THE POWER OF THE HOUSE OF REPRESENTATIVES OVER SUPPLY

B. M. O'BRIEN*

INTRODUCTION

According to many political commentators the recent constitutional crisis will herald a new era of instability in government. A party which has the confidence of the House of Representatives can no longer be assured that it will survive the term for which it was elected. A Senate controlled by a hostile party, in following the precedent set last year, may force the government to face an electorate disenchanted with its record. In order to off-set this potential of instant accountability some constitutional lawyers read, or read into s. 53 of the Constitution, negative implications to the effect that the Senate does not possess the power to reject a money bill.

Central to this discussion is the extent of the constitutional power of the House of Representatives over supply. Is it essential in providing supply to a government that the concurrence of the Senate be obtained? In my opinion it is not essential to obtain the concurrence of the Senate to ensure the passage of supply. The House of Representatives has sufficient power, under the Constitution, to authorize an appropriation in favour of a government which possesses the confidence of that chamber. The possession or absence of such a power in the House of Representatives may, in turn, become crucial in determining the role of the House of Representatives under the principles of responsible government.

As will be shown later the failure of the Labor Government and the Labor controlled House of Representatives in 1975 to obtain supply led to the dismissal of that government. In my view it is most important that the power of the House of Representatives in choosing the government and requiring the government to be answerable to it be not undermined by necessitating the concurrence of the Senate in the passage of supply. The dismissal of the Labor Goverment by the Governor-General on the 11th of November, 1975 has provoked a public debate concerning the powers of the Governor-General under the principles of responsible government. It is not my purpose to enter that debate but rather to render it irrelevant by pointing to the existence of an autonomous power vesting in the House of Representatives over supply. Once the possession of such a power is

* LL.B. (Hons) (Melb.), Barrister and Solicitor (Vic.); Senior Tutor, Faculty of Law, Monash University.

conceded and exercised there would be no doubt that the power of the House of Representatives to choose the government of the day would be firmly established. This would be true, I suggest, even if it is conceded that the Governor-General acted correctly in dismissing the Labor Government.

In supporting my assertion that the House of Representatives enjoys an autonomous power over supply I will be referring in the main, to two provisions of the Constitution. They are sections 53 and 49. Section 53 provides the most explicit reference in the Constitution to the importance of the House of Representatives under the principles of responsible government. That section provides that all money bills originate in the House of Representatives and further it provides that the Senate has no power to amend a money bill. It merely has the power to request by message "the omission or amendment of any items or provisions therein". The House of Representatives is left free to accept or reject such a request. Section 53 concludes by stating: "Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws." It may be thought that this statement implies that apart from the power of origination and the proscription on Senate amendment of money bills in all other respects the Senate possesses in relation to financial measures the same degree of legislative authority as it does with respect to all other legislation. This would, of course, include the right to reject or defer a money bill. Whether such an implication can be made will depend on whether s. 53 has implicitly removed the need for the Senate to affirm a money bill before it can become law.

SECTION 53

Sir Richard Eggleston, in a letter to the *Age* newspaper,[1] has drawn attention to the fact that in both the 1891 and 1897 draft Constitutions s. 55[2] contained the following words

> "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."

The expression "may affirm or reject" was subsequently omitted from the 1898 draft which was adopted at the Melbourne Convention. Furthermore the format and language of s. 53 as appearing in that draft was incorporated without modification in the Constitution itself. The Convention debates provide no indication as to why that expression was omitted. Presumably the omission was instigated by the drafting committee whose proceedings were unrecorded.

[1] *Age*, December 5, 1975.
[2] This is the equivalent of s. 53 in the present Constitution.

Attention was also drawn to a passage from the judgment of Barton J. in *Tasmania* v. *Commonwealth*[3] where His Honour stated

> "The successive alterations of the drafts seem rather to point to the view, not that the final provisions are to be interpreted in the same sense as those struck out of the draft, but that the first intentions were given up, and that entirely different intentions, to be gathered from the language of the Constitution, are those by which we are to abide."[4]

This passage indicates that while the court may not refer to the Convention debates as a guide to the interpretation of the Constitution, the successive drafts will, however, be admissible and relevant in that respect.

The mere omission of the expression "may affirm or reject" may not in itself be sufficient to interpret s. 53 as conferring on the House of Representatives the exclusive power to enact financial legislation. However, the argument is improved when one considers that s. 53 represents the embodiment of a long standing British constitutional convention. As Quick and Garran observed[5]

> "The provision, that appropriation and tax bills shall not originate in the Senate, necessarily confers the monopoly of financial origination on the House of Representatives. This part of the section crystallizes into a statutory form what has been the practice under the British Constitution for over two hundred and twenty years."[6]

The authors go on to cite a House of Commons resolution passed on the 3rd of June, 1678 which had been quoted in *May's Parliamentary Practice*[7]

> "That all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted right of the Commons to direct, limit and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords."[8]

If therefore s. 53 is to be regarded as expressing, as a part of constitutional law, a time honoured constitutional convention then the omission of the expression "may affirm or reject" is of greater significance. Section 53 would under those circumstances be interpreted as merely conferring on the Senate the right to be consulted with respect to the passage of money bills. It would have the power to request "by message, the omission or

[3] (1904) 1 C.L.R. 329.
[4] Ibid. 351.
[5] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus and Robertson, 1901).
[6] Ibid. 667.
[7] *May's Parliamentary Practice* (London: William Clowes and Sons Ltd, 10th ed., 1893).
[8] Ibid. 542.

amendment of any items or provisions"[9] but would be unable to compel the implementation of such omissions or amendments by refusing to pass the money bill since it has neither the power to affirm nor reject such bills. Under this interpretation money bills would need only receive the assent of the House of Representatives and the Governor-General in order to become law.

The most significant objection to this argument is s. 1 of the Constitution which provides

> "The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is herein-after called 'The Parliament' or 'The Parliament of the Commonwealth'."

Assuming that s. 53 is to be interpreted as suggested above, it would mean that that provision reconstructs the legislature as established in s. 1 for the purposes of enacting financial legislation. In all probability the High Court would be reluctant to construe the language of s. 53 as effecting a reconstruction of the legislature when the language of that provision fails to expressly state that purpose. Since reconstruction of the legislature is of such major constitutional importance the court requires clear language before it comes to the conclusion that a reconstruction has occurred.[10] Obiter statements made recently in the *P.M.A.* case indicate a definite reluctance on the part of the High Court to deny the Senate the right to reject a money bill.[11] The decided cases, therefore, provide little encouragement with respect to an acceptance of the view that s. 53 dispenses with the need to obtain the concurrence of the Senate in the passage of a money bill.

Apart from the possibilities already suggested, which are open on s. 53, the Constitution may provide an additional option to a government which has been deprived of money by a Senate refusing to pass supply. It has been supposed until recently that supply can only be granted on an appropriation authorized by an Act of Parliament. While this, no doubt, is the conventional means by which a government obtains finance it is not necessarily the only means. The Constitution, I suggest, has been drafted, wittingly or unwittingly, so as to provide an alternative procedure to effect an appropriation. The key section in this line of argument is s. 49 of the Constitution which reads

> "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the Committees of each House, shall be such as are declared by the Parliament, and until

[9] See s. 53.

[10] *South Eastern Drainage Board (S.A.)* v. *Savings Bank of South Australia* (1939) 62 C.L.R. 603.

[11] *Victoria* v. *Commonwealth* (1976) 50 A.L.J.R. 7, 13, 21, 22, 30, 37 *per* Barwick C.J., Gibbs, Stephens and Mason JJ. This case concerned the validity of the *Petroleum and Minerals Authority Act* 1974 (Cth).

declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

THE NATURE OF THE POWERS GRANTED UNDER SECTION 49

In *R.* v. *Richards; ex parte Fitzpatrick and Browne*[12] the High Court considered whether in 1955 Parliament had otherwise declared its powers, privileges, and immunities. The full bench of the High Court in a unanimous decision found that they had not been otherwise declared. Dixon C.J. in giving the judgment of the court explained what a declaration under s. 49 meant

> "It is dealing with the whole content of their powers, privileges and immunities, and is saying that Parliament may declare what they are to be. It contemplates not a single enactment dealing with some very minor and subsidiary matter as an addition to the powers and privileges; it is concerned with the totality of what the legislature thinks fit to provide for both Houses as powers, privileges and immunities."[13]

The Parliament to date has yet to enact legislation comprehensively defining its powers and privileges. Therefore both Houses enjoy those powers, privileges and immunities possessed by the Commons in 1900, unless, of course, specific federal legislation has modified or abrogated certain of those powers, privileges and immunities.

The High Court also indicated in *Fitzpatrick and Browne* that the "full powers, privileges and immunities of the House of Commons" were transferred to the House of Representatives and the Senate.[14] Finally the court rejected the view that general implications drawn from the Constitution as a whole would operate so as to read down the otherwise clear language of s. 49

> "But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words, which appear to us to be clear, a restrictive or secondary meaning which they do not properly bear."[15]

A POWER TO AUTHORIZE APPROPRIATION POSSESSED BY THE COMMONS

In 1900 the House of Commons possessed the power to authorize Treasury to appropriate[16] and therefore under s. 49 that power was conferred on both the House of Representatives and the Senate. Thus on the

[12] (1955) 92 C.L.R. 157.
[13] Ibid. 168.
[14] Ibid. 164.
[15] Ibid. 167.
[16] Professor Campbell defines a parliamentary appropriation as an "Act by which parliament authorizes the expenditure of moneys of the Crown". See E. Campbell:

authority of *Fitzpatrick and Browne* if the first proposition is true, the second should automatically follow. This power was authoritatively conferred on the Commons in the *Exchequer and Audit Departments Act* of 1866.[17] However, there are instances where the Commons appears to have claimed this power prior to 1866. There is, of course, the resolution of the House of Commons of the 3rd of June, 1678 to which I have already referred. In 1625 the Commons on their own authority made a grant of subsidies to the King.[18] In 1714 in the long preamble to 1 Geo. 1 c. 12 the Commons, by resolution, made a grant of additional revenue to the Crown. In three other pieces of legislation of that year appropriations are made under an enacting formula which dispenses with the advice and consent of the Lords Spiritual and Temporal.[19] On July 6th, 1860 the Commons again by resolution asserted its dominance over supply.[20] Scattered and rare instances such as these do not readily support a recognized claim of power in the Commons.

However, in 1866 the United Kingdom Parliament in the *Exchequer and Audit Departments Act* enacted a complete and exhaustive scheme governing the process of appropriation from the Consolidated Fund.[21] In this scheme the House of Commons has assigned to it a most important and significant role. The key sections governing the expenditure of moneys are ss. 14 and 15. However, before I deal with those provisions it is necessary to summarize the procedure established by this legislation for the collection and expenditure of Crown revenue.

EXCHEQUER AND AUDIT DEPARTMENTS ACT

The gross revenues raised through taxation are paid into accounts in the Banks of England and Ireland known as Exchequer Accounts.[22] These revenues which are paid into the Exchequer Accounts are formed into one general fund[23] known as the Consolidated Fund.[24] The *Exchequer and Audit Departments Act* regards these accounts as being frozen. Therefore, in order to draw from these Exchequer Accounts they must first be opened. The procedure for opening these accounts is as follows.

"Parliamentary Appropriations" (1971) *Adelaide Law Review* 145, 153. It should be noted, however, that while I agree that that is a perfectly good definition of parliamentary appropriations, I have used the term appropriation to mean something slightly different. Appropriation here refers to the act of withdrawing money from Crown revenues.

[17] 29 and 30 Vic. c. 39. See ss. 14 and 15. The legislation was still in force in 1900.
[18] M. L. Gwyer, *Anson's Law and Custom of the Constitution* (Oxford: Clarendon Press, 5th ed., 1922) Vol. 1, p. 282.
[19] 1 Geo. 1 c. 1 and c. 2. (*Statutes at Large*, Vol. 13, pp. 130, 133), 1 Geo. 1 c. 22.
[20] *Supra* fn 7, pp. 550-551.
[21] *Consolidated Fund Act* (1816) 56 Geo. c. 98.
[22] 29 and 30 Vic. c. 39 s. 10.
[23] Ibid. s. 11.
[24] W. R. Anson, *Law and Custom of the Constitution* (Oxford: Clarendon Press, 3rd ed., 1908) Vol. 11, p. 137.

A Ways and Means grant is made by Parliament.[25] On the basis of the Ways and Means grant the Treasury requisitions the Comptroller and Auditor-General to grant "a credit or credits on the Exchequer Accounts".[26] The Comptroller and Auditor-General complies with this requisition by making a grant of credits, "not exceeding in the whole the amount of Ways and Means so granted".[27] Anson described this procedure as follows

> "Where money is wanted to meet *Consolidated Fund* services the Treasury makes a requisition to this officer for a credit on the Exchequer Account. The Comptroller and Auditor-General, if satisfied that the requisition is in accordance with the Acts which govern the proposed expenditure, makes the order, and thus unlocks the Treasury chest."[28]

Making a grant of Ways and Means and thereby authorizing the issue of credits on the Exchequer Accounts provides an essential certification that those accounts have sufficient funds to satisfy the grant of supply. As Alpheus Todd put it

> "The votes in Committee of Supply authorize the expenditure; the votes in Committee of Ways and Means provide the funds to meet that expenditure."[29]

This process of certification would seem appropriate considering that the Committee of Ways and Means deliberates on the introduction of taxation to meet the immediate revenue requirements of the government.[30] The question is does this procedure, which involves the concurrence of both Houses of Parliament, form part of the process of appropriation? The procedure could very arguably be regarded as merely imposing a static condition on the Exchequer Accounts, rendering them capable of being debited. The procedure is therefore merely preparatory to an appropriation and hence does not form part of the process of appropriation. If that is so, then how is an appropriation effected once the Exchequer Accounts have been opened?

The first step is to make a grant of supply to the Crown.[31] Such a grant can be made either by an Act of Parliament or by a Resolution of the House of Commons.[32] By granting supply, the Crown and Treasury are authorized to execute an order which, in turn, is an authority "to issue out of the Credits to be granted to them on the Exchequer Accounts".[33] This

25 29 and 30 Vic. c. 39 s. 15.
26 Ibid.
27 Ibid.
28 *Supra* fn 24, p. 151.
29 A. Todd, *On Parliamentary Government in England* (London: Longmans, Green and Co., 1867) Vol. 1, p. 510. See also G. Reid, *The Politics of Financial Control* (London: Hutchinson University Library, 1966) pp. 75-77.
30 W. R. Anson, *The Law and Custom of the Constitution* (Oxford: Clarendon Press, 3rd ed., 1897) Vol. 1, p. 272.
31 29 and 30 Vic. c. 39 s. 14.
32 Ibid.
33 Ibid.

procedure effects an actual transfer of funds out of the accounts and also out of the general fund.[34] This point is made quite clear by s. 11 of the Act

> ". . . and all Orders directed by the Treasury to the said Banks for Issues out of Credits to be granted by the Comptroller and Auditor-General, as hereinafter provided, for the Public Service, shall be satisfied out of such general fund."

In summary the operation of s. 14 is to confer a power on Parliament or the Commons to authorize the Crown and Treasury to appropriate from Exchequer Accounts which have been opened by a grant of Credits on them. That power was committed to the House of Representatives and the Senate under s. 49 of the Constitution. Under the Australian Parliamentary system there is no equivalent to the Ways and Means procedure leading to a grant of Credits. Hence the "Commonwealth Public Account", established under the *Commonwealth Audit Act* (1901-1973), is always opened or "unlocked" in this sense.

Alternatively, the grant of Credits on Exchequer Accounts, preceded as they are by a Ways and Means grant, may be regarded as forming part of the process of appropriation. That process would therefore involve five steps culminating in an actual appropriation. The procedure would be as follows. First, there would be a grant of supply followed by a grant of Ways and Means "to make good the supplies granted to Her Majesty by any Act of Parliament or Resolution of the House of Commons".[35] This would be succeeded by a requisition and grant of Credits on Exchequer Accounts and finally there would be the execution of an Order requiring issues to be made out of those Credits, thus effecting the actual appropriation.

The taking of the second step of granting Ways and Means must be performed by Parliament. However, since Parliament, when executing this function, is acting exclusively within the contemplation of the law, Parliament is therefore not exercising any of its legislative authority. Rather, it is performing an administrative function. To exercise legislative authority one must alter the law, or as Salmond put it

> "To legislate is to make new law in any fashion. In this sense, any act done with the effect of adding to or altering the law is an act of legislative authority."[36]

When Parliament appropriates public money, as Salmond noted,[37] it does so in legislation. But that is using the term in a very wide sense so as to express more than an exercise of legislative authority. Legislation in the case of appropriation describes the performance of an administrative function by a special functionary.

[34] *Supra* fn 17.
[35] 29 and 30 Vic. c. 39 s. 15.
[36] Salmond, *Jurisprudence* (London: Sweet and Maxwell, 12th ed., 1966) p. 115.
[37] Ibid.

This point is confirmed by an examination of parliamentary financial practice. Deliberations of the Commons concerning the annual revenue and expenditure can range over a period of six months. During that period the annual appropriation of the preceding year will run out; consequently, it is necessary to provide interim appropriations up until the annual appropriation is finally passed. The procedure for implementing these temporary appropriations has been described by May

> "Accordingly, from time to time bills are passed during each session, in pursuance of the provisions of the *Exchequer and Audit Departments Act*, 1866, and of the *Public Accounts and Charges Act*, 1891, s. 2, known as Consolidated Fund Bills,[38] which empower the Treasury to issue out of the Consolidated Fund, for the service of the departments for whose use the grants are voted, such sums as they may require, in anticipation of the statutory sanction conferred by the *Appropriation Act*."[39]

These Consolidated Fund Acts or Ways and Means Acts, as they are also known, are in fact a grant of Ways and Means within the meaning of s. 15 of the *Exchequer and Audit Departments Act*. As such these Acts are designed and limited to the purpose of making good the supplies granted by resolutions of the Commons. It has been strongly suggested that those resolutions remain effective only for the duration of the session.[40] Hence the grant of Ways and Means, being confined to the role of making good the supplies granted by the Commons, will also lapse if the resolution to grant supply lapses. It is therefore necessary that all Consolidated Fund Acts passed prior to the *Appropriation Act* be referred to and authorized in that Act. The *Appropriation Act* combines both functions of granting supply and granting Ways and Means. This is indicated by the fact that the *Appropriation Act* contains a provision stating that all sums granted by the Act "are appropriated". Once the grant of supply is contained in an Act of Parliament there can be no doubt that it will remain effective beyond the current session of Parliament. However, there always existed the possibility that the session of Parliament might terminate prior to the passage of the *Appropriation Act* in which case both the grants of supply passed by the Commons and the grants of Ways and Means passed by Parliament could lapse, leaving the government without money. Consequently s. 2 of the *Public Accounts and Charges Act* (54 and 55 Vic. c. 24, 1891) was passed which states

> "Whereas it is expedient to give statutory authority to the practice with respect to issues from the Exchequer and appropriations in aid; be it therefore enacted that—

[38] They are also known as a Ways and Means Bill. See Anson *supra* fn 24 p. 154.
[39] May *supra* fn 7, p. 526.
[40] W. E. Hearn, *The Government of England* (Melbourne: George Robertson & Co., 1886) p. 370. See also the discussion of this question by Evatt J. in *New South Wales* v. *Bardolph* (1934) 52 C.L.R. 455, 475-481. His Honour questions whether resolutions of the Commons lapse upon a prorogation or dissolution of Parliament.

(1) Where an Act authorizes any sum to be issued out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland towards making good the supply granted to Her Majesty for the service of any year, every sum issued in pursuance of that Act shall be applied towards making good the supply so granted at the time of such issue."

It is clear from this provision that legislation in the form of a Ways and Means grant does not amount to an exercise of legislative authority. Only when one regards a Consolidated Fund Act as being a grant of Ways and Means within the meaning of s. 15 of the *Exchequer and Audit Departments Act* could there be any question as to its validity or effectiveness. If such legislation was supported not by s. 15 but rather by the legislative authority of Parliament, then any defect arising from a lapse of a grant of supply would be cured through the exercise of that authority. Furthermore, if one were to regard a Consolidated Fund Act as an exercise of legislative power and yet still of questionable effectiveness subsequent to a termination of the current session, then it is difficult to see how the position can be improved by re-exercising the same legislative authority to the same end, as has been done by s. 2 of the *Public Accounts and Charges Act*. Therefore, in order to give effect and meaning to s. 2, a Ways and Means grant expressed in the form of a Consolidated Fund Act must be regarded as an administrative act which appears as legislation but does not involve an exercise of legislative power.

If a Ways and Means grant involved the exercise of legislative power then the power to appropriate, as recognized by the *Exchequer and Audit Departments Act*, would be essentially legislative in nature inasmuch as the process of appropriation established by that Act required the exercise of legislative authority. However once it is regarded that a Ways and Means grant involves nothing more than the performance of an administrative function then the power of appropriation, although conceived and established by an exercise of ultimate legislative authority, is not in itself a legislative power. The power to grant supply by resolution of the Commons is not legislative in that it belongs to that catalogue of powers fitting the description of parliamentary privilege. Similarly the power to make a grant of Ways and Means is also not legislative but, as I have shown, administrative.

The next question to arise is in which of these two institutions, the Commons or Parliament, does the power of appropriation ultimately reside. The answer to this question I suggest turns on which of the two institutions has the ability to initiate the process of appropriation. Since it is quite clear from the *Exchequer and Audit Departments Act* that a grant of supply must necessarily precede a Ways and Means grant, it would appear that the Commons is the only institution competent to initiate an appropriation. Although its power to initiate or authorize an appropriation is clearly qualified by the Ways and Means procedure, that procedure does not deny the existence of the power; it merely determines when the power

becomes operable. Alpheus Todd, writing immediately after the enactment of the *Exchequer and Audit Departments Act*, expressed the same view

> "The constitutional effect of this proceeding is that, until the Queen and the House of Lords have assented to the grant of Ways and Means, the appropriation of the public money directed by the vote in supply of the House of Commons is inoperative."[41]

THE REMOVAL OF THE CONDITION TO THE POWER OF APPROPRIATION

To return to the procedure outlined above, if the Ways and Means and Credit procedure is to be included in the process of appropriation then the power of the House of Commons to grant supply and thereby authorize appropriation is accordingly altered. That power of authorization becomes conditional upon a grant of Ways and Means producing a grant of Credits on Exchequer Accounts. In short, the power of authorization is conditional upon the Exchequer Account, being "unlocked" or opened. The mere fact that the power of authorization is conditional in no way prevents its transfer to the House of Representatives and the Senate under s. 49 of the Constitution.

According to this alternative the House of Representatives and Senate possess a conditional power to authorize appropriation. That power is subject to the legislative power of the Commonwealth Parliament under s. 51(xxxvi) of the Constitution which reads

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides."

And also s. 51(xxxix) which reads

> "Matters incidental to the execution of any power vested by this Constitution in the Parliament or *in either House thereof*,[42] or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

In the exercise of this legislative power the Parliament may either modify or abrogate the power. In my opinion the conditional power has been modified by the *Audit Act* to the extent that the condition has been excised from the power. Under ss. 22 and 23 of that Act all moneys received "on account of the Consolidated Revenue Fund"[43] are paid into the "Commonwealth Public Account". Part V of the Act entitled "Payment

[41] A. Todd *supra* fn. 29 at pp. 510, 511.
[42] Emphasis added.
[43] S. 81 of the Constitution.

of Moneys" establishes a complete and exhaustive procedure governing appropriations from the Commonwealth Public Account. This is clearly stated in s. 31 of the Act

> "No money shall be drawn from the Commonwealth Public Account except in the manner provided by this Act."

Sections 32 and 33 set out the procedure for appropriation and those provisions are roughly equivalent to ss. 14 and 15 of the English *Exchequer and Audit Departments Act.* The two sets of provisions differ in two important respects. The English provisions perform two functions. One, they indicate who can initiate the appropriation procedure and thereby indicate who possesses the power to authorize appropriation. Two, they set out the actual mechanics of appropriation. The Australian provisions perform only the second function. They do not identify in whom the power to authorize appropriation vests. This is clear from s. 32(1) and (2) which predicate the operation of the mechanics of appropriation on the fact that the money, being sought to be appropriated, is "lawfully available for expenditure".[44] In order to know whether the money is "lawfully available for expenditure" one must look to the Constitution and the powers conferred thereunder. Those provisions are based therefore on an exercise of those powers conferred by the Constitution and hence must be read as preserving and even enlarging those powers. In order to explain this enlargement of power, I must first describe the mechanics of appropriation under the *Audit Act.*

Sections 32 and 33 envisage the taking of three steps in the appropriation procedure. First, the Treasurer executes an instrument and issues the same to the Auditor-General,[45] stating the amount to be drawn and the authority for such an appropriation. The Auditor-General, having satisfied himself that the money is lawfully available, gives a certificate certifying that the amount is lawfully available for appropriation. Once these two documents have been executed, the Governor-General then issues a Warrant which authorizes the payment out of the Commonwealth Public Account of that amount. Under this procedure there is no equivalent to the Ways and Means and Credit procedure. Consequently, the implication clearly is that the Commonwealth Public Account was not intended to be frozen, due to the absence of any procedure for "unlocking" or opening it. In this sense, therefore, the Commonwealth Public Account is perpetually open. In this respect also the Australian provisions diverge significantly from the English model.

If the Account is perpetually open, then the condition attaching to the

[44] It is worth noting that expenditure of moneys standing to the credit of the Loan Fund and Trust Fund is expressly required to be authorized by an Act of Parliament. See ss. 57(1) and 61.

[45] For a general description of the role of the Auditor-General see E. Campbell, "Parliamentary Appropriations" (1971) *Adelaide Law Review* 145, 164-168.

power of authorization, vesting in the House of Representatives and Senate, will be continually satisfied. The condition attaching to the power vesting in the Commons under the *Exchequer and Audit Departments Act* is the carrying out of the Ways and Means and Credit procedure, that procedure, as I stated above, was merely a device for "unlocking" the Exchequer Accounts. If the equivalent of the Exchequer Accounts is the Commonwealth Public Account and if that Account is perpetually left "unlocked", then the condition attaching to the power of authorization must always be satisfied. It is in this way that the provisions of the *Audit Act* enlarge the power to authorize appropriation conferred on the House of Representatives and Senate.

In short, it is required under the English procedure, in order to effect an appropriation, that there be both a grant of supply and a grant of Ways and Means; by dispensing with the need to make a grant of Ways and Means the *Audit Act* renders a grant of supply as being tantamount to an appropriation.

THE PRINCIPLES OF RESPONSIBLE GOVERNMENT

Between 1625 and 1860 the House of Commons has asserted the power to independently control appropriations on at least four occasions. At no time between those two dates or subsequently has the House of Lords ever challenged that assertion by rejecting a supply bill. It is therefore not surprising to find the *Exchequer and Audit Departments Act* of 1866 according formal recognition to the existence of this power although qualified by the Ways and Means procedure. Certainly it must be conceded that the possession of this power protects and reinforces the authority of the Commons under the principles of responsible government. It is for this very reason that the Commons has so vigorously asserted this power. True it is that this power operates so as to define the relationship between the two Houses of Parliament. Thus while it may be unusual it is nevertheless a power which can appropriately fall within the privileges of Parliament. As Professor Campbell observes

> "Sometimes the rights which one House possesses vis-à-vis the other House also are denominated as privileges."[46]

Some readers may be troubled by the fact that the power derived from s. 49 is given both to the House of Representatives and the Senate. The fear that the possession of such a power by the Senate could undermine the principles of responsible government has been reinforced by the actions of the Governor-General on the 11th of November 1975 in withdrawing the commission of the elected Government and installing the Opposition

[46] E. Campbell, *Parliamentary Privilege in Australia* (Melbourne: Melbourne University Press, 1966) p. 1.

as a caretaker government. It will be recalled that the Opposition had control of the Senate and used its power in that chamber to defer consideration of two Appropriation Bills, thus starving the government of funds. In order to resolve the ensuing deadlock between the two Houses of Parliament, the Governor-General stepped in, dismissed the Government and commissioned the Leader of the Opposition to form a caretaker government. The Appropriation Bills had been deferred; they had not been rejected. Therefore the new government on being installed as such was able to guarantee supply by passing the Appropriation Bills in the Senate. If those Bills had been rejected by the Senate, it would then have been required that those Bills be passed by both Houses before they would become law.[47]

The situation had therefore developed that while the House of Representatives could not provide supply, the Senate could. The actions of the Governor-General in replacing the government, which had the confidence of the House of Representatives with a government which had the confidence of the Senate, was predicated on the fundamental need to obtain supply.[48] It may be thought that such actions having arguably been confirmed by the electorate have established a precedent which affects the very foundations of responsible government. It may be conjectured that it is consistent with the principles of responsible government that the ministry need not enjoy the confidence of the House of Representatives so long as it enjoys the confidence of the Senate and the Senate can provide supply. If under s. 49 of the Constitution the Senate has the power to authorize supply it may under s. 56 be the only chamber which can in fact do so. Section 56 states

> "A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."[49]

If the Governor-General should recommend by message to the Senate that an appropriation be passed, then the Senate would be the only House of Parliament capable of approving that appropriation. Hence by a combination of ss. 49 and 56 of the Constitution there is the apparent potential for the Senate emerging as the pre-eminent House.

The initial objection to the realization of that potential is that it would not in the long term be politically acceptable. For seventy-five years under the principles of responsible government the House of Representatives

[47] S.O.'s 194, 217. Senate, *Standing Orders as in force on 22nd March 1972.* S.O.'s 219, 239. House of Representatives, *Standing Orders as in force on 18th April 1972.*

[48] Dixon, *Jesting Pilate* (Melbourne: Law Book Co. Ltd, 1965) p. 167.

[49] This section recognizes a long standing convention under the Westminster system. See *May's Parliamentary Practice* (London: Butterworths, 18th ed., 1971) p. 248.

(the people's House) has enjoyed the prerogative of determining who shall constitute the government. There is little reason to believe that on a long-term basis the Senate (the State's House) would be able to acquire that most important function. Secondly, collateral to the power of granting supply is the power to levy taxes. Under s. 53 of the Constitution taxation bills must originate in the House of Representatives. Hence it would be impossible for the Senate for longer than a year to deprive the House of Representatives of its power to grant supply. Without the co-operation of the House of Representatives it would not be possible for the Senate to levy taxes and thus to solely have the power to authorize appropriation would, in the course of time, become meaningless.

Furthermore, it is quite clear that the events of the 11th of November 1975 came about because of the temporary inability of the government and the House of Representatives to guarantee supply. This appears from the statement made by the Governor-General in explaining his actions of that day

> "Because of the principles of responsible government a Prime Minister who cannot obtain supply, including money for carrying on the ordinary services of government, must either advise a general election or resign. If he refuses to do this I have the authority and indeed the duty under the Constitution to withdraw his commission as Prime Minister."[50]

The Chief Justice in advising the Governor-General by letter made the same point

> "Secondly a Prime Minister who cannot ensure Supply to the Crown, including funds for carrying on the ordinary services of Government must either advise a General Election (of a kind which the constitutional situation may allow) or resign. If, being unable to secure Supply, he refuses to take either course, Your Excellency has the authority to withdraw his commission as Prime Minister."[51]

The unprecedented actions of the Governor-General in withdrawing the commission of a Prime Minister who enjoyed the confidence of the House of Representatives was justified solely on the basis that the Prime Minister was unable to secure supply. The proposition which thus emerges from this extraordinary event, as part of the principles of responsible government, is that the government must not only have the confidence of the House of Representatives but must also be able to obtain supply. There is therefore nothing in the statements of either the Governor-General or the Chief Justice to indicate that the House of Representatives is no longer the chamber wherein "Governments are made and unmade". Those statements do, however, qualify the power of the House in this respect in requiring that a government chosen by the House must be able to secure supply.

50 The Statement of the Governor-General, p. 1.
51 *Age*, November 19, 1975.

It therefore follows that so long as the ministry enjoys the confidence of the House of Representatives and is able to provide supply, the Governor-General will have no constitutional authority to withdraw its commission and will be bound to follow ministerial advice. Hence if the House of Representatives has, under s. 49, the power to authorize appropriation, the Governor-General could be advised by his ministry to recommend by message to the House of Representatives that the required appropriation be authorized. Thus supply could be secured despite a recalcitrant Senate and the position of the government would not be threatened.

CONSTITUTIONAL REQUIREMENTS WITH RESPECT TO APPROPRIATION

Apart from s. 56 the only constitutional requirement with respect to appropriation is to be found in s. 83 which states

> "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."

This requirement is, as I indicated earlier, echoed in s. 32 of the *Audit Act*. If, as I contend, the House of Commons had a power to authorize appropriation, whether conditional or unconditional, that power vested in both Houses of Parliament under s. 49. Once the power is exercised and the authority thereby granted is implemented, in accordance with the procedure required under the *Audit Act*, the appropriation would be one "made by law".

CONCLUSION

To return to the *Exchequer and Audit Departments Act*, it should be noted that when the House of Commons grants supply to the Crown by resolution under s. 14 it is no doubt contemplated, by that provision, that the House would be sitting as a committee of supply. Consequently in order to overcome the difficulties presented by a hostile Senate, I suggest that the House of Representatives, upon receipt of a message from the Governor-General, constitutes itself as a committee of supply and by resolution grant the supply requested. This will be sufficient in my opinion to render the money, so granted, lawfully available. If the Auditor-General is not satisfied that the money is lawfully available and hence declines to grant a certificate, he is required under s. 32(4) of the *Audit Act* to state in writing his reasons for reaching that conclusion. This would leave the way open for the government to seek a writ of mandamus in the High Court[52] compelling the Auditor-General to reconsider the question in light of the fact that the money was lawfully available. Alternatively if it is thought that there is no such power to authorize appropriations granted to the House of Commons

[52] S. 75(v) of the Constitution.

by the *Exchequer and Audit Departments Act*, then I suggest a declaration could be made under s. 49 that such a power vests in the House of Representatives. Admittedly there may exist certain political difficulties in persuading Parliament to adopt such a declaration. It may be that neither party would regard it as in their best interest to confer such a power on the House of Representatives.

It is important to emphasize that once it is established that the House of Representatives can, without the concurrence of the Senate, authorize an appropriation the power of the House of Representatives to determine who shall constitute the government and its ability to require the government to be accountable to it will no longer be threatened. The Governor-General, under those circumstances, will be bound to follow the advice of his ministers of state who in turn will be responsible to the House of Representatives. The emergence of the House of Commons as the dominant chamber under the system of responsible government was due to the ability of the Commons to control supply. The House of Representatives has always been regarded as the equivalent to the Commons under the Australian federal system. If the House of Representatives is to remain secure in that position it must like the Commons[53] establish, under law, its monopoly over supply.

[53] *Parliament Act* (1911) (Eng.) 1 and 2 Geo. c. 13 s. 1. This provision dispensed with need for the affirmation of the House of Lords in the enactment of money bills.