ON THE FIRST PARAGRAPH OF SECTION 55: A RESPONSE TO P G SHARP

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P G Sharp's paper entitled 'The First Paragraph of Section 55'[1] was a valuable and interesting contribution to analysis of one of the more interesting, yet little discussed, sections of the *Constitution*. He provided a rich historical background to the section and its interpretation, and essentially made the argument that, following *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Victoria)*,[2] there is no further need for legislative drafters[3] to split taxation legislation into a 'Taxing Act' and an 'Assessment Act'.

However, Sharp's argument leaves a great deal unsaid, and I have constructed four questions to set against his article, inviting further comment. They will be dealt with seriatim in this paper, but in summary they are:

1 Are machinery provisions properly to be regarded as provisions which 'deal only with the imposition of taxation'? As will be shown, *Permanent Trustee* appears to leave such provisions in a state of limbo. The High Court seems to suggest that they are captured under s 53 when included in a Taxing Act, and yet are not when included in an Assessment Act.

2 How far is it necessary to go in order to protect responsible government? Sharp argues that the splitting of taxation bills is inimical to responsible government as it effectively allows the Senate to defeat the financial program of a government which has the confidence of the lower house. In fact, accountability to the Parliament is more often exercised by the Senate than by the House, the Senate can in any event reject a tax bill rather than amend it, and it has not been shown that Senate amendments to machinery tax provisions have seriously threatened any government in office.

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* BA (Hons), MMgt, PhD (*Qld*). I am an officer of the Department of the Senate, and freely admit my pro-Senate partisanship. However the views expressed in this paper are entirely my own and do not reflect any official position of the Department of the Senate or any officer within it.

1 P G Sharp, 'The First Paragraph of Section 55' (2005) 33 *Federal Law Review* 569.

2 (2004) 220 CLR 388 ('*Permanent Trustee*').

3 Like many authors, Sharp uses the term 'parliamentary drafters', which tends to suggest that legislative drafting is a function of the Parliament. In fact, government legislation is drafted by the Office of Parliamentary Counsel and delegated instruments are drafted by the Office of Legislative Drafting and Publishing, both executive government agencies answering to the Attorney-General.

3 What is wrong with Senate scrutiny over machinery provisions? Given that Sharp acknowledges that the Senate has not used this power in a calamitous way, then where is the evil which needs reforming? Given that in the modern legislature it is the Senate which properly scrutinises legislation in detail, why is there a sudden need to remove from the Senate a function it has carried out well for decades?

4 If, as Sharp states, the power of request is virtually equivalent to the power of amendment, then again one might ask, why the need for reform? Sharp's argument about which chamber finally disposes of a bill is unconvincing, and there are few other arguments to be asserted.

The view of this paper, it will be apparent, is that, notwithstanding *Permanent Trustee*, the safe and responsible course is to continue to split taxation legislation into two, in order to maximise the amount of the legislation which can be properly and fully scrutinised by the house of parliament which was instituted for precisely this review function — the Senate.

1 ARE MACHINERY PROVISIONS PROPERLY TO BE REGARDED AS PROVISIONS WHICH 'DEAL ONLY WITH THE IMPOSITION OF TAXATION'?

This, of course, is the basic question. If the answer is 'yes', then the provisions can safely be included in the Taxing Act, and under s 53 of the *Constitution* cannot be the subject of amendment by the Senate. If the answer is 'no', then they cannot be included in the Taxing Act, and they will be subject to the scrutiny of the Senate exercising its full powers of amendment.

Unfortunately, in *Permanent Trustee*, the High Court answered 'it depends'.

The majority judges in *Permanent Trustee*[4] cite Higgins J in *Osborne v Commonwealth*[5] and quote Starke J in *Federal Commissioner of Taxation v Munro*[6] who considered that 'provisions incidental and auxiliary to the assessment and collection of the tax' could be properly regarded as provisions which deal only with the imposition of taxation and could therefore be included in the Taxing Act.[7] The consequence is that such provisions, where included in the Taxing Act, could not be initiated or amended by the Senate. So far, so good — disappointing for a faithful Senate officer, but still legally unambiguous.

However, their Honours continued stating that:

> the construction of the first limb of s 55 which should be accepted does not foreclose further observance of a practice or convention of splitting Bills between a taxing Act and an assessment Act. An assessment Act of the character of those in the numerous decisions

4 (2004) 220 CLR 388, 398 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). McHugh J and Kirby J felt it unnecessary to consider s 55.

5 (1911) 12 CLR 321, 373.

6 (1926) 38 CLR 153, 215.

7 *Permanent Trustee* (2004) 220 CLR 388, 419 quoting *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 215 (Starke J).

> of this Court discussed earlier in these reasons will not be a law imposing taxation with respect to which s 53 will restrict the powers of the Senate.[8]

In other words, the selfsame provisions, if included in a separate Assessment Act, will *not* be regarded as 'proposed laws…imposing taxation'[9] because they will be subject to possible Senate amendment! With sincere respect to their Honours, it is difficult to follow the reasoning of the Court on this issue. Either the provisions should, or they should not, be constitutionally subject to amendment by the Senate. To say that the distinguishing feature should be whether they are included within a Taxing Act, or whether they are enacted separately, is curious at best.

Sharp appears to share my curiosity, stating that '[i]nterestingly, their Honours said that despite the construction which should be accepted, their view did not preclude the Commonwealth from continuing the practice of splitting Bills.'[10] His rationale for the Court's decision was that it was 'understandable given the Court's general reluctance to interfere with intra-mural activities; proscribing this practice would remove a privilege from the Senate of being able directly to amend Assessment Acts which it has enjoyed since federation.'[11]

With respect, this is evading the point. Either their Honours consider that the *Constitution*, in accordance with s 53, allows the Senate to amend taxation machinery provisions, or they consider that the *Constitution* places such amendments ultra vires the Senate. The fact that their Honours have, as Sharp puts it, 'left the door open', suggests that in their Honours' view, machinery provisions are not placed beyond amendment by the Senate. Instead, they have invited the legislative drafters to be the arbiters of the Senate's powers. If the drafters wish the Senate to be able to amend provisions, they will split the bills. If they wish to 'protect' the provisions from the Senate, they will combine the bills. To have placed the drafters in such a position of constitutional authority is at best regrettable.

Sharp has a clear approach to my objection: abolish the practice of splitting the bills, even though the High Court has 'left the door open'. He makes three arguments.

The first, that 'the practice is no longer defensible upon a literal construction of the first paragraph of s 55',[12] is not supported. As noted above, and in Sharp's paper,[13] the High Court has very clearly indicated that splitting bills is both proper and permissible. If the High Court's view was that the practice was 'no longer defensible', then why leave the door open for it to continue?

Sharp's second argument is that 'the policy argument … lacks sound historical foundation.'[14] The core of this argument is an analysis of the debates at the Constitutional Conventions, which suggests that s 55 passed in its current form due to an assumption on the part of the delegates that the current wording would cover machinery provisions. I genuinely enjoyed reading Sharp's historical account, which was rich and well-researched. However one must remember that these are the same delegates who believed in implied immunities, and who would in all likelihood have

8 *Permanent Trustee* (2004) 220 CLR 388, 419-20.
9 The form of words used in the second paragraph of s 53.
10 Sharp, above n 1, 578.
11 Ibid 579, footnote omitted.
12 Ibid.
13 Ibid.
14 Ibid.

been appalled by the outcome of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ('Engineers' Case')*.[15] They lived in a world without, for example, disciplined political parties. They envisaged, as Sharp notes, an 'apocalyptic crisis' which might emerge if the Senate were able to amend machinery provisions.

One wonders why, under these circumstances, Sharp places such value on their counsel. While *Cole v Whitfield*[16] gave constitutional lawyers and observers encouragement to consider the historical background of provisions, it was only intended to assist the court to discover the contemporary meanings of the words, not the *intentions* of the founders.

I argue, at section 3 below, that any historical inadequacies of the convention of splitting taxation bills is more than accounted for by the *contemporary* reality that most bills receive their greatest scrutiny and debate in the Senate, and that any move to remove a bill from the Senate's full consideration and full power is a move which should be made cautiously and reluctantly.

Finally, Sharp argues that the splitting of taxation legislation is inimical to the system of responsible government embodied in the *Constitution*. This is dealt with in section 2 below. It suffices for the moment to say that the system of responsible government embodied in the Australian *Constitution* was developed for another political time, innocent of partisan domination of the House of Representatives. Calling on a normative, 19th century version of responsible government is not necessarily a sound way to assess a modern political process.

On balance, I am not convinced by Sharp's assertion that the proper response to *Permanent Trustee* is to cease the practice of splitting bills. On the contrary, the Court has left the way open for the practice to continue under normal circumstances, and legislation can only benefit from more, rather than less, parliamentary scrutiny and debate.

2 HOW FAR IS IT NECESSARY TO GO IN ORDER TO REINFORCE RESPONSIBLE GOVERNMENT?

Discussion of the purpose of s 55 essentially boils down to two propositions: First, under normal circumstances, the lower house of Parliament should be the arbiter of supply to, and of confidence in, the government. Consequently there should be limits on the extent to which the upper house should be able to interfere with those processes. Second, the lower house should not be able to abuse this privilege and circumvent the Senate by 'tacking' provisions on to taxation legislation.

While these propositions are clearly related, they are separate 'mischiefs' and lead to separate analyses of s 55.

The easiest to deal with is tacking. Tacking occurs where provisions which are entirely foreign to a taxation bill are included in order to give them the protection (from amendment in the Senate) which is obtained by virtue of its characterisation as a taxation bill. Perhaps because of s 55 the practice has not been undertaken in Australia.

15 (1920) 28 CLR 129.
16 (1988) 165 CLR 360.

It is common, however, in the United States, particularly in state legislatures.[17] Few if any observers of s 55 would support tacking, which essentially amounts to legislation by deceit.

In *Air Caledonie International v Commonwealth*,[18] the Court appears to state that s 55 was directed specifically towards the mischief of tacking. In *Permanent Trustee*, the majority took the opportunity to resile slightly from such a simple interpretation of the section. They maintained that s 55 was intended to protect the Senate from 'tacked' measures, but balanced this by stating that the section 'at the same time guards against abuse by the Senate … to frustrate the enactment of effective taxation laws.'[19]

This gets us one step closer to understanding the most appropriate interpretation of s 55. That it should protect against tacking is clear. However, according to the majority in *Permanent Trustee*, it should also protect the House of Representatives against moves which would defeat the purpose of its taxation measures. Sharp moves on from this position to argue that a wider interpretation of s 55 must be taken in order to safeguard responsible government. Sharp argues:

> a broad construction of the first paragraph of s 55 is more consistent with the system of responsible government embodied within the *Constitution*. The Compromise was struck to confer upon the House of Representatives power over taxation measures generally, rather than power over a narrow category of taxation laws that merely declare a tax to be imposed. Why confer power upon the House of Representatives over such a limited category of taxation laws if doing so would leave the Senate free to circumvent that power through direct amendment of provisions that specify the rate or incidence of taxation?[20]

This argument cannot pass without a number of comments.

First, it must be noted that 'responsible government' is little more than a polite fiction, at least in the House of Representatives. Barring an unprecedented backbench revolt, a government will never be subject to a motion of no confidence or a refusal to pass supply through the House. The notions of individual ministerial responsibility and collective ministerial responsibility have been treated, in recent years, in an increasingly cavalier fashion. Ministers shown to have underperformed remain in office until they become a political liability. Cabinet ministers leak at will. To base the contemporary interpretation of s 55 on a Victorian-era normative view of responsible government is curious.

In fact, if the government is accountable to the Parliament anywhere, it is in the Senate. As a mechanism for responsible government, for the proposition that the Parliament should oversee the government, the Senate Estimates process outshines any process in the House of Representatives. The Senate committee system, more generally, is expert at holding governments to account through thorough analysis and review of legislation and policy. If the courts truly wish to enhance the government's responsibility to the Parliament, they should maximise the Senate's involvement in

17 One of the more stark examples in recent years can be found in Minnesota, where provisions legalising abortion were tacked onto a bill which deregulated performing circuses.

18 (1988) 165 CLR 462.

19 *Permanent Trustee (*2004) 220 CLR 388, 415.

20 Sharp, above n 1, 582.

legislative processes. Sharp's view of s 55 would give even more protection to the government.

Second, Sharp's view appears to share the founders' apocalyptic premise: that if the Senate were to amend taxation bills, it would be in order to totally defeat the taxation measure and bring down the government. In fact, it is equally plausible that the government might seek to collect a fair and reasonable tax through unreasonable means. Senate amendments could improve legislation and protect the public good.

Let us imagine, for a moment, that the government seeks to institute a new tax. It requires the revenue for quite proper purposes, and in accordance with the normal processes of responsible government it should be entitled to present the measures to the Senate without fearing amendment. Let us go even further, and imagine that the incidence and the rate of taxation were also widely held to be just, and appropriate. However, a Senate examination of the means for assessment and collection finds that it will include unnecessarily high transaction costs for the companies to be taxed, such that in some cases the costs of paying the tax will be equal to the amount of the tax paid. Let us say that there is also a flaw in the assessment provisions, such that a far wider number of companies than intended are likely to be liable for tax.

Under these circumstances, how would amendment by the Senate challenge responsible government? Certainly, the amendments would reduce the revenue to the government (by pulling back liability to the original policy intentions). Certainly, the delay in the law's passage might reduce the speed with which revenue flows to the government. But as a matter of principle, the Senate has not sought to prevent the tax: it has simply reviewed the manner in which the tax is to be imposed, and made amendments.

In the absence of such controls, the government could theoretically decide that all descendents of David were to pay their tax in Bethlehem, and there would be nothing the Senate could do to amend the provision.

Third, Sharp uses phrases such as 'the Senate remains at liberty directly to amend those provisions and thus interfere with the financial policy of the House of Representatives.'[21] It should, of course, be remembered that for any Senate amendments to become law, they would also have to be agreed to by the House of Representatives. Negotiation and compromise is the very stuff of parliamentary politics. If, as Sharp seems to be suggesting, the objective of the Senate was to completely nullify the effect of a tax, then why would the Senate not just defeat it? Even the numbers on such a vote would be easier: one requires only 38 votes to defeat a motion in the Senate, and 39 to pass one.

The argument that a wide interpretation of s 55 is necessary in order to support responsible government consequently carries little weight. The Senate's power to amend machinery provisions, while preserving the taxing provisions intact, has not led to the downfall of any governments in the past, and Sharp offers no reasons why it should do so in the future.

21 Ibid 580.

3 WHAT IS WRONG WITH SENATE SCRUTINY OVER MACHINERY PROVISIONS?

The argument in this section has already been alluded to. Sharp acknowledges that '[t]he apocalyptic crisis that Barton and others prophesied would occur has not eventuated'[22] but then argues that this has been because of the willingness of governments to compromise, rather than because of 'any reticence on the part of the Senate to interfere'.[23]

The primary example given of such government willingness is the GST legislation in 1999. Sharp states:

> An example of this is provided by the passage of the GST in 1999. The Senate's agreement to pass the legislation implementing the tax was obtained only after protracted negotiations between it and the government, the outcome of which was the exclusion of certain goods upon which the tax would fall.[24]

I wish to take the very same legislation as my example, to show how legislation can benefit from a fully-fledged Senate process. The series of Bills which were commonly referred to as the GST Bills were titled the *A New Tax System* Bills, and were known within parliament by the acronym ANTS. In the House of Representatives, the ANTS Bills were introduced on 2 December 1998. The second reading debate commenced on 7 December 1998 and the Bills were passed on 10 December 1998. There were 16 hours of second reading debate spread over four sitting days, and just 45 minutes of consideration of the detail of the Bill.

Contrast this with the Senate. The Bills were introduced into the Senate on the day they passed through the House. However, the Senate had already commenced work on the Bills. A select committee, the Select Committee on the New Tax System ('the Select Committee'), had received terms of reference on 25 November 1998, empowering it to examine the modeling assumptions of the scheme, and the policy as explicated in the government report *Tax Reform: Not a New Tax, a New Tax System*.[25]

The Select Committee received over 1300 written submissions, plus another 600 'form submissions' with essentially identical content. It held 23 public hearings, in capital cities plus Kalgoorlie. Transcripts for the Select Committee alone amounted to over 2600 pages. When the Bills arrived in the Senate, they were referred to three expert legislation committees, which conducted further hearings and received further submissions. All of this was complete by April – hardly a substantial delay.

In the chamber, there were also 16 hours of second reading debate. However, there then followed 50 hours of debate on the clauses of the Bill. Fifty hours in the Senate, compared to 45 minutes in the House. If this constitutes, in Sharp's terms, 'Senate interference', then it is a richly democratic interference.

The Senate, on the ANTS Bills, gave full and serious consideration to the most significant tax reforms in decades. The public was engaged. The Senators dug deep into the clauses. As Sharp notes, the Bills were amended as a result. The GST on basic

22 Ibid.
23 Ibid.
24 Ibid.
25 The Hon Peter Costello MP (Treasurer of the Commonwealth of Australia), *Tax Reform: Not a New Tax, a New Tax System* (1998).

foodstuffs, for instance, was removed. Yet the government does not appear to regard the new tax system as any less a success for those amendments. The amendments did not put its status as a government at risk. So, one is tempted to ask, where is the need for reform? Why is it necessary to argue, as Sharp does, for an end to the splitting of tax legislation, or a broader reading of s 55?

4 IF THE POWER OF REQUEST IS NEARLY EQUIVALENT TO THE POWER OF AMENDMENT, THEN WHY IS REFORM NECESSARY?

Sharp argues that the Senate should not regret losing the capacity to amend the machinery provisions of tax bills, because it retains the power to request amendments. Sharp states 'there is little practical distinction between the Senate's power to amend and its power to request an amendment.'[26] This argument can, of course, be turned around. If there is little practical distinction between a request and an amendment, then why is it necessary to change the past practice?

Sharp argues a 'theoretical distinction' as the basis for expanding the definition of laws imposing taxation. The argument is that if the Senate can amend a bill, then the House is put in the position of either agreeing with the amendments, or sacrificing the bill; while if the bill is returned with a request, the House can decline the request and the Senate must consider the bill in its original form.

In fact, on receiving Senate amendments the House has a range of alternatives, from adopting them, to amending them, to disagreeing with them and sending a message with its reasons. The bill may be laid aside or proceeded with.

Even if Sharp's proposition is accepted, and the 'blame' for the failure of a bill is more likely to be laid at the feet of the Senate in the case of a request, then what is the consequence? If the House declines a request and forces the Senate to vote down what it considers to be a poor piece of legislation, then presumably the senators so voting would be happy to face the electorate and explain their actions. From the perspective of *realpolitik*, facing the media to explain why one has prevented a new tax is a delightful prospect.

SUMMARY

The *Permanent Trustee* case has left s 55 in something of a confused state. We know for certain that it is no longer forbidden to include machinery provisions in Taxing Acts. We know that the current practice of splitting tax schemes into a Taxing Act and an Assessment Act remains permissible. It appears that if the entire scheme is combined into one Act, the machinery provisions cannot be amended by the Senate. However if the Taxing Act and Assessment Act are separate, they can be so amended.

Under the circumstances, there are good reasons for retaining the current practice of splitting the schemes. I argue that the current form of legislation does not put precepts of responsible government at risk; that the full Senate processes do not jeopardise the stability of the government, even where they result in amendment to the schemes. Ultimately, no sound arguments for change have been advanced.

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26 Ibid 583.