"CHARGE OR BURDEN ON THE PEOPLE": THE ORIGINS AND MEANING OF THE THIRD PARAGRAPH OF SECTION 53 OF THE COMMONWEALTH CONSTITUTION

*Paul Schoff**

"The Senate may not amend any proposed law so as to increase the proposed charge or burden on the people."[1]

"I confess it came as a surprise to me to find that this House could make a law to shoot dogs, or poison them, or to do anything with them except increase the tax on them half-a-crown."[2]

INTRODUCTION

This article examines the third paragraph of s 53 from the high ground of history. Section 53 must not be seen as an isolated and unique problem. Rather, it is merely another manifestation of the intractable problem of defining the power to tax. The Bill of Rights, arising out of the Revolution of 1688, defined the constitutional prerogatives of the King, when it provided "[t]hat levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament for longer time or in other manner

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* BA(Juris) LLB (Hons) (Adel), Associate to the Hon Justice W M C Gummow, High Court of Australia.

1 The third paragraph of section 53 of the Commonwealth Constitution. The full text of s 53 is as follows:

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

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

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

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

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

2 Hon D Melville, Legislative Council, Explosives Bill 1885 (Vic) Vic PD 1885 Vol xlix at 1492.

than the same is or shall be granted, is illegal".[3] Art 1 s 7 of the United States Constitution requires that "[a]ll bills for raising revenue shall originate in the house of representatives; but the Senate may propose or concur with amendments, as on other bills". Story elegantly under-stated the position when he remarked, "What bills are properly 'bills for raising revenue', in the sense of the constitution, has been matter of some discussion".[4]

While it must be admitted that tax in the Australian colonies led to nothing so dramatic as a Glorious Revolution, a Bill of Rights, or a War of Independence, problems concerning the scope of the power to tax arrived in Australia along with the other baggage of English law. For example, in 1848 the Supreme Court of Van Diemen's Land held the *Dog Act* 1848,[5] which imposed a tax on dogs, to be unconstitutional. The decision cast considerable doubt on the validity of other taxation arrangements and led to the removal of Montagu J from the Court.[6] With the advent of responsible government in the colonies, and the creation of bicameral parliaments, came the related issue of how to delineate the powers of each House in relation to the origination and amendment of Bills imposing taxation.

The failure of the drafters of the Commonwealth Constitution to deal adequately with the problem is evidenced by the fact that, even after federation, conflict has flourished. In 1903, the stormy passage of the Sugar Bonus Bill marked the beginning of the struggle between the House of Representatives and the Senate. These bodies are still seeking a working solution to the conundrum of the third paragraph. In November 1995 the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) tabled a Report on the third paragraph of s 53.[7] The Committee sought to achieve a synthesis between different approaches to interpretation. One approach taken by the Committee was to examine the history of the words through the process of constitutional drafting in the 1890s. The Committee considered that "history and precedent are good guides even though they may be rejected as absolute masters".[8] It is rare for legal history to be so topical and indeed its utility in the attainment of a mutually satisfactory accommodation between the Houses is rightly questioned. However, the use of history by the Committee, albeit as servant rather than master, is criticised by this article.

Each House faces two enemies. The first enemy is the paragraph itself which doggedly resists sensible meaning. The second enemy faced by each House is the other House. The words are part of the constitutional regulation of their relationship and respective powers, and so the location of meaning inevitably involves an intercameral power struggle. Accordingly, it is not surprising that the High Court's reasons in *Western Australia* v *The Commonwealth* cast only a weak light on the problem. After

3 1 Will & Mary, session 2, c 2. The Act was given this short title by the *Short Titles Act* 1896 (UK).

4 J Story, *Commentaries on the Constitution of the United States* (1st ed 1833) Vol 2 at 342-343.

5 10 Vict, No 5.

6 A Castles, *An Australian Legal History* (1982) at 278-280.

7 House of Representatives Standing Committee on Legal and Constitutional Affairs, *The Third Paragraph of Section 53 of the Constitution* (1995).

8 Ibid at para 3.1.8.

indicating the non-justiciability of the section the Court held that "[n]one of the Senate amendments appears to increase a 'charge or burden on the people'".[9]

The approach and conclusions of the Committee in its Report are outlined in Part 1 of this article. This provides a useful point of departure for the remainder of the article which examines in detail several aspects of the historical approach adopted, and historical conclusions arrived at, by the Committee. Part 2 elaborates the hypothesis that the origins of the third paragraph are to be found in materials which relate to the internal regulation of conflict between different Houses of Parliament in the Australian colonies *prior* to 1890. These materials, in turn, reflected English parliamentary rules and usages. The precise manner by which words from a different context found their way into a provision expressly limiting the power of the Senate remains mysterious. It is, however, readily explicable once the antagonistic history of relations between different Houses of bicameral Parliaments in the colonies is recognised. This antagonism had resulted from political inexperience, but also from chronic uncertainty as to the application of English parliamentary usage and practice in the peculiar constitutional circumstances of the colonies. It is suggested that the drafters, when faced with a problem of parliamentary relations, must have turned to a verbal formulation which was familiar to them from parliamentary experience.

Part 3 is founded upon an acknowledgment that the words of the third paragraph were plucked from expressions within the conventions and standing orders of both the United Kingdom and colonial parliaments. This provides a whole new source of potential meaning. The range of meanings which the words "charge or burden on the people" are able to bear must be tested against the meanings which can be derived for those words from the context in which they originated. It is possible to identify two senses in which the words "charge or burden on the people" were used. First, there is the "revenue" sense which permissively applied the words to all Bills raising any revenue. This sense was used in contradistinction to expenditure or appropriation Bills. The second sense which emerges from the materials, the "incidental" sense, applied the words to Bills which only incidentally raised revenue by way of penalty or fee for service. Part 4 seeks to answer the question of whether either the "revenue" or the "incidental" sense might have been intended by the use of the expression "charge or burden on the people" in the Constitution.[10] It appears that neither sense gives a consistent or sensible operation to s 53, as it finally emerged. However, the section as it appeared in the first draft of the Constitution after the 1891 Convention *is* consistent with the "incidental" sense.

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9 (1995) 183 CLR 373 at 482. The High Court may have been mindful of the admonition in Frankfurter J's celebrated dissent in *Baker v Carr* 369 US 186 at 267 (1962) to avoid "political entanglements ... by abstention from injecting itself into the clash of political forces in political settlements".

10 This question is posed with awareness as to the difficulties in using historical intention in legal interpretation: P Schoff, "The High Court and History: It Still Hasn't Found(ed) What It's Looking For" (1994) 5 *PLR* 253.

PART 1: THE 1995 REPORT OF THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Background to the report

A dispute between the House of Representatives and the Senate over the Taxation Laws Amendment Bill (No 4) 1993 was the catalyst for the inquiry. The Senate had proposed a number of amendments to that Bill, including an amendment which would require taxpayers to pay instalments earlier than before or to pay larger amounts. This amendment would either reduce the interest a taxpayer earned on invested money used to meet taxation obligations, or increase the interest payable on moneys borrowed by the taxpayer for that purpose.[11] In order to investigate the reference, the Committee called for and received submissions,[12] published an issues paper[13] and an Exposure Draft,[14] and held a number of seminars and public hearings.[15] The Committee presented its Report in November 1995. The key objective of the Committee was "to provide a report which may form the basis of a compact to be settled between the two chambers".[16] The achievement of any lasting compact could undoubtedly be celebrated as a pinnacle of bicameral tolerance. However, the agreement of the Senate seems unlikely given the bias of the Report towards an interpretation of the third paragraph which stringently limits the power of Senate amendment.[17]

The committee's approach to interpretation

The Committee explicitly identified the criteria which it considered appropriate to the task of interpretation:

> [T]he task of the Parliament is to arrive at the most sensible and practical view of the third paragraph of section 53 that is consistent with the broad policy of the section (that policy being to preserve the financial initiative of the House of Representatives but otherwise to give the two Houses equal powers), harmonious with the drafting history of the paragraph and the subsequent course of parliamentary precedent, and can be reasonably sustained within the actual wording of section 53.[18]

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11 Standing Committee on Legal and Constitutional Affairs, above n 7 at para 1.3.2.

12 Thirty seven submissions were received prior to the release of the Exposure Draft and 9 submissions were subsequently received. A version of this article was received by the Committee as a comment upon the Exposure Draft.

13 1 September 1994.

14 Tabled on 6 March 1995.

15 Public hearings were held in Canberra on 11, 12 and 19 October 1994 and in Perth on 26 October 1994.

16 Standing Committee on Legal and Constitutional Affairs, above n 7 at para 1.5.1. Recommendation 13 is that "there should be a compact between the Houses in relation to the interpretation and application of the provisions of the third paragraph of section 53 of the Constitution".

17 In a submission to the Committee on 30 March 1995, the Clerk of the Senate, Mr Harry Evans, commented that the recommendations outlined in the Exposure Draft would "significantly alter the legislative balance between the Senate and the government in favour of the latter".

18 Standing Committee on Legal and Constitutional Affairs, above n 7 at para 5.4.1.

This statement shows the necessary difference in purpose between a parliamentary committee and a legal scholar. Section 53 throws up a question of parliamentary procedure and the resolution of that question is more likely to be achieved through sensible negotiation than correct legal analysis. The Committee was correct to point out the extra latitude in negotiation afforded to it by the High Court's indication that the section is non-justiciable. That aside, it is possible to criticise some of the other, more permissive, aspects of the approach articulated by the Committee.

It is undoubtedly true that the "broad policy" of s 53 is, as the Committee puts it, "to preserve the financial initiative of the House of Representatives".[19] However, this broad policy must not be allowed unduly to distort the text of the section. Section 53 is a complete code of limitations on the Senate's financial powers. The fifth paragraph of s 53 is a guarantee that, "[e]xcept as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws". Accordingly, the policy of the section should not be superimposed in such a way as to reverse or avoid its explicit provisions. Yet that is the effect of the Committee's test of possible interpretations by a standard of mere "reasonable sustainability" within the text.

The Committee evinced a desire to achieve an interpretation of s 53 consonant with "drafting history". Much of the remainder of this article demonstrates that this desire has been frustrated. The use of history in the Report was hedged with caveats as to the "[l]imits on the persuasive nature of the history of the paragraph".[20] However, such caveats fail to immunise the Report from historical criticism, because on several occasions the history of the paragraph is called in aid of interpretations favoured by the Committee. Historical integrity is lost when one adverts to history when it is supportive and ignores history when it is inconvenient.

The Report adopted an approach to the history of the third paragraph which suffers from two related failings. First, the Committee divided the "history" into two stages. The first stage is the development of the Constitution through the 1890s. The second stage is the period from 1901 to the present. The pre–1890 history of the paragraph was considered "peripheral to the focus"[21] of the Report. In my view, the pre–1890 period provides the key to understanding the section. The second, and related, failing was an over-reliance upon the views of certain individuals as to the meaning of the third paragraph. The Committee's focus upon the views of Sir Henry Parkes, who died in 1896 before s 53 attained its current form, is mystifying. Similarly, the Committee's use of Sir Robert Garran's papers, found post mortem in his garage, is unsophisticated. It emerges from the sources examined later that, by arbitrarily cutting off the history of the third paragraph and concentrating upon the "intentions" of only two individuals, the Committee's historical conclusions are seriously flawed.

19 Ibid at para 2.2.1.
20 Ibid at para 3.1.4.
21 Ibid at para 3.1.3.

The committee's conclusions and recommendations

Appropriation and expenditure Bills

Several recommendations are concerned with a primary recommendation that the third paragraph applies to proposed laws relating to appropriation and expenditure.[22] This accords with current parliamentary practice, but, as will emerge later, is questionable on the historical evidence. From this recommendation follow related recommendations as to the precise Bills which trigger the third paragraph. Three situations are identified:

1 Where a Bill contains a standing appropriation, it should not be amended such as to increase expenditure under that appropriation.

2 Where a Bill does not contain an appropriation (an expenditure Bill), it should not be amended in such a way as to increase expenditure out of a standing appropriation.

3 Where a Bill does not contain an appropriation and does not affect expenditure from a standing appropriation in another Act or Bill, it may not be amended in such a way as to increase expenditure under a separate standing appropriation. (This somewhat startling conclusion was reached to overcome an argument that the third paragraph only applies to prevent increases to a *proposed* charge or burden. So, the argument ran, if there is no proposed charge or burden in a Bill, the Senate may amend it with the effect of "increasing", by imposition, a charge or burden. However, it seems unnecessary to answer the argument in this way since such an amendment would amount to origination of an appropriation and thus be forbidden by the first paragraph of s 53.[23])

Bills imposing taxation and tax related measures

A second series of recommendations was based on the view that the third paragraph not only applies to appropriation Bills, but that it also applies to Bills imposing taxation and taxation related measures.[24] In contrast, the Committee suggested that the third paragraph ought not to apply to Bills imposing fines, penalties, licence fees and fees for services.[25] The Committee made a number of recommendations as to the kinds of tax Bill which attract the prohibition of the third paragraph. This involved a consideration of both the first two paragraphs of s 53 and s 55. The first paragraph prevents Bills imposing taxation from being originated in the Senate and the second paragraph prevents such Bills from being amended by the Senate. Section 55 uses the words "imposing taxation" in a related context.

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22 It is convenient to define "Appropriation Bills" to encompass those Bills which propose a new appropriation, and those which amend existing appropriations. These may be further divided into "fixed" appropriations which specify the precise amount of expenditure authorised, and "standing" appropriations which are not restricted in their operation to particular year or amount. The term "Expenditure Bill" applies to Bills which, whilst not actually appropriating from Consolidated Revenue, affect the amount which must be expended under an appropriation contained in a separate Act or proposed in another Bill.

23 Standing Committee on Legal and Constitutional Affairs, above n 7 at para 7.7.10. Dennis Rose QC formulated this criticism. The Committee held to its view as "an example of a reasonable practice open to the Houses which is not precluded by the words of section 53" (para 7.8.5).

24 Ibid at section 8.5.

25 Ibid at para 8.9.4.

With descent into some detail, the Committee concluded that all Bills which affect the tax base or tax rates should be originated in the House of Representatives.[26] Also, the Committee advocated the view that amendments which would increase a tax rate or expand a tax base should be subject to the prohibition of the third paragraph.[27] This conclusion applied regardless of whether the Bill originated in the House of Representatives or the Senate. In order to provide some compensatory mechanism for the Senate to register its desire for such an amendment, the Committee recommended that the fourth paragraph of s 53 should apply.[28] This relevantly states that: "The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein". The Committee's view glosses the words of the Constitution to allow the fourth paragraph to apply, even though the third paragraph is manifestly incapable of operating in such a way as to render a proposed law one which the Senate "may not amend". The remainder of this article seeks to establish the proposition that the meaning of the words of the third paragraph may be elucidated by historical analysis beyond that which was undertaken by the Committee. Along the way, doubt will be thrown upon the accuracy of several of the Committee's conclusions.

PART 2: THE EXPRESSION "CHARGE OR BURDEN ON THE PEOPLE" IN PARLIAMENTARY MATERIALS PRIOR TO 1890

The Committee considered that the useful history of the words of the third paragraph started when Sir Henry Parkes uttered them in 1890. However, when one turns to the period prior to that date, there is an abundance of material from which it is possible to infer that the words of the third paragraph originated in the body of rules regulating parliamentary practice in the Westminster system. It will be necessary to examine the standard English works on parliamentary practice which were known to the framers. The crucial words appear in three different, but related, contexts. First, they appear in the rules relating to the origination of Bills by a lower house. Second, they are present in rules about the origination of Bills in Committee of that House. Lastly, they appear in the rules regulating the power of amendment resting with an upper House.

The parliamentary materials

The foundation of works of parliamentary reference is found in the classic volumes of John Hatsell. Writing for the first edition Hatsell said:

> From the beginning of the present century, a period of above fourscore years, the claims of the House of Commons to their Rights and Privileges, in matters of Supply, have been seldom or but faintly controverted by the Lords. The rules, which the Commons have from time to time laid down to be observed in Bills of Aid, or in Bills imposing charges and burthens upon the people, have been generally acquiesced in; and the practice of both Houses of Parliament has been uniformly adapted to these rules.[29]

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26 Ibid at para 9.11.2. This conclusion, in truth, concerns the first paragraph of section 53. The Committee acknowledged that its view on the scope of the words "imposing taxation" was contrary to the High Court's view expressed in the context of s 55 cases.

27 Ibid at para 9.15.5.

28 Ibid at para 9.17.3.

29 J Hatsell, *Precedents and Proceedings in the House of Commons* (2nd ed 1818) Vol 3 at 153.

Hatsell's influence in England is evident in Bramwell's *Bills*,[30] the very first words of which inform the reader that, "Bills of Supply, and all other bills for imposing any pecuniary charge or burthen upon the people, must have their commencement in the House of Commons". References can be found throughout the standard English text on the matter, by Sir Thomas Erskine May. Discussing the requirement for certain Bills to originate in a committee of the whole house, May said:

> The general spirit of the Standing Orders and resolutions of the House required that every proposition to impose a burthen or charge on any class of the people, should receive its first discussion in a committee of the whole house.[31]

The Australian material reflects, almost slavishly, English precedents. The *Parliamentary Handbook* of Edwin Cradock Nowell collected in one volume the "rules, forms, and usages" of the Imperial Parliament. By way of preface, he said:

> The subject of Supply, although its connection with the proceedings of a second Chamber is but slight, has been dealt with at some considerable length and with much minuteness on account of the large space which it occupies in the parliamentary System, and the great importance of acting upon correct principles in a matter so nearly affecting the well-being, if not the very existence, of the Constitution.[32]

That passage is indicative of the magnitude of the problem in colonial parliamentary practice. Nowell's account of the "correct principles" relating to Supply Bills reveals the language of the third paragraph of s 53. Nowell sets out the classes of Bills which are required to originate in the Committee of the whole House:

> In England the following classes of Bills—
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> 1 Relating to religion;
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> 2 Relating to trade;
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> 3 For the expenditure of public money;
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> 4 *Bills and Clauses of Bills for laying any burden or charge upon the people;*
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> are required to originate in Committee of the whole House.[33]

Used separately, the terms "burdens upon the people" and "charges upon the people" appear throughout the handbook.[34] In Blackmore's *Decisions*[35] there is not the same remarkable language, but similar terms appear throughout. The author recognises that "[t]he question is whether or not any new burden is laid upon the people by the proposed Bill".

The Australian colonies were not alone in adopting the rules and usages of the Westminster system. An indication of the profound effect which English usages had in other colonies is gained from Bourinot's Canadian *Parliamentary Procedure and Practice*.[36] It was squarely based on the work of Hatsell and May, acknowledging that

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30 G Bramwell, *The Manner of Proceeding on Bills in the House of Commons* (1833) at 1.

31 Sir Thomas Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (9th ed 1883) at 537.

32 E C Nowell, *Parliamentary Handbook, Showing the Practice of the English House of Commons in Cases not specially provided for by the Standing Orders of the Legislative Council, Tasmania* (1887) at viii.

33 Ibid at 122 (emphasis added).

34 Ibid at 93, 101, 120, 134 and 166.

35 E G Blackmore, *The Decisions of Denison and Brand* (1892) at 26. See also *Decisions of Peel* (1887).

36 J Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (1884).

there were aspects of unique Canadian development, but that the colonial parliamentary tradition dating from the Constitutional Act 1791 was an evolution of the Westminster system. He recognised that:

> The practice of the House of Commons of Canada with respect to the expenditure of public money and the imposition of burthens on the people is strictly in conformity with the practice of its English prototype.[37]

From these materials it is possible to see that the words were commonly used in earlier parliamentary contexts, and that they bore some technical meaning. It would be a mistake to assume that they were, like s 92 of the Constitution, mere "layman's language".

The process of transplantation

English custom and usage were so much a feature of the terrain of Australian colonial politics that the absorption of certain of their forms into the words of the Constitution is not surprising. In this context it is useful to remember that the drafting philosophy behind the Commonwealth Constitution was very different to that which characterised the approach of the American drafters. The rise of legal positivism in the nineteenth century makes the urge of the Australian drafters to harden soft "usage" and "convention" into constitutional words all the more comprehensible. The English materials were well known to colonial parliamentarians.[38] Australian colonial parliaments had agreed, in all cases not specially provided for by their own rules, to be guided by the practice of the English House of Commons. Standing Order 1 of the Victorian Legislative Council was a typical provision. It read:

> That in all cases not hereinafter provided for, resort shall be had to the rules, forms, usages, and practice of the Imperial Parliament of Great Britain and Ireland, which shall be followed so far as the same are applicable to the proceedings of this Council. [39]

In Sydney, in 1897, during discussion of what was then clause 54, Sir Edmund Barton claimed:

> I might point out that this is really an adaptation of what is a standing order of the House of Commons, in which it is provided that the House will not insist on its privileges in certain cases.[40]

Barton referred there to a different, but related, amendment concerning the exclusion of penalties and fees for service from the definition of Bills imposing taxation. However, the statement shows that the drafters were content to plunder the standing orders and usages of the English Parliament as a source of words to regulate the relationship between Houses. Barton further argued:

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37 Ibid at 462.

38 This statement applies equally to the framers. Section 49 of the Constitution provides an example. *In R v Richards; Ex parte Fitzpatrick and Browne* (1955) 52 CLR 157 at 165-166, Dixon CJ stated that: "It is quite incredible that the framers of s 49 were not completely aware of the state of the law in Great Britain and, when they adopted the language of s 49, were not quite conscious of the consequences which followed from it."

39 A similar provision is found as Standing Order 1 of the first Commonwealth House of Representatives. H Reps V&P 1901-2, Vol 1 at 1059. The equivalent provision in the Standing Orders of the NSW Legislative Assembly was considered by the Privy Council in *Barton* v *Taylor* (1886) 11 App Cas 197.

40 *Convention Debates* (Sydney 1897) at 475-9.

> [W]e must recollect that the standing orders of the House of Commons have been so long in existence, and have regulated the practice so uniformly for a long period of time, that they have now acquired such force that there ought not to be any bar to their being inserted in the constitution.[41]

Further support for the inference that the framers turned to English and earlier colonial parliamentary materials can be derived from the identification of a strong motivation to find words for the Constitution which would forestall the possibility of disputation on financial questions. Financial disputes were emblematic in the discourse between upper and lower Houses of Australian colonial Parliaments.[42] The political question metamorphosed into a serious doctrinal point and was symptomatic of doubt as to the applicability of English usages in peculiar Australian constitutional circumstances.

A convenient summary of legislation which provoked financial disputes in Tasmania and South Australia is to be found in another book by the clerk of the Legislative Council of Tasmania, Edwin Cradock Nowell.[43] The date of publication of this book, 1890, is of particular, and obvious, significance. The existence of the book demonstrates that the dispute as to the relative powers of the upper and lower House in colonial Parliaments extended beyond the parochial confines of inter-cameral bickering. The book was a sustained assault on the idea that colonial constitution Acts must be interpreted in accordance with the claims to financial prerogative of the House of Commons:

> The law and practice of the Imperial Parliament are of the greatest possible value to the Colonial Parliaments in regulating their proceedings; and the closer they adhere to these, *so far as they apply*, the better for themselves; but in this matter of the right of the upper Houses to deal with money questions, British precedents *do not apply*, and whatever arguments may be employed against it should be drawn from quite other sources.[44]

This, it seems, was a response to the accepted rubric as enunciated by Alpheus Todd in the first edition of his book, *Parliamentary Government in the British Colonies*.[45] In the second edition, Todd made a particular point[46] of countering the presumptuous colonial arguments of Nowell:

> A claim on the part of a colonial upper chamber to the possession of equal rights with the assembly to amend a money bill would be inconsistent with the ancient and undeniable

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41 Ibid at 479.

42 M Leeming, "'Something that Will Appeal to the People at the Hustings': Paragraph 3 of Section 53 of the Constitution" (1995) 6 *PLR* 131. Arguments were rehearsed on the very first day of sitting of the new Parliament in South Australia on 22 April 1857. The catalyst was the Tonnage Duties Repeal Bill, which had been initiated in the Assembly and returned by the Council to that House with amendments. The problem was temporarily resolved by a series of resolutions which became known as the "1857 Compact" which Leeming establishes as "indisputably the source of par 4 of s 53" (at 145).

43 E C Nowell, *A History of the Relations between the Two Houses of Parliament in Tasmania and South Australia, in regard to amendments to Bills containing provisions relating to the public revenue or expenditure* (1890) at 69. See also A Castles, *Castles' Annotated Bibliography of Printed Materials on Australian Law 1788-1900* (1994) at para 1544.

44 E C Nowell, above n 43 at 86 (emphasis in original).

45 A Todd, *Parliamentary Government in the British Colonies* (1st ed 1880).

46 A Todd, ibid (2nd ed 1894) at 710. For criticism of Todd, see E C Nowell, above n 43 at 82-84.

> control which is exercised by the Imperial House of Commons over all financial measures.[47]

The existence of this dialogue suggests that by 1890, the issue of financial prerogative had become one of principle as well as politics. Nowell outlined two bases for a differentiation to be made between the powers of the House of Lords in the United Kingdom over money Bills and those powers possessed by the upper Houses in Tasmania and South Australia.[48] The first is the distinction between an elected and a nominated upper House. He argues that "the rules of procedure as between the two Houses in matters relating to expenditure and ways and means do not apply to the Colonial legislatures, or at least to those of Tasmania and South Australia". The basis for his claim is a distinction made between elective bodies, such as the Legislative Councils of Tasmania, Victoria and South Australia, and non-elective bodies, such as the House of Lords.[49] The second contention concerns "the maxims of law bearing on the construction of statutes".[50] In neither the Constitution of Tasmania or South Australia is anything said about amendment. The law speaks only of origination:

> If amendments by the other House are to be barred, then it can only be by some extended construction of the statute — a construction which is not obvious, not literal, not natural, not required by anything else within the statute or by the language itself, and only suggested by the practice under the English constitution.[51]

There is ample reason to suspect that the drafters of the Australian Constitution would have been aware of these doctrinal arguments. Inglis Clark was a fellow Tasmanian and might be expected to know of the work of Nowell. Similarly, Kingston would have taken a keen interest in Nowell's work, as it dealt extensively with the South Australian situation. Nowell had also been clerk of the Federal Council of Australasia in its first three sessions and would presumably have been well known to Sir Samuel Griffith. The drafters were certainly aware of the doctrinal debate over the power of an elected upper House to amend a money Bill. The inclusion by Inglis Clark and Kingston of clauses limiting the power of the upper House in their preliminary drafts of the Constitution reflected this.[52] At the Sydney Convention in 1897 there was debate about the appropriate financial powers for the proposed Senate. A Tasmanian delegate, the Hon Sir P O Fysh, mentioned "the strong opinions formed by our own respected Clerk of the Council, Mr Nowell".[53]

One further piece of evidence strongly supports the inference that, to counter inter-cameral dispute, the framers extracted a verbal formulation from the body of

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47 A Todd, above n 46 at 709.

48 E C Nowell, above n 43 at appendix D.

49 E C Nowell, above n 43 at 138. Section 33 of the Constitution Act 1854 (Tas) provided that "all Bills for appropriating any part of the revenue, or for imposing any tax, rate, duty, or impost, shall originate in the House of Assembly". Section 1 of the Constitution Act 1855-6 (SA) is in very similar terms. Section 56 of the Victorian Constitution Act 1855 (Vic) was cast in a different form. It provided that "[a]ll Bills for appropriating any part of the revenue of Victoria, and for imposing any duty rate tax rent return or impost, shall originate in the Assembly, and may be rejected but not altered by the Council".

50 E C Nowell, above n 43 at 138.

51 Ibid at 139.

52 S Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia* (1891) MS Q 198, Dixson Library, CY Reel 221. These provisions conveniently appear in M Leeming, above n 42 at 134.

53 *Convention Debates* (Sydney 1897) at 489.

parliamentary rules. In 1877, debate on the question of the payment of Members of Parliament provided a forum for the expression of views which inform an analysis of s 53.[54] Section 56 of the Victorian Constitution Act 1855 (Vic) was a prohibition upon the Legislative Council which prevented the alteration of a certain class of Bills, a forerunner to s 53.[55] The practice of payment of members had been adopted by two temporary Acts in the early 1870s. In 1877, the second of those Acts was about to expire. The government of Mr Berry was in favour of the continuance of this practice. However, in December 1877, the Legislative Council refused the second reading of the continuing measure. Jenks reports that "the Assembly claimed entire control over the financial policy of the country, and denied the right of the Council to interfere with it in any way".[56] A political compromise was reached whereby the question of principle remained undecided. However, this resolution did not occur before the opinion of the Imperial Government was sought. The submissions which were made on behalf of the Legislative Council in 1878 are crucial. The characterisation of s 56 of the Constitution Act was a recognition that "this provision is the result of an attempt to reduce into a statutory form the well-known practice of the Imperial Parliament".[57] The submission continues:

> Such a conversion of a custom into law not unfrequently produces unexpected results. The elasticity of a custom, and the reluctance to press to extremities a disputed right, lead to consequences very different from those which follow from the precise terms of an Act of Parliament, and from a sense of statutory superiority.

This is an explicit recognition that s 56 of the Constitution Act (Vic) was English parliamentary custom solidified into constitutional prohibition. This is confirmed by the later opinion of William Hearn that s 56:

> ... enacts as rules of positive law for the regulation of the Council, the rule as to origination, which is a rule of the English Common Law, and the rule as to amendments, which is a comparatively modern claim of the House of Commons. [58]

It is my belief that the third paragraph of s 53 of the Commonwealth Constitution was the product of an analogous process. In view of the history of dispute between Houses in colonial legislatures and the emergence of an "academic" debate in the late 1880s, it was necessary clearly to circumscribe the powers of the Senate in the express terms of the Constitution.

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54 E Jenks, *The Government of Victoria (Australia)* (1891) at 255-258.

55 For the text of s 56, see above n 49.

56 E Jenks, above n 54 at 257

57 Enclosure 1 in Bowen, Governor of Victoria, to Hicks Beach, Secretary of State, 26 Dec 1878 in Manning Clark, *Select Documents in Australian History 1851-1900* (1955) at 423.

58 W Hearn, *The Government of England* (2nd ed 1886) at 619. The comment forms part of a memorandum, written for the use of members of a Select Committee of the Legislative Council, which considered s 56 in its operation on the Explosives Bill 1885 (Vic).

PART 3: WHAT DID THE EXPRESSION "CHARGE OR BURDEN ON THE PEOPLE" MEAN IN PARLIAMENTARY MATERIALS AND CUSTOM PRIOR TO 1890?

The search for meaning

Having identified the textual antecedents of the third paragraph and endeavoured to explain the likelihood of a transplantation of those words, I turn now to the way in which the connection can be exploited in the search for meaning. In regard to the English materials, Leeming has cautioned that "[u]ltimately, a detailed account of what happened in earlier times in a nation without a written constitution is of marginal assistance to determining the meaning of a specific autochthonous paragraph in the Australian Constitution".[59] George Reid suggested, in his characteristically colourful way, that members of the House of Representatives debating Senate amendments to the Sugar Bonus Bill (1903), "cast aside our *Mays* and our *Bourinots* in relation to these matters, and ... simply examine the provisions of the Constitution".[60]

This methodology requires qualification in the instance of the third paragraph. If, as I have sought to show, the motivation for s 53 was to ensure that some English parliamentary usages would apply to the Senate, and words were found from precedents to ensure that result, it would be foolish to ignore the meaning which can be derived from those precedents. It is possible to identify some meanings by looking at the concepts expressed by the earlier use of the words in parliamentary custom and usage. I can do no better than to adopt the words of Sir Isaac Isaacs, speaking in the House of Representatives, concerning the potential operation of the third paragraph upon the Sugar Bonus Bill:

> [W]e have to look at the records of past discussions and struggles, both in this country and in the mother-land, in order to ascertain for the guidance of Parliament in its procedure the meaning of terms that are used in the Constitution, so far as those terms can be ascertained in that way. We can derive great enlightenment from such books as *May* and *Bourinot*, and other works of an authoritative character. [61]

Parliamentary materials and various colonial disputes will be examined in order to determine whether the words "charge or burden on the people" bore some technical meaning. It emerges that the expression was used in, at least, two different senses.[62] First, there was the "revenue" sense in which the words were used to denote *any* Bills for raising revenue. This meaning arose in the context of tax Bills being distinguished from appropriation Bills. For example, a taxation Bill might be called a "charge or burden on the people", and an appropriation bill might be called a "charge on the revenue". Secondly, there was the "incidental" sense of "charge or burden on the people", which applied to Bills which only incidentally raised revenue. The touchstone of this "incidental" sense was that the Bill was not really about money, it was about regulation. In the context of Bills for regulation, the words "charge or burden on the people" referred to the means of execution of the Act, either by way of penalty or fee

59 M Leeming, above n 42 at 133.
60 Cth Parl Deb 1903, Vol 14 at 2022.
61 Ibid at 2023.
62 M Leeming, above n 42 at 137-139 persuasively presents an alternative contention that the words applied to Loan Bills.

for service.[63] It would be an exercise in false dichotomy to speak of these two senses as descriptive of the whole universe of meaning of "charge or burden on the people". The senses are neither well defined (in the sense that they may overlap) nor necessarily consistent. For example, the revenue sense describes all Bills for raising revenue, apparently including Bills which incidentally raise revenue. In contrast, the incidental sense excludes Bills with the express purpose of imposing taxation. Accordingly, it is dangerous to remove examination of the sense of the words from the context in which they were used.

The revenue sense of "charge or burden on the people"

In examining the revenue sense of the words, two propositions can be made good. The first proposition is that the words were used to encompass tax and tax-related measures. The second, more contentious, proposition, is that the words, when so used, were such as to differentiate tax Bills from appropriation and expenditure Bills.

The description of tax Bills

The Committee, as I have outlined, considered that the third paragraph applied to tax and tax related measures. The historical material supports this conclusion. Sir Henry Parkes said in 1891 that "all taxes levied must be burdens on the people of the country".[64] Many of the sources already extracted support an identity between Bills for tax and "charges or burdens on the people". The identity is evident in *the Rules, Orders, and Forms of Proceeding of the House of Commons*. The marginal heading of rule 412 is "[t]ax not to be increased on Report". The rule itself reads:

> No amendment, whereby the charge upon the people will be increased, may be made to any such Resolution, unless such charge so increased, shall not exceed the charge already existing by virtue of any Act of Parliament.[65]

A similar result follows from a comparison of, on one hand, Nowell's summary of the types of Bill which must originate in a Committee of the whole House, and on the other hand, May, who is Nowell's quoted source. Nowell's summary has already been reproduced.[66] His categorisation of Bills expressly refers to May, yet the words which appear in May, "the imposition of taxes"[67] are transposed as, "[b]ills for laying any burden or charge upon the people".[68] That Nowell was correct in his summary is borne out by May's characterisation of tax Bills as "public burthens".[69] Contemporary

63 Section 92 cases are a fruitful source for definitions of "fee for service" laws. For example, in *Hughes and Vale Pty Ltd* v *New South Wales [No 2]* (1955) 93 CLR 127 at 179, Dixon CJ, McTiernan and Webb JJ said, "[T]he conception appears to be based on a real distinction between remuneration for the provision of a specific physical service of which particular use is made and a burden placed upon inter-State transportation in aid of the general expenditure of the State".

64 *Convention Debates* (Sydney 1891) at 449.

65 Reproduced as an appendix to Bourke, *Decisions of the Right Honourable Charles Lefevre* (2nd ed 1857) at 359. The same language was chosen for the first Standing Orders of the Commonwealth House of Representatives: "290. No amendment whereby the charge upon the people will be increased may be made to any such resolution, unless such charge so increased shall not exceed the charge already existing of any Act of the Parliament."

66 Text accompanying n 33.

67 T E May, above n 31 at 430.

68 E C Nowell, above n 32 at 122.

69 T E May, *Constitutional History of England 1760-1860* (1861) Vol 1 at 476.

textbooks on statutory interpretation yield the same result. When strict construction is considered, "a taxing Act" is identified where "a statute professes to impose a charge".[70]

The background to the Victorian payment of members dispute in 1877 included resolutions which, in their form, support the view that taxes were perceived to be charges or burdens on the people. The short-lived premiership of Graham Berry at the end of 1875 included a budget statement with proposals to meet the deficit by borrowing. He also proposed a new land tax. Sir James McCulloch opposed the tax and moved that the House:

> Whilst affirming the principle of direct taxation on property, is of opinion that any such measure should be general in application, and be accompanied by proposals for relief from certain of the burdens imposed on the people through the Custom House.[71]

Tax Bills and appropriation Bills distinguished

The Committee came to the conclusion from the history of the third paragraph that "[t]here was a clear intention to give the Senate the same legislative powers as the House of Representatives *except* in relation to appropriation and tax Bills (however defined)".[72] From this, further material was adduced in support of the view that the third paragraph should apply to prevent amendments increasing appropriations or expenditure. Support was derived from opinions expressed in debate on the Sugar Bonus Bill 1903. Clause 2 of the Sugar Bonus Bill had read:

> There shall be paid out of the consolidated revenue fund, which is hereby appropriated accordingly ... to every grower of sugar-cane or beet within the Commonwealth in the production of which sugar-cane or beet white labour only has been employed, after 28 February 1903.[73]

The Senate proposed to add, "[o]r for a period of twelve months immediately preceding the delivery thereof for manufacture".[74] The amendment was clearly in the nature of an increased appropriation. Debate ensued on the operation of the third paragraph upon the amendment. Sir Edmund Barton, speaking in the House of Representatives, could not "come to any other conclusion than that a proposal for an appropriation out of the consolidated revenue fund imposes a charge or burden on the people".[75] He believed this "because a charge on the revenue is a charge on the people's revenue, and therefore a charge on the people".[76] Barton correctly identified any view contrary to his, as resting on the distinction between "charges on the people" and "charges on the revenue". He was fortified in his opinion by reference to some of the parliamentary materials already outlined. *Bourinot* is cited, "for the purpose of demonstrating what is the meaning of the term — 'a charge or burden on the people'".[77] Discussion of *May* is extensive[78] and to the same effect.

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70 H Hardcastle, *A Treatise on the Construction and Effect of Statute Law* (3rd ed 1901). Within legislative language and judicial interpretation "charge" and "tax" are undoubtedly interchangeable: *Cox* v *Rabbits* (1878) 3 App Cas 473 at 478.

71 H G Turner, *A History of the Colony of Victoria* (1904) at 184.

72 Standing Committee on Legal and Constitutional Affairs, above n 7 at para 3.7.2. Emphasis in original.

73 Cth Parl Deb 1903, Vol 14 at 2014.

74 Ibid.

75 Ibid.

76 Ibid at 2015.

77 Ibid at 2015.

Some care is clearly necessary in accepting the opinions of drafters or judges of the High Court when those opinions were expressed not as drafters or judges, but as politicians. The opinions expressed by Sir Edmund Barton in the House of Representatives were expedient rather than accurate. The historical material, in my view, supports the contrary proposition. The definition of a revenue Bill as a "charge or burden on the people" arose in the context of distinguishing a tax Bill from one making an appropriation. The dichotomy between a "charge upon the revenue" and a "charge upon the people" is plainly evident in contemporary parliamentary usage. There are many examples of this. In *The Rules, Orders, and Forms of Proceeding of the House of Commons* the distinction is manifest:

> By Standing Order, 25 June, 1852, if any Motion be made in the House for any Public Aid, or charge upon the people, the consideration and debate thereof may not be presently entered upon ... [79]

In *Bourinot*, expenditure and appropriation are termed "measures imposing charges on the public exchequer".[80] There is also a telling separation between the treatment of rules relating "Tax Bills"[81] and those relating to "Aid".[82] The payment of salaries and expenditure fit under the heading "Aid" and are termed, "charges on the public revenue".[83] Sir Edmund Barton also sought to rely on May. The ninth edition of *Parliamentary Practice* does not truly support any merging of the concepts of "charge on the revenue" and "charge on the people". Speaking of origination, May's language, although ambivalent, does indicate a distinction:

> As a general rule, bills may originate in either house: but the exclusive right of the House of Commons to grant supplies, and to impose and appropriate all charges upon the people, renders it necessary to introduce by far the greater proportion of bills into that house.[84]

This statement is consistent with an imposition being termed a "charge on the people", which may, then, be appropriated. At the stage of appropriation, the term "charge on the revenue" is appropriate. This impression is reinforced by reference to May's other major work, *The Constitutional History of England 1760-1860*. Discussing the relationship between various ministries and the Commons, May concedes that the Commons "agreed to every grant of money, and to every new tax and loan" and concludes that "their votes have neither diminished the public expenditure, nor reduced the ultimate burdens upon the people".[85] The boundaries of each alternative are strictly maintained.

The Australian material provides further support for the separation of "charges on the revenue" and "charges on the people". The Committee relied upon the view of Quick and Garran that the third paragraph prevents amendments which would increase appropriations.[86] Their view was based upon the idea that an increased appropriation or expenditure would inevitably lead to an increase in taxation. This unsophisticated "balanced budget" view must be dubious in its application to modern

78 Ibid at 2016-2019.
79 Bourke, above n 65 at 406. See also T E May, above n 31 at 653.
80 J Bourinot, above n 36 at 464.
81 Ibid at 495.
82 Ibid at 523.
83 Ibid at 523.
84 T E May, above n 31 at 521.
85 T E May, above n 69 at 471.
86 Standing Committee on Legal and Constitutional Affairs, above n 7 at para 6.2.1.

government revenue structures. However, for my purposes the important fact is the recognition that the interpretation of the third paragraph offered by Quick and Garran is predicated on a distinction between tax Bills and appropriation Bills:

> If the Senate could propose an increase in the amount of money to be spent in a public work bill — say from one million sterling to two million sterling — that amendment would necessitate increased taxation in order to give effect to it, and consequently an addition to the burdens and charges on the people.[87]

There is no attempt to refute the distinction between taxation and appropriation. Indeed their view is premised on an express equation of "taxation" with "burdens and charges on the people", and a distinction between that concept and "expenditure". Nowell's *Parliamentary Handbook*, in the section entitled "Supply" talks only of "[m]otions involving any charge upon the public revenue".[88] In relation to origination the exceptions to the general rule are stated to be: "Bills for restitution of honours, or in blood, and Bills of Supply, or involving charges upon the people ...".[89] Nowell reproduces the following rule:

> When Bills contain Clauses which involve charges upon the Public Revenue, whether payable out of the Consolidated Fund or out of moneys to be provided by Parliament, or whether by way of direct payment or guarantee, or impose any tax or State burden upon the people, such clauses are printed in italics.[90]

The Committee also set great store by the views of Sir Henry Parkes on the third paragraph. In 1891 Parkes elaborated his "cardinal principles", which included, "for example ... the power of dealing with all Bills imposing burdens on the people, or appropriating their money".[91] While it is important not to place excessive reliance on the disjunctive "or", these last passages clearly demonstrate the cleavage between appropriation and supply on one hand, and the imposition of "charges upon the people" on the other. The words "charge or burden on the people" were used to describe Bills for taxation, in the context of distinguishing those Bills from Bills for appropriation.

The incidental sense of "charge or burden on the people"

The Committee recommended that fines, penalties, licence fees and fees for services ought not to be regarded as charges or burdens on the people for the purposes of the third paragraph.[92] This conclusion was based, at least partly, on the view that origination and amendment of such Bills might be forbidden under the first and second paragraphs of s 53. The Committee reasoned that "a proposed law is not to be taken to impose taxation *merely* by reason of it containing those kinds of impost".[93] Once again this glosses the words of the section which are that "a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing [such] provisions".

The following section will examine material which shows that an accepted denotation of "charge or burden on the people" referred to Bills for the regulation of

87 J Quick and R Garran, *The Annotated Constitution of the Commonwealth* (1901) at 671.
88 E C Nowell, above n 32 at 94.
89 Ibid at 120.
90 Ibid at 134.
91 *Convention Debates* (Sydney 1891) at 362.
92 Standing Committee on Legal and Constitutional Affairs, above n 7 at para 8.9.4.
93 Ibid at para 8.9.1. Emphasis in original.

various activities, either by the extraction of fees for service or penalties for contravention. Where a Bill for such regulation was not primarily to raise revenue, but rather had that effect incidentally by including measures imposing penalties or exacting fees for service, the term "charge or burden on the people" was used to describe it. The English and Australian material will be considered in turn.

The English material

Hatsell used the words, "charge or burden on the people" to refer to Bills which only incidentally raised revenue as a product of regulation:

> That in Bills which are not for the special grant of supply, but which however impose pecuniary burthens upon the people, such as Bills for turnpike roads, for navigations, for paving, for managing the poor, or for rebuilding churches, for which purpose tolls and rates must be collected — in these the Lords may make amendments.[94]

The possibility that the term, in this sense, referred to something quite distinct from both tax Bills and appropriation Bills was raised in *The Report from the Select Committee on Tax Bills* produced by the House of Commons in 1860.[95] The Select Committee was, "appointed to search the Journals of both Houses of Parliament, in order to ascertain and Report on the Practice of each House with regard to the several descriptions of Bills Imposing or Repealing Taxes".[96] For the sake of clarity the Select Committee classified Bills according to "character and object" as follows:

1 Bills of Supply and Tax Bills;
2 Bills for appropriating Supplies;
3 Public Bills, which are not strictly Bills of Supply or Tax Bills, but which operate as a Tax or Charge on the people; and,
4 Bills for altering or repealing Acts which relate to Supply, Taxes or Charges.[97]

This taxonomy admits of a category of Bills which are neither tax nor supply Bills, and yet are "charges on the people". The Select Committee noted that, "in the early part of the reign of Charles the Second, a question arose whether other Bills which were not strictly Bills of Supply, or Tax Bills, but which would operate as a charge on the people, could, or could not originate in the Lords".[98] Part III of the Appendix to the Report, in section (a) details no less than forty-nine "Public Bills which are not strictly Bills of Supply or Tax Bills, but which operate as a Tax or Charge upon the People" which had been amended by the Lords, and part (b) a further five such Bills which were rejected or postponed by the Lords. The Bills in question are Bills which do not have as their chief object the imposition of a tax or duty, but which incidentally achieve that effect in furtherance of a different goal. They are measures primarily for the regulation of various activities; May terms them, "bills concerning questions of public policy".[99] These Bills which raised revenue incidentally by way of fine or fee, also often incidentally appropriated; the fee was usually used to defray the cost of the service and

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94 J Hatsell, above n 29 at 154.
95 House of Commons Paper (414), *Report from the Select Committee on Tax Bills* (1860). The reference arose out the rejection by the Lords of the Paper Duties Bill 1860 (UK): T E May, above n 31 at 649.
96 Ibid at iii.
97 Ibid at iii.
98 Ibid at xi.
99 T E May, above n 31 at 649.

the penalty for certain conduct used to defray the cost of regulation of that conduct. This did not affect their nomination as Bills imposing a "charge or burden on the people". An example will bear this out.

In 1661 a Bill was originated in the Lords, entitled "a Bill for Paving, repairing, or Amending the Streets and Highways of Westminster". It proscribed various activities which were deleterious to the maintenance of roads, and also provided for various improvements. The Commons observed that this Bill "was to alter the course of the law in part, and to lay a charge upon the people"[100] and laid it aside. The Commons recognised that the Bill was of great "publick concernment"[101] and subsequently brought in a similar Bill. This was returned by the Lords with amendments inserting two provisoes for the erection and repair of bridges. These were rejected, "because the provisoes are to lay a charge on the people".[102] The Lords gave way and the Bill became an Act "for repairing the highways and sewers, and for paving and keeping clean of the streets in and about the city of London and Westminster".[103] It included regulatory measures and provided that "rates and taxes are to be made for defraying the charges and wages of scavengers".

Regulation was often achieved by the imposition of penalties. It appears from the Report that pecuniary penalties and forfeitures were included within the category of Bills imposing a "charge or burden on the people".[104] The best example of a dispute between the Commons and Lords on the issue of penalties arose with the India Silks Bill 1696.[105] This was an "Act to restrain the wearing of all wrought Silks and Bengals, imported into this kingdom from Persia and East India, and all Calicoes printed or stained there". The amendment in the Lords imposed an additional penalty on the wearing of such fabric, where the Commons had only penalised the sale thereof. This amendment was rejected as a breach of privilege. The Lords argued:

> that the imposing of pecuniary Penalties of this nature is no charging of Money upon the People; because nothing can truly be called so which is within the People's choice, not to pay if they please, as they need not to do in this case, unless they will wilfully break the Law, which is made for the welfare of the State, and not for taxing of the Subject. [106]

The House of Commons insisted on their privilege by maintaining that penalties for enforcement were measures imposing a "charge or burden on the people". Eventually the Lords were forced, "by receding from their Amendments, to settle the right of the Commons beyond all disputes whatsoever".[107] Through the eighteenth and nineteenth century the ultimate privilege was maintained, although Standing Orders progressively relaxed the practical restriction. The series of Standing Orders relating to penalties and fees for service are reproduced in the Report.[108] In 1849 the Standing Order allowed the Commons to waive its undoubted privilege in regard to penalties and fees "[w]hen the object of such pecuniary penalty or forfeiture is to secure the

100 House of Commons Paper, above n 95 at xii.
101 Ibid at 49.
102 Ibid.
103 13 &14 Caroli II, c 2.
104 House of Commons Paper, above n 95 at xii.
105 Ibid at 51.
106 Ibid.
107 Ibid.
108 Ibid at xii-xiii.

execution of the Act, or the punishment or prevention of offences".[109] If the main object is "to secure the execution of the Act" then there would be no objection to the incidental laying of a charge or burden on the subject.

Bills imposing some kind of fee for government service were included in the section of the Report dealing with Bills imposing a "charge on the people" and it is not surprising to find that "[t]he same rule was applied to fees as well as to penalties".[110] The Appendix includes a list of Private Bills, "which involved or related to some charge on the people".[111] In connection with such Bills, the Select Committee reproduced a Standing Order of 1858 to the effect that the Commons, "will not insist on its privileges with regard to any clauses in Private Bills sent down from the House of Lords, which refer to tolls and charges for services performed, and are not in the nature of a tax".[112] The Select Committee Report reveals that, in English parliamentary usage, the separate classification of Bills involving a "charge on the people" referred to regulatory Bills. It was the character of these Bills, which tended to impose penalties, or charge fees for service, which attracted that classification. May confirms this approach by identifying the possibility of a separate class of Bills "not confined to matters of aid or taxation, but in which pecuniary burdens are imposed on the people ...".[113] Throughout the text penalties and fees for service are called "charges upon the people" or "burthens".[114] The key is the "incidental" nature of the charge in relation to the objects of the bill. May reports that:

> So strictly had the right of the Commons been maintained in regard to the imposition of charges upon the people, that they denied to the Lords the power of authorising the taking of fees, and imposing pecuniary penalties ... [115]

The Australian material

There are several Australian sources which support this interpretation: Nowell's *Parliamentary Handbook*; his commentary to various Tasmanian disputes; legal opinions given in 1865 concerning the dispute in Victoria which lead to the Darling Grant controversy; and later controversy over the Victorian Explosives Bill 1885 are all situations where the expression "charge or burden on the people" was used to apply to incidentally raised revenue.

The appendix to Nowell's *Parliamentary Handbook* outlines examples of proceedings as between the two Houses in England and is divided into two sections.[116] The first concerns "Money Bills", and consists almost exclusively of Supply Bill examples, with some Tax Bills.[117] The second section is devoted to "Bills involving charges upon the people".[118] Nowell was content to distinguish those Bills incidentally raising revenue,

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109 T E May, above n 31 at 647; E C Nowell, above n 43 at 120; House of Commons Paper, above n 95 at xiii.
110 House of Commons Paper, above n 95 at xii.
111 Ibid at xiv.
112 Ibid.
113 T E May, above n 31 at 642.
114 Ibid at 642, 643, 646 and 684; T E May, above n 69 at 476.
115 T E May, above n 31 at 646.
116 E C Nowell, above n 32 at appendix. He cites the House of Commons Paper (414), above n 95.
117 E C Nowell, above n 32 at 175.
118 Ibid at 179.

from "Money Bills" properly so-called, by describing them as "charges upon the people". Nowell wrote in 1890 about the relaxation of privilege in regard to these regulatory Bills:

> There are, no doubt, very numerous cases where the Commons have objected to the action of the Lords, even where it has borne but in the most remote degree upon the imposition of burdens upon the people; but it must not be lost sight of that the Commons do not now insist on their privileges in this respect with the same strictness as they formerly did.[119]

Once again the term "burdens upon the people" is explicitly linked with the relaxation of the Commons privilege in respect of penalties and fees for services. This characterisation is borne out by the Tasmanian experience. In Tasmania there had been inter-cameral friction on several occasions concerning amendments to measures imposing penalties. An example is provided by the Bill for the Preservation of Trout 1877, which originated in the Legislative Council.[120] Two clauses were found objectionable. First, a clause providing that one moiety of the penalty should go to the informer. Second, a clause that money received from the sale of ova and fry, licence fees, and a moiety of fines should be paid into the Treasury. The Assembly immediately laid the Bill aside as a breach of privilege, and promptly "reinitiated", passed and sent it up to the Council. The Council objected to this but the President of the Council conceded that the clauses did involve "the imposition of burdens".[121] Nowell's commentary similarly identifies these provisions as "burdens upon the people".[122]

Events leading to the dismissal of Governor Darling in Victoria are of interest for the debate which was thrown up in regard to the powers of the Legislative Council.[123] The McCulloch Ministry had tacked a Tariff Bill and a Gold Duties Repeal Bill on to the Appropriation Bill. The Council protested that this was a violation of long-established constitutional practice and laid the Bill aside. In November 1865 the Tariff was sent up separately and, under the purported power of s 56 of the Constitution Act, the Council rejected the Bill. After several months of manoeuvring, and two changes of ministry, a compromise was reached and the Bill passed. The dispute was all the more acrimonious because, as soon as the Bill had first passed the Assembly in early 1865, the immediate collection of duties was authorised. This was successfully challenged in the Supreme Court.[124]

In a dispatch from Governor Darling to Secretary of State Edward Cardwell in September 1865, Darling reported the "claim of the Council to deal with the export duty on gold, as if it were not a tax or impost over which the Assembly had a right to exercise the special power conferred upon them by the 56th clause of the Constitution

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119 E C Nowell, above n 43 at 120.

120 Ibid at 26.

121 Ibid at 27.

122 Ibid at 28.

123 Z Cowen, "A Century of Constitutional Development" in *Sir John Latham and Other Papers* (1965) at 137-143; Manning Clark, above n 57 at 419-422. For correspondence between the Governor and the Colonial Secretary, see *British Parliamentary Papers 1864-1869* (1969) Vol 25 at 31-279, 297-421 and 531-611.

124 *Stevenson* v *The Queen* (1865) 2 WW & a'B (L) 143.

Act".[125] An opinion of the Attorney-General on the meaning of s 56[126] of the Constitution Act was enclosed. The Attorney's opinion is, in some respects, bizarre. The conjunction "and" between "Bills for appropriating" and "for imposing any duty" indicated to him that no Bill will come under s 56 unless it both appropriates a part of the revenue *and* imposes a duty or tax. Darling rightly prefaced the opinion by saying that, "if this opinion were accepted (which it certainly is not by me), the Assembly, apart from tacking, would have no means of preserving their privilege in regard to Money Bills".[127] However, in another respect the Attorney raised a point which indicates doubt over the application of the section to Bills which only incidentally impose a duty or tax and appropriate part of the revenue. He latched onto the words "*for* appropriating" and "*for* imposing":

> There is a clear difference ... between a Bill imposing a duty, and a Bill *for* imposing a duty. The main object of a Bill imposing a duty is not necessarily the imposition of a duty, but the main object of a Bill *for* imposing a duty is the imposition of a duty. The distinction is easily seen in the case of a Bill imposing a penalty.[128]

The argument was then developed that the "framers" did not wish to deal with "matters of detail which would be out of place in a Constitution Act".[129] Accordingly, s 56 was taken to apply only:

> ... to a class of Bills so entirely relating to money matters that it could be decided at once that the Council should have no power in any way to alter them, while it was intended that the powers of the Council as to Bills only partially relating to money matters should be the subject of future arrangement ... [130]

Mr Dennistoun Wood, the Attorney-General who provided this opinion, is hardly an authoritative source.[131] However, the argument he presented demonstrates a conception of Bills imposing penalties or exacting fees for service as separate from tax Bills because the charge is only incidental.

The issue was reignited in Victoria by the Explosives Bill 1885.[132] The Bill was one to "consolidate and amend the law with respect to importing, manufacturing, carrying, storing, and selling gunpowder and other explosive substances".[133] The Council had made provision for both licence and storage fees.[134] The Minister for Defence moved that the Bill be recommitted to omit certain clauses to avoid a breach of privilege. Objection was taken by William Hearn that the clauses were, in fact, within the competence of the Council and the President's opinion was sought. The President

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125 *British Parliamentary Papers 1864-1869* (1969) Vol 25 at 51. (Enclosure 6, in Darling to Cardwell, September 18 1865).

126 Ibid at 60. For the text of s 56 see n 49.

127 Ibid at 52.

128 Ibid at 60 (emphasis in original). See also *Convention Debates* (Sydney 1897) at 471 per H B Higgins for the advertence of the Convention to this issue.

129 *British Parliamentary Papers*, above n 123 at 61.

130 Ibid at 61.

131 John Dennistoun Wood was Tasmanian-born, an English barrister, admitted to the Victorian Bar in 1853: A Castles, above n 43 at para 2540.

132 The facts of this dispute are taken from W Hearn, *The Government of England* (2nd ed 1886) at 613-623.

133 Ibid at 613.

134 Vic PD 1885, Vol xlix at 1255.

found that the proposed omission was in accordance with s 56.[135] After a report by the Standing Orders Committee,[136] a Select Committee was appointed to consider the true extent of the Council's power "in dealing with matters incidentally arising in relation to money".[137] Hearn's memorandum, which appears as an appendix to *The Government of England*, was written for the use of members of this Select Committee. The course of parliamentary debate and Hearn's memorandum explicitly identified incidental taxes as "charges or burdens on the people".

Before the President delivered his opinion, Mr Dobson recalled the Local Government Act Amendment Bill 1884. There had been a proposal to insert a new clause into that Act, empowering municipalities to levy rates for the removal of night-soil, a fee for service. In his opinion this had been a provision "imposing a charge on the people".[138] The President's opinion made the same connection in adverting to:

> [T]he circumstance that the Assembly cannot insert in a Bill any clause for imposing a charge upon the people until it has been considered in a committee of the whole, and agreed to by the House. This is when the imposition is merely one incidental to the general object of the Bill. When, however, the Bill is for the purpose of taxation, resolutions on which to found the Bill must precede its introduction.[139]

Hearn, like Dennistoun Wood before him, begins by recognising that a Bill "for imposing", "is a bill of which the object, as stated in its title, is the imposition of such duties or taxes".[140] Hearn argued that the position established by the resolutions of the House of Commons was to the effect that:

> "[A]ll Aids and Supplies and Aids to His Majesty are the sole gift of the Commons" ... would be fairly expressed by a modern draftsman in the words "all bills for imposing any duty, rate, tax, &tc, shall originate in the Commons, and may not be altered by the Lords". If such a draftsman were instructed to extend these privileges of the Commons from Bills of Aid and Supply to all bills which impose any kind of pecuniary burthen upon the people, he would probably alter the first four words of his sentence from "all bills for imposing" into "all bills which impose".[141]

Hearn's conclusion is "that there is absolutely no authority for the proposition that the Legislative Council is in any way restricted in dealing with Bills which, incidentally only, impose any charge upon the public, or upon any class of the public".[142]

The conclusion from this Australian material, and the English material on which it tended to be based, is that there was an accepted meaning of "charge or burden on the people" which referred to regulatory Bills which only incidentally raised revenue, usually by the imposition of penalties or the exaction of fees for service. These "incidentals" were, in fact, a major source of revenue.[143] I turn now to consider the

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135 Ibid at 1332.
136 Ibid at 1486.
137 Ibid at 1486,1492.
138 Ibid at 1257.
139 Ibid at 1332.
140 W Hearn, above n 132 at 619-620.
141 Ibid at 620.
142 Ibid at 623.
143 It is possible to gain some impression of the importance of incidentally raised revenue from the Comparative Statement of Revenue and Receipts on Account of the Consolidated Revenue Fund 1885-6 (G B Barton, *Excise Duty on Beer: Case and Opinion of Counsel* (1887) (Mitchell Library) Appendix B. This work represented "the opinion of Mr G B Barton and

significant possibility that the use of "charge or burden on the people" in the third paragraph was designed to prevent Senate amendment to Bills incidentally imposing a charge on the people in such a way as to increase that charge.

PART 4: WAS EITHER THE "REVENUE" SENSE OR THE "INCIDENTAL" SENSE INTENDED IN THE COMMONWEALTH CONSTITUTION?

The operation of section 53

To decide whether either the revenue sense or the incidental sense might have been intended in the Commonwealth Constitution, it becomes necessary to consider the rest of s 53. There are difficulties for either sense. If "charge or burden on the people" in the third paragraph is used in the revenue sense and simply means Bills imposing taxation, then the third paragraph is rendered useless since all amendments to measures imposing taxation are forbidden by the second paragraph.[144] In relation to the incidental sense of "charge or burden on the people" a problem is immediately thrown up by the first paragraph of s 53. The first paragraph provides that proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. However, the paragraph defines such laws to exclude proposed laws "containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law". Such proposed laws can thus be originated in the Senate. It is perverse to argue that the Senate cannot amend a proposed law such as to increase a licence fee or penalty given that it can originate such a law with whatever level of fee or penalty it likes. This led the Committee to conclude, as I have outlined, that the third paragraph of s 53 ought not to apply to fines, penalties, fees for services and fees for licences.

The difficulty of fitting either sense of "charge or burden on the people" into the operation of the section might fairly lead to the conclusion that those senses were not what was meant in the third paragraph. Such a conclusion rests on the premise that the dynamic between the third paragraph on one hand, and the first and second paragraphs on the other, does admit a sensible operation. The historical method in its

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Mr Edmund Barton" on the power of the NSW Legislature to authorise an excise duty on beer). "Revenue Proper" is a product of "taxation", "land revenue", "receipts for services rendered", and "general miscellaneous receipts". The category of "receipts for services rendered" is further divided into railway receipts, post office and mint receipts, fees for conveyance of gold, pilotage and harbour dues, registration of brands, public school fees, and assorted fees of office. These sources of revenue are not classified as taxation, but are the product of regulatory exaction.

144 It was this problem which formed the basis of the opinion expressed by Quick and Garran. They assumed that proposed laws increasing a "charge or burden on the people" were "laws imposing taxation" within the meaning of the second paragraph of s 53 and accordingly amendment was forbidden. To give the section some work they opted for a construction which made appropriations the subject of the third paragraph. Following similar reasoning, the Committee found other possibilities which reconcile the tension between the second and third paragraphs of s 53 by identifying tax Bills which are a "charge or burden on the people" for the purposes of the third paragraph, but which are not "imposing taxation" for the purposes of the second paragraph. These include Bills which enlarge the tax base, or increase the rate of taxation imposed in another Act.

application to law often hides such a premise. Once the premise is acknowledged it can, of course, be abandoned. Spared in this way from the burden of finding a meaning which is "useful", it is possible to look through the other end of the telescope — at the shape of the sections in 1891, which ended up as s 53. The operation of the section in its original form, gives the incidental sense of the words in the third paragraph some currency.

The original shape of section 53

The crucial words first appeared in the memorandum of decisions of the Constitutional Committee which resulted from discussions in March 1891.[145] When one examines the draft as it stood, largely unscathed, at the end of first Convention the sections had been numbered as cll 54 and 55. Clause 54 and the relevant part of clause 55 read:

> 54 Laws appropriating any part of the public revenue, or imposing any tax or impost shall originate in the House of Representatives.
>
> 55(1) The Senate shall have equal power with the House of Representatives in respect of all proposed Laws, except Laws imposing taxation and Laws appropriating the necessary supplies for the ordinary annual services of the Government, which the Senate may affirm or reject, but may not amend. But the Senate may not amend any proposed Law in such a manner as to increase any proposed charge or burden on the people.[146]

Clause 54 concerned the *origination* of two classes of bill. Origination was forbidden to the Senate for any law "appropriating *any* part of the public revenue" or "imposing *any* tax or impost". These terms deliberately cast the restriction wide enough to preclude origination of Bills even where they only incidentally exacted or appropriated revenue. Clause 55 concerned restrictions on Senate power to *amend* certain classes of Bill. Three types of Bill are mentioned. First, Senate amendment was forbidden to laws described as "Laws imposing taxation". Second, amendment was forbidden to laws described as "Laws appropriating supplies for the ordinary annual services of the Government". Third, amendment was forbidden to "any proposed Law in such a way as to increase any proposed charge or burden on the people".

The first two restrictions on amendment in clause 55 are related to the two types of Bill which had to originate in the House of Representatives under clause 54. The classes of Bill which could not originate in the Senate were broader than the Bills which could not be amended. The words "laws imposing any tax or impost" covered a broader class of Bills than the words "laws imposing taxation". Similarly the words "appropriating any part of the public revenue" were broader than "appropriating the necessary supplies for the ordinary annual services of the Government". This would leave two "gaps" between the classes of law which could not be originated and the classes of law which could not be amended.

It is possible that the third restriction on amendment in clause 55, containing the words with which we are concerned, was designed to fill these gaps. This would work as follows. The type of Bill which would fit into the gap between "laws imposing any tax or impost" and "laws imposing taxation" would be a Bill incidentally raising revenue. Such a Bill could not be originated, and, in light of the third restriction in clause 55, could only be amended so as not to increase the incidental charge on the people. This, of course, appeared to leave the other gap untouched, namely that

145 S Griffith, above n 52 at 28.
146 *Convention Debates* (Sydney 1891) at 953.

between a "law appropriating any part of the public revenue" and "laws appropriating supplies for the annual services of the Government".[147] Bills which fitted into this gap would include incidental appropriations. However, there was simply no need expressly to prevent amendment upwards of incidental appropriations since such appropriations were, by their nature, incidental to regulation and thereby limited to the amount of regulatory exactions. As we have seen, these regulatory exactions, as "charges or burdens on the people", could not be increased by the Senate.

The operation of cll 54 and 55 in this way is certainly tenable. The form of clause 54 divided the laws which could not be originated by the Senate into two classes. Clause 55 then imposed different restrictions on the amendment of each class. Laws for the purpose of raising revenue or for the purpose of appropriating could not be amended at all. In contrast, laws which only incidentally achieved these results could not be amended upwards. The internal consistency of the sections as they passed the 1891 Convention was reliant upon the existence of a class of laws which incidentally raised revenue or, in the terms of the section, increased a "charge or burden on the people".[148]

Section 53 through the later conventions

The problem of the dynamic between the first and third paragraphs as they finally emerged did not exist when the draft Constitution passed the 1891 Convention. It was purely a creation of the 1897 Convention. In discussions on the resolutions at Adelaide, Mr O'Connor distinguished between "[B]ills which impose taxation and incur expenditure, and ... other Bills which merely incidentally require expenditure to carry out their purpose".[149] He argued that origination and amendment of the former should be forbidden to the Senate. This accords with the 1891 Bill. However, "the other class of Money Bills should be handed over to the Senate to deal with on exactly the same footing as the House of Representatives".[150] In response to this argument, a crucial change to the scope of the power of the Senate to originate laws occurred. It became:

> Proposed laws *having for their main object* the appropriation of any part of the public revenue, or the imposition of any tax or impost, shall originate in the House of Representatives.[151]

The clause was met with immediate opposition. Sir George Turner recognised that it enlarged the power of the Senate and suggested an alternative "means by which bills which in reality deal with large questions of public policy, and which incidentally appropriate small portions of the revenue, may be fairly dealt with".[152] This was by

147 That there is a gap appears in Sir Isaac Isaacs's consideration of the clause in the *Convention Debates* (Adelaide 1897) at 472.

148 Some modest support for this interpretation may be gained from debates upon the Queensland Constitution Bill 1892. This Bill proposed to divide Queensland into autonomous regions joined in a federation. Griffith, introducing the Bill, noted the provisions relating to Money Bills "are taken without alteration from the provisions of the Commonwealth Bill" (Qld Leg Assembly 1892, Vol LXVIII at 794). Unfortunately there was no detailed discussion of the words. However, a statement of Mr Gregory in the Legislative Council indicates that he, at least, thought that the words covered the situation of incidentally raised revenue. (Qld Leg Council 1892, Vol LXVI at 170).

149 *Convention Debates* (Adelaide 1897) at 53.

150 Ibid.

151 *Convention Debates* (Adelaide 1897) at 469. Emphasis added to indicate the change.

152 Ibid.

way of Standing Order. Other members agreed with the principle of removing the restriction on Senate origination of such Bills, but disagreed with the wording of the clause. George Reid said that his "objection is to the words used to do it; they do not meet the objection in view, and they raise a number of difficulties".[153]

These arguments, and the ensuing debate, show that the restriction on origination which had existed in 1891 was wide enough to cover incidental appropriations and taxes. Eventually it was Reid's camp which won the day and different wording was employed to achieve the same result. This change occurred at the Sydney session of the second Convention. The Legislative Council and Assembly of New South Wales, and the Legislative Assemblies of Victoria and Tasmania all proposed the omission of the words, "having for their main object".[154] Barton commented on the proposal in a way which strongly supports the incidental sense of "charge or burden on the people" in the third paragraph:

> There has been a good deal of trouble about the definition ot the words "having for their main object", and I think we all feel this: even those of us who are against any undue limitation of the power of origination in the Senate of some matters which impose charges on the people. [155]

In this context Barton could only have been speaking of Bills incidentally taxing or appropriating. He went on to introduce the Tasmanian Assembly's suggestion which proposed to add words in virtually the same form as finally emerged in the Constitution.[156] This was discussed by various delegates and apparently agreed to. However, Mr Symon said that if he "had clearly heard what was being done"[157] he would have wanted further discussion. Mr Higgins had to explain what had occurred which "was not heard by hon. members at the end of the chamber".[158] The whole debate is tremendously confused, with amendments offered all around; delegates of the small states suspecting a "dark design"[159] in every proposal. After much veering between whether the amendment increased or diminished the power of the Senate, the proviso was eventually inserted.[160]

The crucial fact, for the internal consistency of the section, was that there was no corresponding change to the restriction on Senate amendment of such proposed laws. This failure resulted in the section becoming nonsensical; it forbids upward amendment of Bills which may be originated. This weakness is damaging, but perhaps explicable. At the Adelaide session debate over the issue took two days and ranged over the whole of the Senate's powers and the deadlock provisions. By the time the relevant words came to be specifically considered, in the Sydney session, the risk of reopening the debate may have put off further reconsideration. The suggestion of the South Australian Legislative Council to omit the words which finally became the third paragraph was negatived without discussion just before the Convention adjourned, "as we are not going to sit after tea tonight".[161] Given the confusion caused by the changes

153 Ibid at 478.
154 *Convention Debates* (Sydney 1897) at 467.
155 Ibid at 468.
156 Ibid at 468.
157 Ibid at 469.
158 Ibid at 471.
159 Ibid at 470.
160 Ibid at 481.
161 Ibid at 538.

to the power of origination it is a fair guess that few delegates had much idea what was going on by this stage.

CONCLUSION

It may be seen from this article that the expression "charge or burden on the people", as it was used in the third paragraph of s 53, is only able to be properly understood in the context of its history. It seems certain that the words came from materials relating to the regulation of conflict between upper and lower houses of Parliament in England and in the Australian colonies. Less certain are the meanings which the expression was capable of bearing, which can derived from those historical materials. I have identified two meanings. Finally, it has been suggested that the expression may have been meant to bear one of those particular meanings when it was inserted into the draft of the Constitution in 1891. This conclusion serves to remind interpreters that the search for meaning rests on the fragile assumption that the drafting of any section proceeded on a sensible basis.

These historical possibilities assist in the formation of a historical understanding of the section. However, it must be stressed that historical *understanding* of the words of the Constitution does not necessarily assist in the task of political or legal *interpretation*. This is true for many reasons. In the case of the third paragraph of s 53 it is true for the most basic reason that the result produced by history is unusable in law. A possible meaning of the words, derived from past usage in other contexts, in an early draft of the Constitution, is of marginal assistance to Parliament in the internecine struggle for meaning, or to the High Court in the legal interpretation of the words. It is the words of the Constitution as it was finally drafted with which both Parliament and the Court must grapple.

One final observation concerns the failure of drafting in this aspect of the Constitution. The drafters wanted to cover all the possibilities by a detailed mechanical code in s 53. They sought words from parliamentary history in order to regulate the relationship between Houses. It is apparent that they failed in their positivist project. The reasons for that failure must, in fairness, include the intractable nature of the problem of defining tax. But in large measure the desire to codify, to express the possibilities, to regulate the unregulateable, must also be found responsible. In this we may perhaps take a lesson for any future constitutional drafting in Australia. As James Madison said:

> The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words or phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.[162]

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162 J Madison (writing as Publius), Concerning the Difficulties which the Convention must have Experienced in the Formation of a Proper Plan" in *The Federalist Papers* (1788, Penguin edition 1987) at 245.