probably fall within the scope of section 5A. However, if there were no legislation setting up the new instrumentality, then the costs of establishing it would probably not be an ordinary annual expense.³

In July and August 1996, the Auditor-General also sought advice from the Crown Solicitor, *inter alia*, whether appropriations for non-recurrent capital items, and

2 Crown Solicitor's Advice, 13 October 1948.

3 *Ibid.*

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'. Although the Crown Solicitor concluded that both categories of appropriations are included within the ordinary annual services of government and are therefore subject to section 5A, there are various arguments to the contrary.⁴

As there have been no court proceedings on the interpretation of sections 5A and 5B since their insertion into the *Constitution Act 1902* in 1933, interpretation of the meaning of 'ordinary annual services of the Government' remains unresolved. However, some further guidance is available from the Senate.

The Senate has taken various steps to define the meaning of the expression 'ordinary annual services of the Government' as it appears in sections 53 and 54 of the Commonwealth Constitution. According to *Odgers*, the expression was understood by the framers of the Commonwealth Constitution as referring 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.⁵ This understanding is reflected in the terms of the so-called Compact of 1965, an agreement between the Government and the Senate whereby the Government undertook that the following matters would not be regarded as part of the ordinary annual services of the government and would therefore be included in bills subject to amendment by the Senate:

- (a) the construction of public works and buildings,
- (b) the acquisition of sites and buildings,
- (c) items of plant and equipment which are clearly definable as capital expenditure,
- (d) grants to the States under section 96 of the Constitution, and
- (e) new policies not authorised by special legislation, subsequent appropriations for such items to be included in the appropriation bill not subject to amendment by the Senate.⁶

This list was affirmed by a resolution of the Senate in 1974, which stated that:

[P]roposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate Appropriation Bill subject to amendment by the Senate.⁷

In 1999, the Senate further adjusted the classification of items falling within the category of ordinary annual services. These adjustments provide:

- items regarded as equity injections and loans be regarded as not part of ordinary annual services;

4 Auditor-General's Report to Parliament, Vol 2, 1996, pp 430-441.

5 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 282.

6 *Ibid.*

7 *Senate Journal* (17/2/1977) 572, quoted in *Odgers*, 11th edn, p 283.

- all appropriation items for continuing activities for which appropriations have been made in the past be regarded as part of the ordinary annual services;
- all appropriations for existing asset replacement be regarded as provision for depreciation and part of ordinary annual services.⁸

There are precedents where the Senate has amended money bills not for the ordinary annual services of government.⁹

APPROPRIATIONS FROM THE CONSOLIDATED FUND

The annual appropriation bills

The passing of the annual appropriation bill and cognate bill each year provides the legislative authority for expenditure from the Consolidated Fund for, amongst other things, the ordinary annual services of the government.

The meaning given to 'appropriate' in the *Macquarie Dictionary* is 'to set aside for some specific purpose or use'.¹⁰

The Appropriation Act for a particular financial year, when passed by both Houses and assented to by the Governor, becomes the law authorising the expenditure of the sums shown in the estimates for the financial year. The authority for the Act expires on 30 June of that financial year. The Act itself appropriates the amounts set out in the estimates for payments on recurrent services and capital works and services from the Consolidated Fund. It also appropriates payments made from the 'Advance to Treasurer' and payments made in anticipation of parliamentary approval under section 22 of the *Public Finance and Audit Act 1983* during the previous year.

In *Brown v West*,¹¹ 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 judgment, the court 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, but the Parliament forgoes its annually-exercised power over expenditure by government when a law containing a standing appropriation is enacted. Standing appropriations need not be included in

8 *Odgers*, 11th edn, pp 283-284.

9 *Ibid*, p 384.

10 Delbridge *et al* (eds), *The Macquarie Dictionary*, 3rd edn, Macquarie Library, Sydney, 1997, p 97.

11 (1990) 91 ALR 197.

annual appropriations. Browning (2nd ed, p 410) reports that an estimated two-thirds of total expenditure from the Consolidated Revenue Fund is not by appropriations for the service of the year or in respect of the year, but by standing appropriations.

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.

In the *AAP Case* it was common ground among all the judgments, save that of Stephen J, that the validity of the appropriation there in issue depended on the question whether the purpose stated by the Parliament in the Appropriation Act was a 'purpose of the Commonwealth': see pp 360, 367, 372-3, 392, 406, 417. Mason J said (CLR at 392; ALR at 323):

Section 83 in providing that 'No money should be drawn from the Treasury of the Commonwealth except under appropriation made by law', gives expression to the established principle of English constitutional law enunciated by Viscount Haldane in *Auckland Harbour Board v The King* [[1924] AC 318 at 326]: 'no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself'. An Appropriation Act has a twofold purpose. It has a negative as well as a positive effect. Not only does it authorize the Crown to withdraw moneys from the Treasury, it 'restrict(s) the expenditure to the particular purpose', as Isaacs and Rich JJ observed in *Commonwealth v Colonial Ammunition Co Ltd* [(1924) 34 CLR 198 at 224].

Viscount Haldane followed the sentence quoted from the judgment in *Auckland Harbour Board v The King* at 326-7 with the observation that:

The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment.¹²

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

However, since the judgment in *Brown v West*, the introduction at the Commonwealth level of accrual accounting in 1997, and the presentation of the budget according to an outcomes and outputs reporting framework, has posed a significant challenge to the Commonwealth Parliament's control of the appropriations process.

In 2005, in *Combet v Commonwealth*,¹³ the majority of the High Court, when called upon to consider the legality of government advertising following the move to the outcomes and outputs framework, held that an administered item 'must be linked to a stated outcome', but that a 'departmental item' does not need to be so linked, and that as a result portfolio budget statements and the outcomes stated therein play no role in determining the validity of appropriations under the *Appropriation Act (No 1)* (Cth), s 7.¹⁴

In effect, the Court allowed the Appropriation Acts for the ordinary annual services of the Commonwealth to be expressed in very broad terms.

McHugh J was alone in holding that the majority's interpretation rendered the Appropriation Act unconstitutional. As he put it, it 'authorises an agency to spend money on whatever outputs it pleases'.¹⁵

The decision in *Combet v Commonwealth* has been criticised for what it fails to say about the limits to government appropriation at the Commonwealth level. The Clerk of the Senate is on record as follows:

The system which has now been put in place - of appropriations and funding at the Commonwealth level - has had the effect of reversing the results of the English Civil War, the revolution of 1688 and the reforms of William Pitt the Younger because the parliament now, in passing the appropriation bills, no longer determines how much money will be available or what it will be spent on. This has come about not because of conspiracies by wicked monarchs - although there may be some of those about, still - but via a collection of changes which people have not paid adequate and appropriate attention to, partly because they were thought to be accounting changes and nobody pays attention to accounting changes.

Invariably, the question arises of what to do about it. ... I have quoted two passages from the judgement of the Chief Justice in the recent High Court case in which he tells us very clearly what must be done. First, the statements of outcomes in appropriation bills must specify with far more concreteness the purposes for which the money is being appropriated and, secondly, much more information should be provided to the parliament about how the money is proposed to be spent and how it is spent after the event.¹⁶

13 (2005) 80 ALJR 247.

14 *Ibid* at 279 and 280 per Gummow, Hayne, Callinan and Heydon JJ.

15 *Ibid* at 271 per McHugh J.

16 Senate Finance and Public Administration References Committee, Transcript, 8 December 2006, p 1.

The Senate Finance and Public Administration References Committee subsequently recommended that:

[T]he Government ensure that future appropriation bills that the Senate cannot amend under the provisions of the Constitution restore the need for any approved expenditure to be legally linked to and connected with a specific outcome or purpose.¹⁷

Such issues of transparency and accountability of appropriations have not arisen in New South Wales to the same extent. The New South Wales budget papers continue to provide an 'Operating Statement' detailing the major categories of expenses and revenues of agencies, a 'Cash Flow statement' detailing the cash impacts of agency activities, and a 'Balance Sheet' detailing the assets and liabilities of an agency. In addition, the New South Wales Budget Papers continue to provide a 'Results and Services' section summarising the outcomes the agency is working towards and a 'Strategic Directions' system explaining objective of areas of focus for the agency in the budget year.

Sections 27AA and 27AB of the *Public Finance and Audit Act 1983*, which require that certain information must be provided in the budget papers, are examined later in this chapter.

Temporary supply

The *Public Finance and Audit Act 1983* authorises the Treasurer to pay sums from the Consolidated Fund for the first three months of a new financial year until a new appropriation bill for that financial year is assented to. The Act further includes a formula that provides for spending at the previous year's rate adjusted for inflation. It also allows adjustments to the estimates where, during the year, functions are transferred between departments.

These arrangements remain in force until 30 September after which, if necessary, the government introduces a supply bill. A supply bill is an appropriation bill permitting payments out of the Consolidated Fund pending the passing of the annual appropriation bills. Since 1996, when the Government changed the budgetary cycle to bring down the Budget in May or June, there has been no requirement to pass a supply bill.

Standing appropriations

In addition to the annual appropriation bills, there are various Acts which include provisions permanently appropriating moneys from the Consolidated Fund. Some may appropriate funds for special purposes from time to time while others, such as the *Parliamentary Remuneration Act 1989* and *Public Finance and Audit Act 1983*, have standing appropriations.

¹⁷ Senate Finance and Public Administration References Committee, *Transparency and accountability of Commonwealth public funding and expenditure*, March 2007, p xiii.

THE POWERS OF THE COUNCIL IN RELATION TO MONEY BILLS

The term 'money bill' in relation to section 5 of the *Constitution Act 1902* refers either to bills appropriating public revenue or bills imposing any new rate, tax or impost. It includes the annual appropriation bills as well as any other bills that appropriate money.

Section 5 requires that both types of money bills, that is bills appropriating public revenue and bills imposing any new rate, tax or impost, must originate in the Assembly.

However, since the beginning of responsible government in New South Wales in 1856, there has been dispute between the two Houses on the question of the Council's powers over money bills. The Assembly places a wide interpretation on the provisions of the *Constitution Act 1902*, jealously guarding its authority under the proviso in section 5 that money bills originate in the Assembly, and its authority under section 46 with respect to appropriations recommended by the Governor. The Assembly's claims lie in 'the financial initiative of the Crown' and the belief that sections 5 and 46 of the *Constitution Act 1902* incorporate the principle that the government has control of public revenue. The basis of the Assembly's claims lies in the long history of struggle between the Commons and the Monarch for control of the financial affairs of the kingdom, particularly during the Tudor and Stuart period. This is discussed in more detail in Appendix 12.

This claim is not admitted by the Council, which has adopted a much narrower construction of sections 5A and 5B of the Act than the Assembly. The Council regards only those bills that fall within the terms of section 5A as not capable of amendment. This issue is discussed below.

The annual appropriation bills

The *Parliament Act 1911* (UK) provides that a money bill which has been passed by the House of Commons in the Westminster Parliament and sent to the House of Lords but not passed by the latter House within one month may, unless the House of Commons has otherwise directed, be presented to the Monarch for Royal Assent notwithstanding that the House of Lords had not passed the bill (see Appendix 12).

At the time section 5A was inserted into the *Constitution Act 1902* in 1933, there was considerable debate in relation to the provisions of the *Parliament Act 1911*. In particular, under the *Parliament Act*, the Speaker of the House of Commons can certify that a bill is a 'money bill', and therefore subject to the mechanism described above if the House of Lords fails to pass the bill. The absence of this provision in Part 5A, as inserted into the *Constitution Act 1902* in 1933, is significant. 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 trend of the new sections 5A and 5B was to limit the powers of the Assembly and to confirm certain powers claimed by the Council.¹⁸

The wording of section 5A in relation to ‘any Bill appropriating revenue or moneys for the ordinary annual services of the Government’ recognises that a bill may appropriate revenue or money for purposes other than the ordinary annual services of the government. Consequently, the position of the Council is that this section does not apply to all bills that appropriate revenue or money, but only to that class of bills in which the appropriation is for the ‘ordinary annual services of the Government’. Bills that appropriate money for other purposes, in the event of a deadlock, are subject to the provisions of section 5B.

Since the insertion of sections 5A and 5B into the *Constitution Act 1902*, the general consensus of opinion has been that the only bills to which section 5A applies are the annual appropriation bills.¹⁹ While the Council has the power to suggest amendments to a bill for the ordinary annual services of government, there is no precedent for amendments to the main appropriation bill being suggested to the Assembly.

Money bills other than the annual appropriation bills

As indicated above, under the *Constitution Act 1902*, bills that appropriate revenue for the ‘ordinary annual services of the Government’ should be distinguished from other bills appropriating public revenue or bills imposing any new rate, tax or impost. Generally, when a dispute has arisen between the two Houses in respect of a money bill the Assembly, in order to avoid creating precedents casting doubt on its claim, has usually arrived at a compromise. For example, the Public Service Salaries Bill (1931), which was amended by the Council to provide for an increasing scale of percentage reductions on public service salaries according to level of income, and to allow for a marriage allowance rebate for married males and widowers with dependent children, was discharged in the Assembly and a new bill introduced in a form acceptable to the Council.²⁰ A similar case arose in relation to the Stamp Duties Amendment Bill 1977 when the Council made amendments in relation to death duties.

On other occasions, when the Council has felt dissatisfaction with a money bill, it has included in the message returning the bill to the Assembly a paragraph expressing the Council’s point of discontent. This occurred in 1894, 1904, 1905 and 1961.²¹

18 Crown Solicitor’s Advice, 13 October 1948.

19 Section 5A also applies to the annual Supply Bill. However, since the budget cycle was brought forward in 1996 to allow the budget to be presented in May, there has been no requirement for the Parliament to pass an annual Supply Bill.

20 *LC Debates* (4/8/1931) 4950-4951.

21 On the following occasions, although the Council returned the Appropriation Bill to the Assembly without amendment, the message included an addendum expressing concern at particular provisions: *LC Minutes* (21/12/1894) 126, (20/12/1904) 123, (5/12/1905) 175, (9/11/1961) 115.

On two other occasions in 1969 in relation to the Aborigines Bill and the Consumer Protection Bill, the Assembly obtained a message from the Governor under section 46 of the *Constitution Act 1902* before agreeing to the Council's amendments. In its message to the Council on both occasions, 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.²²

It is clear that taxation bills, which are defined in section 5 as bills that must originate in the Assembly, have been deliberately excluded from section 5A and are therefore amendable by the Council.

When section 5A was inserted in the *Constitution Act 1902* by the *Constitution Amendment (Legislative Council) Act 1932*, several members of the Council emphasised during the debate that section 5A(1) was intended to be limited to appropriation bills only and not to extend to other types of money bills, such as bills imposing taxation. The Hon Henry Manning, then Attorney General, stated in debate:

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.²³

Subsequently, on 11 November 1943, when speaking in the Assembly on the second reading of the Constitution (Legislative Council Reform) Bill, the Hon William McKell, then Premier, said:

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.²⁴

22 *LC Minutes* (12/3/1969) 385, (2/4/1969) 490-491.

23 *LC Debates* (28/9/1932) 588.

24 *LA Debates* (11/11/1943) 735.

When the bill was forwarded to the Council for concurrence, the Minister of Justice (the Hon Reg Downing) on 30 November 1943, said in relation to the 1933 reforms which inserted sections 5A and 5B:

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 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.²⁵

On 27 June 1872, the Council resolved that fees for licences or services and pecuniary penalties do not constitute an appropriation of public revenue or the imposition of a new tax or impost.²⁶ This has been confirmed by resolution of the House on several occasions since.

The Assembly standing orders provide that it is not a breach of privilege to receive a bill initiated in the Council, or Council amendments to a bill initiated in the Assembly, having the effect of imposing a fee for a licence or service or a pecuniary penalty.²⁷

There have been many examples of the Council proposing amendments to money bills other than the annual appropriation bills. While not all of the amendments have been carried, and the Assembly has on occasion questioned the right of the Council to amend such bills, they provide a substantial body of practice verifying the authority and power of the House to amend bills other than the annual appropriation bills. These are discussed below.

Government Railways (Free Passes) Amendment Bill 1934

In 1934, the Government Railways (Free Passes) Amendment Bill specifically authorised the issue of free passes to members of the Council who were members immediately before 23 April 1934. During the course of the debate it became apparent that one former member of the Council had been inadvertently excluded since he was not a member immediately before the specified date.²⁸

The Council amended the bill to provide that the member concerned receive a gold pass for travel on the railways. When the amendment was considered in the

25 *LC Debates* (30/11/1943) 1115-1116.

26 *LC Minutes* (27/6/1872) 33-34.

27 Standing order 228 states: Subject to section 5 of the *Constitution Act 1902*, the House will not object to legislation initiated in the Legislative Council on the ground that it contains provisions:

- (a) imposing or otherwise dealing with pecuniary fines or penalties; or
- (b) requiring payment of or otherwise dealing with pecuniary fees for services or for licences or similar authorities.

28 He had actually ceased to be a member on 9 February 1934.

Assembly, the Speaker called the attention of the House to the fact that the amendment might involve additional expenditure. In agreeing to the Council's amendment, the Minister of Justice, the Hon Lewis Martin said that the amendment did not involve any additional expense and was not a case where the Crown was providing a service for the member. The House agreed and did not take any action.²⁹

Stamp Duties (Amendment) Bills, 1939 and 1952

Bills varying stamp duty are taxing bills that do not involve the ordinary annual services of the government and can be amended by the Council.

In debate on the Stamp Duties (Amendment) Bill on 2 November 1939, the Hon James Concannon asked the responsible minister, the Hon Marsden Manfred, whether he would consider recommittal of clause 2 of the bill to enable the committee of the whole House to increase the rate of duty on estates over £3000 in value (as the bill was a taxation bill and not an appropriation bill). The minister was of the view that it would be beyond the power of the House to increase taxation under the bill because of the proviso in section 5 of the *Constitution Act 1902*.

In seeking a ruling from the chair on the matter, Mr Concannon contended that it was within the power of the House to increase or reduce rates of taxation. However, the Chairman, after quoting from section 5 of the *Constitution Act 1902*, in a contrary ruling, ruled that the amendment forecast by the member would be out of order because it would add an impost on that contemplated by the bill as originated in the Assembly.³⁰

However, in 1952 the Council made several amendments to another Stamp Duties (Amendment) Bill, notwithstanding the ruling of the Chair in 1939. When the bill was returned to the Assembly, the power of the Council to amend a money bill did not arise during consideration of the Council's amendments.

Fire Brigades (Amendment) Bill 1955

In 1955, an indirect increase in the expenditure of revenue of the Crown occurred when the Council amended the Fire Brigades (Amendment) Bill, to provide that the wages and salaries fixed in respect of firemen or officers of fire brigades by any award in force upon a particular appointed day or any award made after such an appointed day would not be reduced by reason of any reduction of the average ordinary working hours for firemen and officers of fire brigades.³¹

29 *LA Debates* (19/12/1934) 4925-4926.

30 *LC Debates* (2/11/1939) 7234-7235.

31 *LC Debates* (30/3/1955) 3421.

State Planning Authority Bill 1963

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 in proportion to the amount to be paid to the Fund by councils. The then 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.³²

Consumer Protection Bill 1969

In 1969, the Consumer Protection Bill brought together in one bill various consumer protection measures already administered by the Department of Labour and Industry. The amendments made by the Council increased the number of positions on the Consumer Affairs Council. The Council's amendments were agreed to by the Assembly, but in an addendum to its message the Assembly indicated it was only doing so '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 amendments' under section 46 of the *Constitution Act 1902* and only on the basis that its action not be regarded as a precedent.³³

In debate on a matter of privilege on the addendum, the Leader of the Government in the Council, the Hon John Fuller, said:

For many years there has been dispute between the Legislative Assembly and the Legislative Council on the powers of the Council, especially in relation to money bills. 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 ... Section 5A is a long provision with three subsections which, in brief, provide that the Legislative Council's powers to make any amendments whatever in the annual Budget or in any Supply Bill are very limited. However, to my

32 *LC Debates* (20/11/1963) 6437-6438.

33 *LC Minutes* (2/4/1969) 491.

mind section 5B covers the sort of money provision with which we are now concerned, which is not a straight-out Budget or Supply Bill. This provision refers to general bills that involve expenditure, as this one does, but are not vital and do not impose new taxes or new imposts upon citizens of New South Wales. I consider that the Legislative Council can amend in any way that it deems fit any bill covered by section 5B of the Constitution Act.³⁴

In supporting the Leader of the Government, the Leader of the Opposition in the Council, the Hon Reg Downing, claimed:

It seems to me that, as the Minister said, section 46 of the Constitution Act applies to the Legislative Assembly and that, subject to sections 5, 5A and 5B of that Act, this House is empowered to do what it desires in respect of any legislation, with the exception of a bill appropriating revenue for the ordinary annual services of the Crown ... Since the reconstitution of this House in 1934, the Legislative Council has very wide powers indeed, limited only by section 46 of the Constitution Act regarding the initiation of expenditure ...

However, once the Legislative Assembly sends a bill such as this to the Legislative Council for its view, it is within the power of this Chamber to do what it will.

However, I have strongly taken the view, both when in Government and in Opposition, that this Chamber should not reject any taxation measure, and this is a convention that should be observed by a House that is not directly elected by the people. However, my view, which has been held consistently is that there is no legal bar to the Council's rejecting, for example, the turnover tax.³⁵

Business Franchise Licences (Tobacco) Further Amendment Bill 1989

The Business Franchise Licences (Tobacco) Further Amendment Bill provided for a 5 per cent increase in the variable component of licence fees imposed on tobacco sellers under the *Business Franchise Licences (Tobacco) Act 1987*. The Labor Opposition sought to amend the bill to have the tax received paid into a separate account until an Act was passed which would enable the funds to be used by a foundation. When the Chair of Committees ruled the amendment out of order on the grounds that it was outside the leave of the bill, the opposition sought to move another amendment seeking to ensure that a percentage of the tax collected would be allocated to health promotion and anti-smoking activities. This was also ruled out of order, not only as being outside the leave of the bill, but because it offended against section 5 of the *Constitution Act 1902*.

The debate over the legitimacy of the amendment focused on whether the bill was appropriating public revenue, and therefore not subject to amendment by the Council, or merely a taxing bill. In arguing against the power of the Council to

34 *LC Debates* (2/4/1969) 5528.

35 *LC Debates* (2/4/1969) 5528-5529.

amend the bill the Leader of the Government, the Hon Ted Pickering, relied on advice from the Solicitor General, which maintained:

The amendment seeks to appropriate part of the public revenue. Reference may be made to *New South Wales v Bardolph* (1934) 52 CLR 455 at 508; *Victoria v Commonwealth* (1975) 134 CLR 338 at 354, 386, 392, 410-11; and *Davis v Commonwealth* (1988) 63 ALJR 35 at 39, 48 for discussion as to the effect and operation of an Appropriation Act. The reason why the proposed s 41(3) appropriates revenue is twofold. First, it authorises the Chief Commissioner to pay portion of the tax revenue into a separate account. This is in contradistinction to the operation of s 39 of the Constitution Act which provides that except as otherwise provided by any Act, all public moneys are to be paid into Consolidated Revenue. Secondly, there is an appropriation by the authority given to the Chief Commissioner to pay the money held in the separate account to a Foundation established by an Act which has stated objectives. As I read that provision the Foundation must be created by an Act of Parliament, presumably in such a way that it has authority to receive money, but the authority to pay that money to it when established is to be found in s 41(3) and not in the Act yet to be passed to establish the Foundation ... The issues raised may involve the privileges of the respective Houses. However, my concern lies with the lawfulness of the proposed action which turns upon the proper construction of the *Constitution Act 1902*. If the requirements of that Act with respect to the powers of the Legislature and the procedure to be adopted by it are disregarded then the validity of any ensuing legislation could be challenged in the Courts: see *Victoria v Commonwealth* (1975) 134 CLR 81 at 118, 163, 181. My ultimate concern is therefore the validity of the tax which it is presently the sole purpose of the bill to exact.

Since the foreshadowed amendment involves the appropriation of a part of the Consolidated Fund, section 46 of the Constitution Act is quite explicit on the first question. It provides that:

- (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 embodies the constitutional and parliamentary principle of 'the financial initiative of the Crown', ie, the principle that the Government of the day initiates or moves to increase appropriation and taxation: Odgers, *Australian Senate Practice* (1976) pp 370-4; Pettifer, *House of Representatives Practice* (1981) pp 32-4.

The motion to introduce the foreshadowed s 41(3) was not recommended by the Governor's message, nor will it be proposed by a Minister of the Crown.

The consequences of s 46 being disregarded is stated plainly, namely that the Legislative Assembly would be acting unlawfully. I need not delay to examine whether that would invalidate the legislation if ultimately passed (although I have little doubt that it would) because it is unthinkable that the Assembly would knowingly do that which is declared unlawful by the Constitution.

2. The power of the Council to make the amendment

If the Bill passes through the House without amendment, can it be amended as proposed in the Council? In my opinion it cannot because the Constitution Act precludes it.

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. But there are other provisions pointing clearly in the same direction.

Section 5A, which provides a mechanism whereby certain appropriation Bills can be put into law despite the disagreement of the Council refers to the ways in which the Council may indicate its views on such Bills before that mechanism can first be put into action. It refers to circumstances in which the Council 'rejects or fails to pass (the Bill) or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree'. There is a world of difference between making an amendment or suggesting an amendment (see Odgers, *op cit* p 370), which once again reflects the matters of deep constitutional principle to which I have referred. There is no suggestion in s 5A that the Council can do the former. Whilst s 5A is confined to Bills which appropriate revenue for the ordinary annual services of the Government (which the proposed s 41(3) does not purport to do) the critically relevant part lies in the statutory recognition of what might otherwise have been said to be a mere privilege, but what in truth is a constitutional principle embodied in the Constitution Act. I see no reason why that statutory recognition should be read down as confined to the more limited class of appropriation Bills under s 5A is concerned to allow to be passed despite Council opposition.

Finally, there is s 46 to which reference has already been made. If it is 'unlawful' for the Assembly to 'originate' an appropriation which has not been first recommended by the Governor's message, how could it ever be contemplated that the Assembly could be asked to respond to an amended Bill coming back from the Council in which the appropriation was inserted by the Council? As presently advised I cannot see how the matter could be cured by some waiver on the Assembly's part of what in the United Kingdom is a privilege, but what in our State Constitution is expressed in more significant terms. This in turn explains the reference in s 5A to the Council's role in suggesting an amendment, a practice which allows the amendment to be originated in the Assembly by resort to the procedures contemplated in s 46(1) or (2).

Nor can the Council take the view that s 46 is none of its concern. The Constitution Act speaks to the whole Legislature. It could not conceivably contemplate that one branch of it would do that which, for reasons given in the preceding paragraph, would inevitably require the other to act unlawfully in order to give effect to the wishes of the upper House, ie, pass the Bill as amended. Indeed, as I have already indicated, s 5 actually qualifies its conferral of law-making powers by insisting that money Bills 'originate' in the Assembly. In this context the use of the verb 'originate' looks backward: it speaks of the Bill through its stages, but requires that it must have originated in the lower House. Since what would come back to the Assembly from the Council in the event that the amendment is passed there would be the Bill as amended, and since the Bill would be (in part) an appropriation Bill that appropriation Bill would not be properly described as one which originated in the Assembly. Hence the very limitation on law-making power stated so clearly in s 5 would have been infringed.

This interpretation reflects rulings given by the President of the Council on a number of occasions: see Hansard vol 78, 2d series, p 3761 (17.12.1919); Minutes, No 35 (19.12.1928). See also the rulings of the President given on 16 October 1862, 9 June 1886 and 28 August 1889. I am aware that it has been argued that s 5B of the Constitution Act affirms the Council's power to amend any Bill other than one to which s 5A applies. I do not agree with that argument, since it overlooks the matters to which I have already referred. Section 5B operates to provide a mechanism for resolving deadlock brought about lawfully and regularly. In my view, for the reasons stated, this would not be the position if the Council were to pass the Bill with amendment.³⁶

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 his opinion, the amendments that the opposition were seeking to move were within the legislative power of the House, and did not offend against section 5 of the *Constitution Act 1902*:

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

36 LC Debates (8/8/1989) 9526-9528.

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 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.

One question is whether section 5A of the *Constitution Act 1902* is relevant. It applies where the Legislative Assembly passes a bill ‘appropriating revenue or moneys for the ordinary annual services of the Government ...’. In my view, this bill is not an appropriation for the ordinary annual services of the Government. That bill is generally known as the Budget. The bill in question is not the Budget, and I do not think that the mechanism for resolution of disagreement between the Houses provided by section 5A would be applicable as a matter of law. That method (pertaining to the annual Budget) gives clear ascendancy to the power of the lower House.

Under that particular section, where the upper House rejects, fails to pass, or returns the bill to the lower House with a message, the Legislative Assembly may direct that the bill with or without amendment suggested by the Legislative Council be presented to the Governor, and the bill becomes law accordingly. This is so notwithstanding that the upper House has not consented to the bill. It seems to me that this quite special revenue raising bill directed to a specific matter does not come within section 5A.

Accordingly, the more general mechanism for the resolution of this agreement between the Houses becomes relevant: this is section 5B. This provides for the mechanism of a joint sitting and ultimately for decision by referendum. I need not explore the implications of that mechanism for present purposes.

In summary:

- (a) I believe that, the bill having originated in the lower House, it is open to the upper House to amend the appropriation bill in the way which

is proposed by the Opposition without infringing either section 5 or section 46 of the *Constitution Act 1902*.

- (b) Assuming that the Legislative Council passes the amendment and that there is, therefore, a disagreement between the Houses, the method of resolution of that disagreement is the general method (section 5B) rather than the method applicable to disagreements between the Houses with respect to appropriation bills dealing with ordinary annual services of the Government (section 5A).³⁷

Nevertheless, the amendments were subsequently ruled out of order by the Chair of Committees, a member of the Government, on the grounds of being beyond the leave of the bill and falling within the constraints of section 5 of the *Constitution Act 1902*.³⁸

INITIATION OF BILLS WITH FINANCIAL OBLIGATIONS

Although it is unusual, there have also been instances where bills with financial obligations have been initiated in the Council. Such bills avoid the requirement of section 5 of the *Constitution Act 1902* as they contain provisions that require that funding be made available out of money to be provided by the Parliament, effectively through an appropriation bill.

In 1993, the Letona Co-operative (Financial Assistance) Bill was introduced in the Council. Part 5 of the 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'. Part 9 further provided that such assistance 'be provided out of money to be provided by Parliament or that is otherwise legally available'. In effect, this provision required the government to provide financial assistance to Letona Co-operative Limited by way of an appropriation from the Consolidated Fund. The bill received assent on 25 November 1993.

In 1996, the Innovation Council Bill was introduced in the Council. Part 15 of the 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', again apparently obliging the government to fund the Innovation Council from the Consolidated Fund. The bill received assent on 1 November 1996.

THE ANNUAL BUDGETARY PROCESS³⁹

The word 'budget' derives from the Old French word 'bougette' which was a diminutive of 'bouge' meaning leather bag. This in turn comes from the Latin 'bulga' meaning knapsack. In Middle English the word was 'bouget'.

³⁷ Opinion of Shaw JW QC, as quoted in *LC Debates* (8/8/1989) 9507-9508.

³⁸ *LC Debates* (8/8/1989) 9530, 9531-9532.

³⁹ Material for this section is substantially drawn from Nicholls D, *Managing State Finance: The New South Wales Experience*, New South Wales Treasury, Sydney, 1991, pp 17-18, 24-30.

In Britain, the Chancellor of the Exchequer carried a statement of the government's needs and resources to Parliament in a leather pouch or bag, known as a budget. Over time, the word 'budget' came to refer to the statements inside the bag, rather than the bag itself.⁴⁰

A budget today refers to an estimate, often itemised, of expected income and expenditure, or operating results, for a given period in the future. Specifically, it refers to the estimates of government income and expenditure.

The estimates, together with the government documents that are tabled in parliament with the estimates, are generally referred to as 'the budget'.

A historical perspective

Under the early administration of the Governors of New South Wales, the financial management of the State was conducted according to the British Treasury system. A central fund, the Consolidated Revenue Fund, was established, through which the main functions of government were financed. An annual budget with detailed estimates was prepared for approval by parliament, and an approved government auditor audited the accounts. Budget requests, accounts and vouchers had to be sent to London, although by 1844 the main accounts were no longer sent to England for review and final audit.

The first local Treasurer was appointed in 1824, at the same time as the first Council was established, with responsibility for 'local revenues' derived from duties and other imposts in the colony. Paragraph 17 of the King's Instruction to the Governor, dated 17 July 1825, required that all laws and ordinances for levying money, and imposing fines and penalties, make express mention that they were granted or reserved for public use and support of the government.

Details of revenue and receipts and their appropriation for the year 1829 were first laid before the Council by the Governor on 19 April 1830.⁴¹ The following year, on 20 September 1831, the Governor tabled an abstract of revenue and its appropriation for the years 1829 and 1830. The Governor then presented a minute, which was unanimously agreed to, recommending funds to allow the Attorney General to provide a clerk, the furnishing and fitting of a public office, and stationery for the Attorney General. This would appear to be the first occasion that the Council had approved such expenditure.⁴² Later minutes tabled by the Governor recommended that sums be 'appropriated out of the colonial revenue' for the purposes specified in the minute, such as accommodation for the Arch-deacon, building of the King's School and aid for an academic institution.⁴³ In his speech on opening the session on 19 January 1832, Governor Denison indicated that an abstract of revenue and expenditure of the last year and estimates of

40 *Ibid*, p 153.

41 *LC Minutes* (19/4/1830) 80.

42 *LC Minutes* (20/9/1831) 87.

43 *LC Minutes* (8/11/1831) 91-92.

probable expenditure for the current year would be laid before the Council. The Governor also indicated that after the estimates were discussed an Act of Appropriation would be tabled.⁴⁴ Subsequently, on 24 January 1832, the Governor tabled estimates of expenses for 1832,⁴⁵ and on 31 January 1832 tabled estimates of income for 1832.⁴⁶ The Council proceeded to consider the estimates of expenditure on 1, 6, 10 and 20 February 1832.⁴⁷

When responsible government was adopted in 1856 Parliament assumed full power over taxation and expenditure.⁴⁸

A notable departure from the British financial system came in 1870 when the first *Audit Act* of 1870 set up the head of Treasury, rather than the Auditor-General, as the Comptroller of the Exchequer. Consequently, governments in this State have enjoyed considerable flexibility in managing their finances, and from very early on have had complete control over taxation and executive expenditure detail.⁴⁹ There is also an inclusion in the estimates of a provision for contingencies known as the 'Advance to the Treasurer' to be spent at the Treasurer's discretion and accounted for in the following year.

In an attempt to institute some sort of fiscal control over the government, a system of Governor's warrants was agreed to, whereby the Treasury prepared a statement to authorise payment of funds from the Consolidated Fund consistent with the amounts appropriated by the Parliament. These were signed by the Auditor-General and then sent to the Governor for signature. However, there was no prohibition on the government's bankers to allow funds to be drawn down from the Consolidated Fund, unless covered by the warrant. Consequently, governments regularly spent in excess of the amount appropriated by Parliament and had the expenditure approved in retrospect.

The push for major reforms in public sector financial management began in the late 1970s following the publication of the Wilenski Reports.⁵⁰ The main emphasis of these reforms was on improving the presentation of the budget and the budgeting procedures, improving the efficiency and effectiveness of government and promoting greater accountability through better reporting by, and monitoring of, government agencies.⁵¹

44 *LC Minutes* (19/1/1832) 1.

45 *LC Minutes* (24/1/1832) 3, 4-10.

46 *LC Minutes* (31/1/1832) 11, 12-13.

47 *LC Minutes* (1/2/1832) 14, 15, 17-19.

48 Nicholls, above n 39, pp 17-18.

49 In England, to ensure that the executive government spent only in accordance with and not in excess of the amount approved by Parliament, the Auditor-General was also the Comptroller, whose signature was required to authorise the withdrawal of funds from the Consolidated Fund. See Nicholls, above n 39, p 25.

50 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.

51 Nicholls, above n 39, p 30.

Before 1982, the recurrent and capital budgets were divided into two separate funds, the Consolidated Revenue Fund and the General Loan Account respectively. It was understood that the General Loan Account Appropriation Bill (relating to the capital account) was not for the ordinary annual services of government and was not therefore subject to section 5A of the *Constitution Act 1902*. 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.⁵²

However, in 1982 the two funds were merged. During debate on the bills proposing the merger of the two funds,⁵³ the opposition claimed 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 section 5A(1). The Leader of the Government in the Council, the Hon Paul Landa, stated that the Solicitor General had advised that the merger of the funds would not alter the powers of the Council.⁵⁴

Before 1982, the annual appropriation bills dealing with the ordinary annual services of government fell within the provisions of section 5A of the *Constitution Act 1902*, and could not be amended in the Council. By contrast, the annual General Loan Account Appropriation Bill, because it did not deal with ordinary *annual* services, did not fall within the provisions of section 5A, and was subject to amendment and rejection the same as with any other bill before the House.

As the two Funds were merged and combined within the one set of appropriation bills, the position of the Council in relation to appropriation bills which deal with matters other than appropriations for ordinary annual services of government is now unclear, and important constitutional questions could arise if the passing into law of an appropriation bill under section 5A was challenged in the courts. One question that might arise is whether section 5A(3) could be invoked to invalidate those sections of the Act which dealt with capital expenditure on the basis that they were 'tacked on' to a section 5A bill. Another more important question that may arise is whether a power of the Council – that is, the power to legislate under section 5 – had been impliedly altered without following the procedure laid down in section 7A.

52 *LC Debates* (25/8/1982) 458.

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

54 *LC Debates* (25/8/1982) 456.

The modern budget process

The State Budget covers a 12-month period from 1 July to 30 June, although forward estimates for the subsequent two years are also included in Budget Paper No 2. These forward estimates are for the information of Parliament, not for its approval.

Public Finance and Audit Act 1983

In 2002, sections 27AA and 27AB were inserted into the *Public Finance and Audit Act 1983*. Section 27AA sets out the information that must be provided in the budget papers, including:

- a Budget policy statement;
- revised estimates for the year before the budget year, and an explanation of any significant variations in major government financial statistics aggregates from the budget estimates for that year for the general government sector;
- outcomes, outputs and total expenses for each program for the budget year and the prior year;
- financial statements prepared in accordance with the Uniform Presentation Framework;
- primary financial statements in accordance with Australian accounting standards;
- primary financial statements in accordance with government financial statistics principles.

Section 27AB 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.

Fiscal Responsibility Act 2005

Part 3 of the *Fiscal Responsibility Act 2005* sets out 10 broad principles of sound financial management of the State:

- keeping the budget and forward estimates in surplus;
- constraining growth in net cost of services and expenses;
- managing public sector employee costs;
- evaluating capital expenditure proposals;
- managing State finances with a view to long-term fiscal pressures;
- maintaining or increasing general government sector net worth;
- funding employer superannuation liabilities;
- total asset management;

- prudent risk management;
- tax restraint.

Part 9 of the Act provides that '[these] principles may be departed from in the presentation and implementation of the budget, but any departure should be temporary'.

The budget speech and budget papers

The appropriation bills are introduced each year into the Assembly, at which time the Treasurer tables the budget papers and gives the budget speech.⁵⁵ The term 'budget papers' means the official budget documents of the government tabled in parliament in connection with annual appropriation bills. These usually comprise:

- the Budget Speech, that is the Treasurer's speech highlighting the government's budget strategy and key features of the budget (Budget Paper No 1);
- the Budget Statement (Budget Paper No 2), which provides in-depth analysis of the economic background to the budget and a detailed outline of the budget and the State's capital program (Budget Paper No 2);
- the Budget Estimates, which provides detailed estimates of Consolidated Fund receipts and payments in a program format (Budget Paper No 3);
- the Infrastructure Statement, which provides details of projects being undertaken by departments and authorities within the State's overall capital program (Budget Paper No 4);
- the appropriation bills presented to Parliament seeking appropriations out of the Consolidated Fund for the current financial year expenditures and to cover payments made in the previous financial year from the 'Advance to Treasurer' and under section 22 of the *Public Finance and Audit Act 1983* (Budget Paper No 5). These bills include a separate bill for appropriations for Parliament;
- the New South Wales Long-Term Fiscal Pressures Report, which projects the long-term fiscal position of the State over a 40-year period (Budget Paper No 6).⁵⁶

55 On 4 April 1995 the Governor appointed the Hon Michael Egan as Treasurer, the first time a Treasurer had been appointed from the Legislative Council since responsible government in 1856. Subsequently, on 21 September 1995, the House agreed to a request from the Assembly for the Treasurer to attend at the table of the Legislative Assembly on 10 October 1995 for the purpose of giving a speech in relation to the New South Wales Budget 1995/96, *LC Minutes* (21/9/1995) 186. This practice has continued for all subsequent budgets where the Treasurer has been a member of the Council.

56 Sections 27A, 27AA and 27AB of the *Public Finance and Audit Act 1983* detail the format and content of the Budget Papers, which must be tabled in the Assembly before the end of the prior financial year.

The budget speech is the second reading speech on the appropriation bills and outlines the government's economic and financial policy. It also announces the expected budget outcomes and indicates how any deficit will be financed.

Parliament appropriation bill

Before 1993, the appropriations for the recurrent services and capital works of the legislature were included in the general Appropriation Bill. However, in 1993 the practice changed and appropriations for the legislature were contained in a separate, but cognate, Appropriation (Parliament) Bill. The impetus for the change was an unsuccessful attempt by the executive to institute a Parliament Commission to manage the Departments of the Parliament, with the budgets for the Parliament negotiated between the Commission and the Treasury within the State Budgetary framework, on a rolling triennial basis. To effect this, two bills were introduced into the Assembly; the Parliament Management Bill 1992 and the Parliamentary Remuneration (Amendment) Bill 1992. As neither the members nor the Clerks had been consulted in the preparation of these bills, both Houses agreed to the appointment of a joint select committee to examine the management of the Parliament with particular reference to the two bills.⁵⁷ In its report, the Committee outlined three alternatives regarding the appropriations for the Parliament and, while noting that there was support for each within the committee, left the choice to the Parliament itself to debate and determine.⁵⁸ The only recommendation taken up by the government was introduction of a separate appropriation bill, cognate with the ordinary appropriation bill, as a government measure.⁵⁹

There is some dispute over whether the Appropriation (Parliament) Bill is a bill that appropriates money for the 'ordinary annual services of the Government'.

The question of whether the legislature is a part of the 'ordinary annual services of the Government' has arisen in the Commonwealth Parliament, in the context of broader debate on which appropriations should be subject to amendment by the Senate. As in New South Wales until 1982, the practice since 1901 in the Commonwealth has been for the government to introduce two appropriation bills, one for

57 *LC Minutes* (7/5/1992) 177-179, 183-185.

58 Report of the Joint Select Committee on the Management of the Parliament, November 1992, pp 4-5. The three alternatives included:

- (a) a separate appropriation bill for the Parliament, negotiated between a Board of Management and the Treasury;
- (b) a separate appropriation bill for the Parliament, prepared by a Board of Management and presented to each House by the respective Presiding Officer;
- (c) a separate appropriation bill for the Parliament, cognate with the ordinary appropriation bill, and introduced as a government measure, with specific provision for an Advance to the Presiding Officers and a supplementary appropriation bill which the Board of Management would be required to report upon the use of in its annual report.

59 No Parliament Commission or Board of Management has been introduced and no 'Advance to the Presiding Officers' has been established.

the ordinary annual services of the government and another for works and buildings, the latter being subject to amendment by the Senate. However, in 1952, an opinion from the Commonwealth Solicitor General – that an ordinary service is virtually any service that the government is competent to provide pursuant to its powers and authorities and could include non-recurring capital items – appeared to challenge the Senate’s right to amend the second Appropriation Bill.

The matter again arose in 1965 during debate in the lead up to the Compact of 1965, as cited earlier, when the government attempted to include provision for matters not normally considered as part of the ‘ordinary annual services of Government’ within the non-amendable annual appropriation bills. During the debate, Senators argued that appropriations for the two Houses of the Commonwealth Parliament should not be regarded as ordinary annual services of government, or even services of Government. Accordingly, it was recommended that appropriations for the Parliament be contained in a separate bill.⁶⁰

In 1981, a Senate select committee report recommended that the appropriations for each House of Parliament should be included in a separate amendable appropriation bill.⁶¹ Although the 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, in debate on the bill, Senator Sir John Carrick said:

[T]he Government believes firmly that it needs to maintain control over the total amount of funds available for expenditure by the Parliament because of the constitutional responsibility of the Government for budgetary policy and for the level of future expenditure ...⁶²

The first separate parliamentary appropriation bill was introduced in the Commonwealth Parliament in 1982.⁶³

Whether or not the Appropriation (Parliamentary Departments) Bill is amendable by the Senate has not been tested, as the appropriations for the Senate are determined by the Standing Committee on Appropriations and Staffing, in consultation with the Minister for Finance.⁶⁴

There has been one occasion where the Council has sought to amend the Appropriation (Parliament) Bill. On 26 June 1996, the Council returned the Appropriation (Parliament) Bill to the Assembly with a suggested amendment relating to the establishment of a President’s Contingency Fund for the funding of any additional committees to be appointed by the Council. During the debate on the amendment

60 *Odgers*, 11th edn, p 284.

61 Senate Select Committee on Parliament’s Appropriation and Staffing, Parliamentary Paper No 151 of 1981.

62 *Senate Debates* (25/3/1982) 1216.

63 *Odgers*, 11th edn, p 284.

64 *Odgers*, 11th edn, pp 313-314.

both the Leader of the House and the Leader of the Opposition agreed that the bill was subject to section 5A of the *Constitution Act 1902*.⁶⁵

The message forwarding the bill was reported to the Assembly on 27 June 1996, at which time the Assembly disagreed to the amendment and returned the following message to the Council:

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.⁶⁶

Both the Solicitor General and the Crown Solicitor argue that the appropriations for the legislature form part of the 'ordinary annual services of the government'.⁶⁷ Their position is based, in part, on the fact that since 1900 the appropriations for the legislature and the judiciary have continued to be treated as part of the ordinary annual services of the government. However, in the absence of any judicial ruling on the meaning of 'ordinary annual services of the Government', doubt continues to exist as to whether the appropriations for the Parliament fall within the 'ordinary annual services of the Government' and consequently whether the Council has the power to amend such bills.

Parliamentary scrutiny of the budget

The government's budget strategy and annual appropriations bills are subject to the scrutiny and approval of the Parliament. Until 1971, two Assembly committees, the Committee of Supply and the Committee of Ways and Means, debated the estimates themselves before the introduction of an appropriation bill based on those estimates.

Reforms in 1971 streamlined the process of budgetary approval by providing for the presentation of the appropriation bill at the same time as the estimates. A further streamlining occurred in 1984, when the Council adopted a procedure whereby, following the tabling of the budget papers in the Council, a take-note debate on the papers proceeds concurrently with the debate on the appropriation bill in the Assembly. This procedure continues to this day.

The first form of committee scrutiny of the budget in New South Wales in recent times came in 1991.⁶⁸ During the period 1991 to 1994 joint estimates committees

65 *LC Debates* (26/6/1996) 3712.

66 *LC Minutes* (11/9/1996) 289.

67 Crown Solicitor's Opinion, dated 19 August 1996, quoted in *Auditor-General's Report to Parliament*, 1996, Vol 2, pp 430-441.

68 The Council established a number of Estimates Committees in the period before the advent of responsible government in 1856.

were established consisting of members of both the Council and Assembly.⁶⁹ The establishment of these committees was the result of a memorandum of understanding, commonly known as the Charter of Reform, which was signed on 31 October 1991 by Premier Greiner and three non-aligned independents in the Assembly.⁷⁰

The general election in March 1995 resulted in the election of the Carr Labor Government. In October 1995, the Council established three estimates committees of its own.⁷¹ The Hon John Hannaford, then Leader of the Opposition in the Council, saw the establishment of the estimates committees as reinforcing the relevance of the House. He stated:

Only through a sensible system of estimates committees, under which all arms of Government are accountable to the public through the questioning of departmental representatives, will this House remain relevant to the people of New South Wales.⁷²

These original estimates committees had a government majority and reflected the portfolio responsibilities of ministers in the Council. The committees were limited in their scope, operating for a short time to inquire into the budget estimates and report to the House.

Similar arrangements were adopted in 1996⁷³ and the Council disagreed with a request from the Assembly for the appointment of joint estimates committees.⁷⁴

In 1997 the Council proposed that joint estimates committees with the Assembly be established,⁷⁵ but when the Houses were unable to reach agreement on the mode of operation of the joint committees⁷⁶ the Council referred the budget estimates and related documents to its newly established General Purpose Standing Committees⁷⁷ according to their portfolio responsibilities (see Chapter 19 (Committees)).⁷⁸ This practice has continued in subsequent years, and it is now accepted that the Council alone performs the scrutiny function of budget estimates.⁷⁹

69 *LC Minutes* (25/9/1991) 136-141, (14/10/1992) 301-316, (13/10/1993) 279-300.

70 *LA Debates* (31/10/1991) 4004-4038 contains a copy of the Memorandum of Understanding; see also Griffith G, 'The New South Wales Legislative Council: An analysis of its contemporary performance as a house of review', *Australian Parliamentary Review*, Autumn 2002, Vol 17(1), p 53.

71 *LC Minutes* (17/10/1995) 217-222.

72 *LC Debates* (17/10/1995) 1762.

73 *LC Minutes* (30/4/1996) 81-95.

74 *LC Minutes* (16/5/1996) 147-148.

75 *LC Minutes* (6/5/1997) 643-650, (7/5/1997) 657-676.

76 *LC Minutes* (22/5/1997) 741-746, (27/5/1997) 752-766.

77 *LC Minutes* (7/5/1997) 677-683.

78 *LC Minutes* ((29/5/1997) 777, 779-781.

79 See, for example, *LC Minutes* (28/5/1998) 487-491, (28/6/2007) 210-215.