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OF THE SENATE

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Mr Tom Duncan
Secretary
Standing Committee on Administration and Procedure
Legislative Assembly for the Australian Capital Territory
CANBERRA ACT 2600

Dear Mr Duncan

Section 65 of the *Australian Capital Territory (Self-Government) Act 1988*

Thank you for your letter of 16 December 2019 requesting my views on an inquiry of the Administration and Procedure Committee relating to the application of section 65 of the *Australian Capital Territory (Self-Government) Act 1988*. I hope that the following observations are useful.

The constitutional positions of the Houses of the Commonwealth Parliament

Between them, sections 53 to 56 of the Commonwealth Constitution have two tasks: to codify for a bicameral, federal parliament the right of the executive to initiate appropriation and taxation measures; and to constrain – as minimally as possible – the legislative powers of an elected Upper House so as to respect that right.

Because these provisions seek to accomplish both of these tasks, they may not provide particularly useful guidance to the provisions necessary to codify and protect the financial initiative of the executive in a subordinate, unicameral assembly.

Section 53 is a key example of balancing the powers of the Senate, intended to protect the interests of the states, with the concept of responsible government, reflected in the design of the House of Representatives. Its conceptual starting point is that the Houses have equal powers in relation to bills, except in specified situations, where the Senate is constrained from initiating or amending different types of money bills. Where the Senate may not amend financial measures, it may generally request the House to do so; essentially inviting the executive to initiate the measure. Sections 54 and 55 each constrain the executive from combining amendable and non-amendable financial measures in ways that would unduly restrict the Senate's power to deal with them. More broadly, the Senate may defer or withhold its assent to financial legislation as it may any other bill.

Since the first sitting of the Commonwealth Parliament in 1901, each House has developed its own practices in relation to the interpretation of section 53, in particular, and each House has tested its

powers in respect of financial legislation. The practices of the Senate are recorded in chapter 13 of *Odgers' Australian Senate Practice*.

The position of the Legislative Assembly for the Australian Capital Territory

As noted, the Constitutional text, and the practices of the Commonwealth Senate flowing from it, may be of limited use in assisting the Legislative Assembly for the Australian Capital Territory, particularly because of their constitutional differences. The appropriateness of provisions that restrict non-executive members moving amendments to, or initiating, financial legislation must be viewed in their different contexts.

It is also the case that, although similar, the types of restrictions placed on non-executive members of the ACT Assembly are different to those applying in the Senate in a number of key ways. *Odgers Australian Senate Practice* records the restrictions in section 53 as follows:

- bills to appropriate money or to impose taxation may not originate in the Senate
- the Senate may not amend a bill for imposing taxation
- the Senate may not amend a bill for appropriating money for the ordinary annual services of the government
- the Senate may not amend a bill so as to increase any proposed charge or burden on the people.

Restrictions on non-executive members of the ACT Assembly largely reflect the restrictions on the Senate's powers, but with important differences. First, pursuant to standing order 201A, non-executive members of the ACT Assembly may only move amendments to appropriation bills if the amendment would reduce items of proposed expenditure. As outlined in the discussion paper, this may prohibit amendments that would 'set conditions on the objects of expenditure' or set a 'period during which expenditure [could] occur' as neither of these amendments would necessarily be to reduce items of proposed expenditure. Senate practice allows senators to propose such amendments, subject to the other constraints in section 53. Secondly, non-executive members of the ACT Assembly are not prevented from moving amendments to bills imposing taxation, whereas the Senate may not amend such bills.

Restrictions on the Senate's powers to amend bills are also tempered by the ability of the Senate to request the House of Representatives to make amendments. Any senator may move a request for an amendment. In that respect, a senator has a greater power in relation to financial legislation than a member of the House of Representatives other than a minister.[1] Viewed in this way, the provisions of section 53 relating to amendments are, for the most part, procedural limitations only, not substantive limitations on power, as the Senate can reject a bill unless it is amended in the way the Senate requests. Questions of the interpretation of section 53 are relevant only to the extent of determining the form of particular amendments initiated by the Senate (an amendment to a bill made by the Senate, or a request to the House of Representatives to amend the bill). There is no similar avenue available to non-executive members of the ACT Assembly so that the limitations on the moving of amendments are substantive rather than procedural. It would be interesting to contemplate whether a

[1] *Odgers' Australian Senate Practice* (14th edition), p. 367.

procedure to allow non-executive members of the Assembly to request the government to initiate financial measures they may not initiate themselves would be in order.

An additional area of difference between the ACT Assembly and the Senate is the apparent presence of procedural restrictions on the rights of members beyond those required by under the relevant law. ACT Assembly standing order 201A arguably imposes a greater restriction on members of the Assembly than is set out in the Self Government Act. Similarly, the House of Representatives imposes procedural restrictions beyond those required by section 56 of the Constitution.[2] By contrast, the standing orders and practices of the Senate reflect the Senate's interpretation of section 53, and impose no further restraints on the rights of senators.

Noting the connection between the practices of the ACT Assembly and the House of Representatives as expressed in ACT Assembly standing order 275, and the fact that both Houses have resolved to impose additional restraints on their members, it may be the case that analysis of the practices of the House of Representatives may be of more utility to the inquiry. Ultimately, however, and particularly in light of the constitutional differences discussed above, I agree with the conclusion of the discussion paper that 'questions as to the practice that ought to apply in the future is a matter for the Assembly alone to determine within the constitutional constraints imposed by the Self-Government Act'.

Yours sincerely

(Richard Pye)

[2] For instance, compare standing order 180 to the terms of section 56; Standing order 179 imposes additional restrictions on non-Executive members in relation to tax bills.