BACKGROUND PAPER—APPLICATION OF SECTION 65 OF THE SELF-GOVERNMENT ACT AND RELATED STANDING ORDERS

OFFICE OF THE CLERK

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REFERENCE

1.1 On 20 September 2018 the Assembly passed the following resolution:

That this Assembly:

(1) notes the ambiguity in the interpretation of the application of Section 65 of the *Australian Capital Territory (Self-Government) Act 1988*; and

(2) calls on the Assembly to refer this matter to the Standing Committee on Administration and Procedure for consideration and inquiry into the application of Section 65 of the *Australian Capital Territory (Self-Government) Act 1988*, specifically:

(a) the ability for non-executive members to amend bills, move motions and introduce private members bills that have a monetary impact on the ACT;

(b) the Assembly's application of standing order 201a and adherence to the principle of "the initiative of the crown" and how it relates to the *Australian Capital Territory (Self-Government) Act 1988*;

(c) who is responsible or has jurisdiction to rule on what bills or amendments are compatible with the *Australian Capital Territory (Self-Government) Act 1988*; and

(d) any other relevant matter.

1 BACKGROUND, SCOPE AND CHRONOLOGY

BACKGROUND AND SCOPE

1.1 A parliament, composed of elected representatives, has an inherent function to legislate on behalf of the polity on whose behalf it governs. In the ACT system of government, the legislative power is conferred upon the Assembly by way of s 22 of the *Australian Capital Territory (Self-Government) Act 1988* (Clth) (the Self-Government Act) [1] —the effective constitution of the ACT—which states 'the Assembly has power to make laws for the peace, order and good government of the Territory'.[2] The Assembly consists of 25 elected members, a subset of whom are the ACT Executive, comprising the Chief Minister and ministers appointed by the Chief Minister in accordance with s 39 of the Self-Government Act.[3] The remaining members are non-executive or private members. While the legislative initiative—the capacity to propose or amend legislative proposals—is broadly enjoyed by all members (both executive and non-executive), there are certain exceptions that arise under s 65 of the Self-Government Act and the Assembly's standing orders in relation to proposals falling under the rubric of the 'financial initiative of the executive'.

1.2 On 20 September 2018, on a motion by Mr Andrew Wall MLA, the Assembly resolved to refer matters concerning the application of s 65 of the Self-Government Act and associated standing orders to the Standing Committee on Administration and Procedure for consideration and inquiry.[4] The inquiry came following the attempt, by a non-executive member, to initiate two separate legislative proposals which, had they been successful, would have impacted on the finances of the Territory.

1.3 The first proposal was in the form of an amendment to the Betting Operations Tax Bill 2018 which sought to appropriate funds to certain non-government entities. The second proposal was in the form of the Land Tax (Community Housing Exemption) Amendment Bill 2018 which sought to alter the scope of the application of a tax provided for under the *Land Tax Act 2004.*

1.4 Both the bill and the amendment to the bill were ruled out of order and there was subsequent disagreement in the Assembly about the extent to which a non-executive member is, or ought to be, prevented from initiating or amending legislation by reason of s 65 of the Self-Government Act and/or the operation of standing orders 200, 201 and 201A.

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[1] Passed by the Commonwealth Parliament pursuant to s 122 of the Australian Constitution which grants the Commonwealth the power to make laws for the government of the territories.

[2] The power of the Assembly to make laws extends to the powers to make laws regarding the exercise of powers by the Executive (s 22(2) of the Self-Government Act).

[3] The ACT Executive exercise the executive powers provided for under s 37 of the Self Government Act.

[4] *Minutes of Proceedings*, No 73, 20 September 2018, p 1031.

1.5 The disagreement was characterised by differing views as to the ambit of non-executive members' legislative initiative vis-a-vis the ambit of the executive's financial initiative, and the appropriate means by which the limits of these prerogatives ought to be determined in light of prevailing statutory and procedural requirements.

1.6 This paper:

a) considers the financial initiative of the executive as it has been conceived in the practices of Westminster, the Commonwealth parliament, and the Assembly;

b) postulates the extent to which non-executive members may be prohibited from initiating legislation (whether by way of a bill or an amendment to a bill) which has an impact on the finances of the Territory (expenditure or revenue); and

c) considers the applicable jurisdiction for interpreting and ruling on questions that arise in the Assembly that potentially engage s 65 of the Self-Government Act or related standing orders.

PROCEDURAL CHRONOLOGY

PROPOSED AMENDMENT TO THE BETTING OPERATIONS TAX BILL 2018

1.7 On 2 August 2018, the Treasurer presented the Betting Operations Tax Bill 2018, the purpose of which was to establish a 'legislative framework for the implementation of a point of consumption betting operations tax in the ACT'.[5]

1.8 On 18 September 2018, Mr Mark Parton MLA, a member of the opposition, sought to move by leave[6] an amendment to the Betting Operations Tax Bill 2018. The proposed amendment sought to insert a new clause in the bill providing that 'For a financial year, the prescribed proportion of total betting tax paid to the commissioner under section 12 for the previous financial year is appropriated to the racing clubs'.[7]

1.9 The Assistant Speaker ruled the amendment out-of-order on the grounds that it was in breach of standing order 200, which provides that 'An enactment, vote or resolution for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister…'. Standing

[5] Betting Operations Tax Bill 2018, Explanatory Statement, p 2

[6] Mr Parton's amendment had not been circulated in accordance with standing order 178A.

[7] See Schedule of Amendments, Schedule 1, *Minutes of Proceedings*, No 71—18 September 2018, p 995.

order 200 is an almost precise replication of the terms of s 65(1) of the Self-Government Act, which makes provision for the proposal for money votes.[8]

1.10 A point of order was raised by the Opposition Whip seeking to clarify the Assistant Speaker's ruling on the grounds, he argued, that the amendment that had been proposed did not increase the quantum of money to be appropriated and was not therefore a breach of standing order 200. He stated that:

> Mr Parton's amendment does not, in any form, increase the quantum of money to be appropriated. That has been covered in the appropriation bill. All this seeks to do is amend the way in which the funds are expended. The money has been appropriated whether or not Mr Parton's amendment is adopted and accepted. All Mr Parton's amendment would do to the bill is actually inform the government on how that money should be allocated.[9]

1.11 The debate was adjourned and the resumption of the debate made an order of the day for a later hour that day. Later that day, the Speaker made a statement upholding the ruling of the Assistant Speaker. The Speaker advised the Assembly that she had received advice from the Clerk of the Assembly, who had consulted with Parliamentary Counsel and the Solicitor-General. The Speaker ruled as follows:

> Once the betting tax bill becomes law and commences, public moneys raised by the imposition of the tax will be paid into consolidated revenue. The moneys so raised may only be expended in accordance with the appropriation under section 6 of the Financial Management Act.
>
> The amendment to the betting tax bill proposed by Mr Parton purports to effect an appropriation of public moneys raised by the tax. As such, it is contrary to section 65 of the self-government act. It is for this reason and based on the advice of the officers I have referred to in this statement that I have ruled the amendment to be out of order.[10]

1.12 The plain words of the relevant amendment made clear that an appropriation of funds was proposed, viz '… the prescribed proportion of total betting tax paid to the commissioner under section 12 for the previous financial year is **appropriated to the racing clubs** [emphasis added]'.[11] The mere fact that the stated purpose of the appropriation proposal was in the form of an amendment to a taxation bill, rather than an amendment to an appropriation bill, did nothing to alleviate the conditions that are imposed by the Self-Government Act and the standing orders.

[8] Subsection 65(2) of the Self-Government Act states that 'Subsection (1) does not prevent a member other than a Minister from moving an amendment to a proposal made by a Minister unless the amendment is to increase the amount of public money of the Territory to be appropriated'.

[9] Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3662.

[10] Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3717.

[11] See Schedule of Amendments, Schedule 1, *Minutes of Proceedings*, No 71—18 September 2018, p 995.

1.13 As there was no existing appropriation against which the lawful payment of Territory funds could have been made to the 'racing clubs'[12] (i.e. nowhere else had the object of the proposed expenditure been granted under an enactment—for example, under a previous appropriation Act), the relevant clause of the bill represented a new appropriation and may be construed as a 'proposal' for the purposes of s 65(1) of the Self-Government Act or standing order 200.[13] That is, were the proposed amendment to have been successful it would have resulted in an enactment[14] authorising appropriation.

1.14 The Speaker also noted that standing order 201A, which expresses the Assembly's endorsement of the principles of the financial initiative of the Crown as per its resolution of 23 November 1995, was relevant to her consideration. Standing order 201A states that:

> An amendment in accordance with standing order 201 must be in accordance with the resolution agreed to on 23 November 1995— i.e. "That this Assembly reaffirms the principles of the Westminster system embodied in the 'financial initiative of the Crown' and the limits that that initiative places on non-executive Members in moving amendments other than those to reduce items of proposed expenditure."[15]

1.15 Following the Speaker's statement, the Leader of the Opposition contended that the only source of authority limiting the moving of the amendment proposed by Mr Parton was standing order 201A and that a motion to suspend standing orders, if successful, would remove any impediment to the amendment being moved.[16] In speaking to this view, the opposition contended that:

- the language in section 65 of the Self-Government Act did not explicitly prohibit the moving of an amendment—of the kind moved by Mr Parton—to a revenue bill;[17]
- it was not for the Speaker to determine whether an amendment complied with the Self-Government Act, only whether the amendment was within the standing orders and resolutions of the Assembly (which could be suspended were it the will of the Assembly);[18]
- the combined effects of the Speaker's ruling and standing order 201A may have 'put unnecessary restriction on members' free rights… that were not intended as part of the Self-Government Act';[19]and

[12] Section 58 of the Self-Government Act provides that '… no public money of the Territory shall be issued or spent except as authorised under enactment' and s 6 of the *Financial Management Act 1996* provides that 'no payment of public money shall be made otherwise than in accordance with an appropriation'.

[13] See paragraph 2.7.

[14] See footnote 42.

[15] During consideration of the 1995-1996 Appropriation Bill, the Assembly contemplated whether it would be in order for a non-executive member to move an amendment to transfer money from the Treasurer's Advance to a separate division of the bill relating to the Department of Education and Training. A full history of the events surrounding the resolution of 23 November 1995 and the adoption of standing order 201A are contained in Mark McRae (Ed), *Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory*, Canberra, 2009, pp 230-233.

[16] Alistair Coe MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3717.

[17] Andrew Wall MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3718.

[18] Alistair Coe MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3717.

[19] Andrew Wall MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3718.

- if the amendment was successful following a suspension of standing orders, the legality of the amendment could be 'open to [legal] challenge… if a jurisdiction chose to challenge it'.[20]

1.16 Following the debate, the opposition sought to suspend so much of standing orders as would have prevented Mr Parton from moving the amendment. The motion was defeated.

LAND TAX (COMMUNITY HOUSING EXEMPTION) AMENDMENT BILL 2018

1.17 On 19 September 2018, Mr Parton introduced the Land Tax (Community Housing Exemption) Amendment Bill 2018.[21] The purpose of the bill was to exempt from land tax owners of land who had entered into an agreement with a registered community housing provider and who had made the land available under the agreement to the provider for the purpose of community housing.[22]

1.18 On 23 October 2018, the Speaker acknowledged that the bill did not contravene standing orders 200, 201, or 201A. The bill was, however, ruled out-of-order[23] on the grounds that:

a) there being no specific procedural codification in the Assembly's standing orders relating to non-executive members' ability to amend taxation proposals and no Assembly precedent, House of Representatives Practice applied by reason of standing order 275 (Standing order 275 provides that in the absence of an Assembly practice '…any question relating to procedure or the conduct of business of the Assembly… shall be decided according to the practice prevailing in the House of Representatives in the Parliament of the Commonwealth of Australia'); and
b) House of Representatives standing order 179 prohibits non-executive members' bills of this kind.

1.19 The House of Representatives standing order 179 provides that:

> (a) Only a Minister may initiate a proposal to impose, increase, or decrease a tax or duty, or change the scope of any charge.
>
> (b) Only a Minister may move an amendment to the proposal which increases or extends the scope of the charge proposed beyond the total already existing under any Act of Parliament.
>
> (c) A Member who is not a Minister may move an amendment to the proposal which does not increase or extend the scope of the charge proposed beyond the total already existing under any Act of Parliament.

1.20 The Speaker stated that the bill sought to alleviate a tax, which was not permitted by House of Representatives standing order 179.[24] That is, by proposing to disapply the imposition of the tax on the

[20] Alistair Coe MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3717.

[21] *Minutes of Proceedings*, No 72, 19 September 2018, p 997.

[22] See clause 5 of the Land Tax (Community House Exemption) Amendment Bill 2018

[23] *Minutes of Proceedings*, No 74, 23 October 2018, p 1037.

[24] Joy Burch MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 23 October 2018, p 4040.

class of persons mentioned in clause 5 of the bill, the bill sought to 'change the scope of the charge'[25] and was therefore contrary to paragraph (a) of House of Representatives standing order 179.[26]

1.21 As noted, in ruling that the Land Tax (Community Housing Exemption) Amendment Bill 2018 was out-of-order, the Speaker, having considered relevant advices, adopted the view that House of Representatives practice could be taken to apply by reason of Assembly standing order 275.[27] It is important to point out that that the Speaker's ruling, informed by the advice that she received, indicated that no precedent existed in the Assembly's practice concerning taxation bills being initiated by non-executive members.[28] Further analysis reveals that there have been occasions where non-executive members have successfully presented bills which, had they passed, would have resulted in considerable impacts on taxation and other revenue measures, most notably the Utilities (Network Facilities) Repeal Bill 2007 and Utilities (Network Facilities) Repeal Bill 2008.[29]

1.22 The Speaker stated that '… matters that are directly relevant to the financial initiative of the Crown and section 65 of the self-government act have been referred to the standing committee on admin and procedure for inquiry and report. I expect that additional clarity will be brought to bear on these issues following the Assembly's receipt of that report'.[30]

1.23 The opposition sought to suspend so much of standing orders as would prevent the bill from proceeding to be debated at the next sitting. In speaking to the motion, the Opposition Whip contended that the only impediment to the bill being brought on for debate was the interpretation of the standing orders embodied in the Speaker's ruling. He said that 'From time to time private members' bills have passed this place that have had a financial implication. We regularly see it. It is fair to say that just about every bill that comes through this place from a private member has a financial implication in it in some way, form or shape'.[31]

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[25] A 'charge on the people' is taken as a reference to a tax or a duty. See Sir David Natzler and Mark Hutton (eds.) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Twenty-fifth edition, Lexis Nexus, United Kingdom, 2019, p 851. See also, David Elder (ed.) *House of Representatives Practice,* Seventh edition, Department of the House of Representatives, Canberra, p 416.

[26] As per paragraph (c) of standing order 179, a non-executive member is, however, not prevented from moving an amendment which does increase or extend the scope of a charge under an existing Act.

[27] Standing Order 275 provides that 'Any question relating to procedure or the conduct of business of the Assembly not provided for in these standing orders or practices of the Assembly, shall be decided according to the practice at the time prevailing in the House of Representatives in the Parliament of the Commonwealth of Australia'.

[28] Joy Burch MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 23 October 2018, p 4040.

[29] *Minutes of Proceedings*, No 116, 17 October 2007, p 1242 and *Minutes of Proceedings*, No 131, 5 March 2008, p 1381. Other examples include the Rates (Fire and Emergency Services Levy Repeal) Amendment Bill 2008 (Mr Mulcahy) and the Payroll Tax Amendment Bill 2013 (Mr Smyth).

[30] Joy Burch MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 23 October 2018, p 4041.

[31] Mr Andrew Wall MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 23 October 2018, p 4044.

1.24 The motion to suspend standing order was negatived and the bill was removed from the Notice Paper.[32]

[32] *Minutes of Proceedings*, No 74, 23 October 2018, p 1038.

2 OVERVIEW OF RELEVANT MATTERS

2.1 As noted above, there are two statutory provisions and three procedural provisions which lie at the heart of the committee's inquiry. They are as follows:

- **Section 65(1) of the Self-Government Act** provides that:

  An enactment,[33] vote[34] or resolution[35] (proposal) for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister.

- **Section 65(2) of the Self-Government Act** provides that:

  Subsection (1) does not prevent a member other than a Minister from moving an amendment to a proposal made by a Minister unless the amendment is to increase the amount of public money of the Territory to be appropriated.

- **Standing order 200**, which is an almost precise replication of s 65(1), provides that:

  An enactment, vote or resolution for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister. Such proposals may be introduced by a Minister without notice.

- **Standing order 201,** which embodies the terms of s 65(2), provides that:

  A Member, other than a Minister, may not move an amendment to a money proposal, as specified in standing order 200, if that amendment would increase the amount of public money of the Territory to be appropriated.

[33] While an enactment may refer to the process of making an Act or statute and has been taken to be synonymous with the word Act itself, an enactment may also refer to any section or part of a section in an Act. Section 12 of the *Acts Interpretation Act 1901* (Clth) provides that 'Every section of an Act shall have effect as a substantive enactment without introductory words'.

[34] A 'vote' in the monetary sense of the word may be taken as a reference to a sum of money appropriated to a government department and roughly equivalent to a given line of appropriation within an appropriation bill. As noted in Clerk's advice of 14 November 1995: 'Votes are units of appropriation… They are drawn up on a departmental basis, and each vote specifies which department is accountable for it, but there may be several votes controlled by a single department'. See Appendix 6 of *Debates of the Legislative Assembly for the Australian Capital Territory*, 23 November 1995, p 2584.

[35] While a 'resolution' in its modern procedural context is generally taken as reference to the successful passage by the Assembly of a motion expressing an opinion on a given matter, it may also be taken as a reference to the 'financial procedures in the colonial legislatures and the UK House of Commons (and used by the House of Representatives until 1963) where certain Bills were based on financial resolutions. Financial procedures were more complex involving consideration by committees of supply and ways and means. The procedure in relation to the main appropriation Bill of the year culminated with formal consideration of the Committee of Ways and Means after which a Bill to give effect to the resolution was brought in and usually passed formally and immediately. Such procedures are not used by the Assembly'. See Clerk's advice 14 November 1995, Appendix 6 of *Debates of the Legislative Assembly for the Australian Capital Territory*, 23 November 1995, p 2583. See Appendix 1 for additional commentary of history of financial resolutions.

- **Standing order 201A**, which does not have a statutory equivalent, provides that:

  > An amendment in accordance with standing order 201 must be in accordance with the resolution agreed to on 23 November 1995 – i.e. "That this Assembly reaffirms the principles of the Westminster system embodied in the 'financial initiative of the Crown' and the limits that that initiative places on non-executive Members in moving amendments other than those to reduce items of proposed expenditure."

2.2 These provisions are attempts to embody the doctrine of the financial initiative of the executive. It is fair to say that the Assembly's practice regarding the application of the doctrine has been mixed and there is no consensus among parliamentary chambers as to the precise limits it imposes on non-executive members. The Assembly's procedural codification of the doctrine has been informed by the statutory obligations that are imposed under the Self-Government Act and in response to a number of controversies that arose early in the life of self-government.

2.3 While legal opinions abound, because s 65 of the Self-Government Act is unlikely to be justiciable,[36] the courts do not offer a ready path for resolving these matters and the Assembly itself is placed very much at the centre of how the doctrine is to be interpreted and applied.

2.4 For all of these reasons, it is not possible to offer a conclusive view on the precise scope of the financial initiative as it applies in the Assembly. It is, however, possible to canvass the underlying rationale that is advanced for the broader doctrine and the Assembly's current understanding of these matters based on relevant practice and precedent. It is also possible to posit available interpretations regarding the scope of the relevant provisions and the extent to which non-executive members might be prevented from initiating or amending legislation as a consequence.

2.5 Below is a summary of the relevant issues.

APPROPRIATIONS

2.6 The first and most notable restriction placed on private members' legislative initiative is the prohibition on initiating a money vote. A money vote or proposal for appropriation of revenue is a special class of legislation granting public money that is to be expended on a particular public purpose, government service or object of expenditure.[37] Section s 65 (1) of the Self-Government Act prohibits non-executive members from initiating any such proposals in any form—only ministers may do this.

[36] Initial advice from the ACT Solicitor General, 6 August 2019.

[37] Sir David Natzler and Mark Hutton (eds.) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Twenty-fifth edition, Lexis Nexus, United Kingdom, 2019, pp 852-854.

2.7 The second restriction is that non-executive members are not able to propose amendments to an appropriation where the purpose is to increase the amount of money appropriated. This prohibition arises from s 65(2) of the Self-Government Act. Non-executive members are not explicitly prevented from moving other amendments pursuant to this provision, only from moving amendments that seek to increase an appropriation[38]. However, an amendment that is itself in the form of an appropriation may be regarded as 'a proposal' under the terms of s 65(1).[39]

2.8 In addition to the statutory constraints imposed by the Self-Government Act on the legislative initiative of non-executive members through s 65, the Assembly has also imposed additional restrictions through its standing orders.[40] While standing orders 200 and 201 are largely a restatement of the terms of ss 65(1)-(2) of the Self-Government Act, standing order 201A provides that amendments to appropriation proposals by non-executive members are permitted only where they are directed to reducing amounts of proposed expenditure. This additional limitation has operated to prevent non-executive amendments to appropriation bills that purport to tie the hands of executive government in expending funds on contested areas of policy (for example, to prevent the closure of schools or libraries).

2.9 Under the prevailing practice of the Assembly, an amendment that seeks to increase the amount to be appropriated to an individual line of appropriation (i.e. appropriation to a specific object of expenditure) is impermissible even where a proportionate reduction to a separate appropriation line is proposed in order that the total appropriation is not increased. In short, it has not been regarded as permissible for a private member to seek to 'rob Peter to pay Paul' in amending an appropriation proposal.

2.10 *Erskine May* observes that there are three 'important precepts' implied in the appropriation of expenditure:

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[38] It ought to be noted that an amendment by a non-executive member that proposes to include an appropriation for a given purpose where none had been sought by a minister, would self-evidently represent 'an increase the amount of public money of the Territory to be appropriated'.

[39] In discussing what is meant by the term 'proposal' in s 65, in addition to the words that precede the parentheses in s 65(1) (i.e. enactment, vote, and resolution), the text of s 56 of the Australian Constitution, upon which s 65 is based (see paragraph 4.12) also bears consideration. Section 56 provides that 'A vote, resolution, **or proposed law** [emphasis added] 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 a message of the Governor-General to the House in which the proposal originated'. The terms deployed in each s 65 and s 56 are almost identical—both include the terms 'vote' and 'resolution', and broad equivalence between the term 'proposed law' in s 56 and the phrase 'enactment… must not be proposed' in s 65 may be drawn. Against this background, it is reasonably clear that the intention of s 65 is to prevent anyone but a minister (there being no Vice-Regal function involved in the enactment of ACT laws) from proposing a law—whether in the form of a bill for a proposed enactment or vote, or an amendment for a proposed enactment or vote—that would have the effect of appropriating funds to a given purpose or object of expenditure. In this view, all appropriation proposals to apply Territory funds to an object of expenditure, and all proposals to increase appropriations to objects of expenditure, are the exclusive province of ministers.

[40] The Assembly is empowered to make standing rules and orders with respect to the conduct of its business pursuant to s 21 of the Self-Government Act.

(1) Am amount of appropriated to a particular service cannot be used for another service.

(2) The amount appropriated is a maximum amount.

(3) The amount is available only to defray costs or the use of resources which have arisen during the financial year in respect of which the amount has been appropriated by the relevant Act.[41]

2.11 A bill or amendment to a bill initiated by a non-executive member that seeks to do any of the following things would, under the Assembly's practice, be regarded as being out of order by reason of s 65 of the Self-Government Act or related standing orders:

a) appropriate funds (whether by a specific amount or where words are used in relevant clauses which make clear that a charge on the Territory's finances is to be effected);
b) increase the total amount of funds to be appropriated;
c) increase the amount of funds to be appropriated to a particular 'vote' or object of expenditure within an appropriation (for example, a particular appropriation line to a Territory entity as per s 6 and Schedule 1 of the Appropriation Bill 2018-2019); or
d) move an amendment to an appropriation, other than an amendment to reduce proposed expenditure (to, for instance, place conditions as to how appropriated funds may not be spent (amendments omitting or reducing certain appropriations is permissible))[42].

2.12 Legal advice has previously been tabled in the Assembly suggesting that it would not be impermissible under s 65 for a non-executive member to move an amendment seeking to transfer funding between recurrent and capital expenditure so long as the total appropriation for the object of expenditure (i.e. the particular 'vote') is not increased.[43] However, since the resolution of 23 November 1995 and the subsequent adoption of standing order 201A, which have operated to prevent the moving of an amendment by a non-executive member except amendments that 'reduce items of proposed expenditure', amendments seeking to transfer amounts between capital and recurrent funding have been ruled out of order.[44]

2.13 These matters are discussed in chapter 5.

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[41] Sir David Natzler and Mark Hutton (eds.) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Twenty-fifth edition, Lexis Nexus, United Kingdom, 2019, p 853.

[42] There have been numerous occasions where non-executive members have attempted to reduce appropriations by way of an amendment which have not been ruled out of order. See, for instance: *Minutes of Proceedings*, No 59, 31 August 1999, p 518; *Minutes of Proceedings*, No 131, 21 June 2001, p 1514; *Minutes of Proceedings*, No 63, 24 June 2003, p 769.

[43] This is on the basis that recurrent and capital expenditure were regarded as being contained *within* a particular 'vote'. See advice of Len Sorbello, Deputy Law Officer, Attorney-General's Department, in Appendix 6 of *Debates of the Legislative Assembly for the Australian Capital Territory*, 23 November 1995 p 2594.

[44] See *Minutes of Proceedings*, No 24, 28 June 2005, p 220.

ESTABLISHMENT OF A SCHEME OR ENTITY

2.14 So long as no appropriation is purported to be given effect, there is no prohibition against non-executive members initiating a bill, or an amendment to a bill, that seeks to establish or change the operation of a public scheme or entity.

2.15 A bill which seeks to establish a scheme or entity of some variety is a general, rather than special, class of legislation that merely seeks to provide a statutory basis for a given policy initiative. Legislation of this kind is the bread and butter of parliaments and there is no procedural or statutory prohibition on non-executive MLAs introducing or amending such legislation[45] irrespective of the possibility that a downstream financial impact on the Territory possibly arises were funds later appropriated to that purpose (the only proviso being that a non-executive members' bill must not itself purport to appropriate the funds that are to be directed to that purpose).[46]

2.16 However, there is no obligation on the executive to itself propose to appropriate funds merely by reason of the fact that an enactment establishing a scheme or entity has been passed by the Assembly—it is the prerogative of the executive as to whether funding will be sought in order to fund a given scheme or entity.

2.17 This is discussed in chapter 4.

REVENUE AND TAXATION

2.18 Taxation proposals are a special class of legislation directed towards imposing a burden on the people.[47] The House of Representatives regards a taxation proposal as a bill to impose, increase, or decrease a tax or duty, or change the scope of any charge.[48]

2.19 While the prohibition on non-executive members of the Assembly initiating appropriations or seeking to increase appropriations by amendment is, for the present moment, largely settled practice, non-executive members' legislative initiative in relation to revenue and taxation proposals is not explicitly proscribed.

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[45] Following the passage in the Commonwealth Parliament of the Arts, Environment and Territories Legislation Amendment Bill 1993, which amended s 65 of the Self-Government Act, s 65 was amended to make it clear that s 65 was not intended to operate in such a way as to prevent non-executive members from initiating or amending this kind of legislation.

[46] See discussion of these issues as they are conceived by the Australian Senate in Dennis Pearce, 'The Legislative Powers of the Senate', *Commentaries on the Constitution*, Leslie Zines (ed), 1977, pp 123-4.

[47] See David Elder (ed.) *House of Representatives Practice,* Seventh edition, Department of the House of Representatives, Canberra, p 435.

[48] See House of Representatives standing order 179.

2.20 The Assembly's standing orders are silent on taxation and other revenue proposals and there is no explicit constitutional impediment under the Self-Government Act in relation to non-executive members initiating or amending them.[49] However, where a revenue proposal initiated by a non-executive member also sought to hypothecate that revenue, or a portion of it, to a given object of expenditure (rather than to general revenue), s 65 and related standing orders would be engaged on the grounds such a provision could be regarded as an appropriation of funds.

2.21 In the face of disagreement about the Assembly's practice, the Assembly could, should it wish, clarify its practice by stating, in categorical terms, whether or not non-executive members enjoy the freedom to initiate or amend revenue proposals and, should it do so, what constraints, if any, might apply. Importantly, procedural codification could not seek to alleviate any of the constraints imposed by s 65.

2.22 These matters are discussed in chapter 6.

JURISDICTIONAL ISSUES

2.23 Given that s 65 of the Self-Government Act deals with amendments and bills, which are by their very nature 'proceedings in parliament',[50] deference is likely to be afforded by the courts to the Assembly in resolving, as internal procedural matters, any questions that arise under relevant provisions.

2.24 As a result, the Speaker, non-executive MLAs involved in the initiation of legislative proposals, and the Assembly as a whole may, on occasion, be required to themselves assume an interpretive function in relation to s 65. There is an onus on the Assembly to perform this interpretative task with a sense of prudence and conscientiousness and having regard to the long-term consequences of a given approach on the good government of the Territory. It is perhaps useful to consider whether the principles arrayed to advance a given position on the financial initiative of the executive are capable of being relied upon irrespective of whether a given proponent happens to be in government, the opposition or the crossbench.

2.25 These matters are discussed further in chapter 7.

A BRIEF NOTE ON MOTIONS RELATING TO THE TERRITORY'S FINANCES

2.26 The inquiry's terms of reference at paragraph 2(a) refer to the 'ability for non-executive members to… move motions… that have a monetary impact on the ACT'.

[49] Indeed s 56 of the Australian Constitution, upon which s 65 is based, contains no explicit restriction in relation to revenue proposals.

[50] See Article 9 of the Bill of Rights 1689 and s 16 of the Parliamentary Privileges Act 1988 (Clth)

2.27 There is no impediment to any member seeking to move a motion in the Assembly calling on the government to take some action—financial or otherwise. However, while it is possible that certain political consequences might flow from a government's failure to heed the will of the Assembly, such as a loss of majority support or negative media attention, there is no legal obligation on the part of the government to abide by the terms of such a resolution or order arising from such a motion. The matter is discussed in the *Companion to the Standing Orders.*[51]

[51] Mark McRae (Ed), Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory, Canberra, 2009, p 89.

3 FINANCIAL INITIATIVE

WESTMINSTER AND THE COMMONWEALTH

3.1 As noted above, the extent to which non-executive members are permitted to initiate or amend financial legislation engages the principle of the financial initiative of the Crown or, as it is more often referred to in the Australian context, the financial initiative of the executive.

3.2 The principle of the financial initiative of the executive has been summarised in *House of Representatives Practice* as follows:

- The Executive Government is charged with the management of revenue and with payments for the public service.
- It is a long established and strictly observed rule which expresses a principle of the highest constitutional importance that no public charge can be incurred except on the initiative of the Executive Government.
- The Executive Government demands money, the Parliament grants it, but the Parliament does not vote money unless required by the Government, and does not impose taxes unless needed for public service as declared by Ministers.[52]

3.3 While the general principle of financial initiative being an exclusive right of the executive is well recognised, the precise scope of the principle's operation has been contested both within the Assembly and further afield.

3.4 In a system of responsible parliamentary government,[53] financial initiative of the executive is taken to be of the 'highest constitutional importance' because the executive—and the executive alone—incurs political responsibility for the decisions it takes to raise and expend public funds. It is open to the parliament to refuse to grant the executive's specific requests for revenue and payments for the public service where a majority of members determine that the proposals do not, for instance, comport with an alternative political or economic worldview. However, where a government makes a proposal for the appropriation of funds or the raising of revenues that is approved by the parliament, the government remains responsible and answerable to the parliament, and to electors, for the consequences of those proposals. In the absence of the financial initiative of the executive, to whom might responsibility be directed were a parlous financial position to emerge as a direct result of

[52] *House of Representatives Practice*, Seventh Edition, pp 415-416.

[53] The principle of responsible government is not specifically mentioned in the Australian Constitution (nor is it mentioned in the Self-Government Act). Indeed, whether responsible government was to assume a prominent place in the Australian Federation was a matter of considerable disagreement in the constitutional conventions leading up to 1900. See Reid and Forrest, *Australia's Commonwealth Parliament,* Melbourne University Press, Melbourne, 1989, p 304. Nevertheless, the principle of responsible government has routinely been held up as a virtue within both the Commonwealth and ACT contexts. It must be stated, however, that the precise obligations arising from the executive's answerability to the parliament is routinely contested.

financial proposals (whether in the form of taxation or appropriation) both initiated and then passed by a non-executive majority?[54]

3.5 The connection between responsible government and financial initiative is succinctly summarised in the *Parliamentary Practice in New Zealand* which states that:

> … those in [executive] office… accepting responsibility for the Government's policies of economic and financial management, should not have fiscal decisions foisted upon them. The House of Representatives' alternative, if it wishes to change an important aspect of a Government's policy that those in office will themselves not change, is to change the Government, not to attempt to force Minister to carry out, and thus accept responsibility for, fiscal policies with which they do not agree.[55]

3.6 As a counterpoint, there is an alternative line of argument which suggests that all elected members of parliament enjoy an inherent freedom, as legislators, to initiate and amend legislation and that parliament's procedural arrangements ought not to restrict that freedom beyond the constraints imposed under relevant statutory or constitutional arrangements (e.g. s 65 of the Self-Government Act).

3.7 It can also be argued from a democratic perspective that the parliamentary majority, rather than a procedural limitation favouring the executive, ought to be determinative as to whether or not a non-executive legislative proposal will be debated, even where some financial impact (not caught by constitutional and statutory prohibitions) possibly arises.[56] Were such a proposal to succeed on the

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[54] Interestingly, the Financial Management Act establishes a requirement for the government to consider the 'principles of responsible fiscal management' in the preparation of the Territory budget. The meaning of the phrase is provided a s 11(7) of the Act and is worth repeating in full:

(a) ensuring that the total liabilities of the Territory are at prudent levels to provide a buffer against factors that may impact adversely on the level of total Territory liabilities in the future, and ensuring that, until prudent levels have been achieved, the total operating expenses of the Territory in each financial year are less than its operating income levels in the same financial year;

(b) when prudent levels of total Territory liabilities have been achieved, maintaining the levels by ensuring that, on average, over a reasonable period of time, the total operating expenses of the Territory do not exceed its operating income levels;

(c) achieving and maintaining levels of Territory net worth to provide a buffer against factors that may impact adversely on levels of Territory net worth in the future;

(d) managing prudently the fiscal risks of the Territory;

(e) pursuing spending and taxing policies that are consistent with a reasonable degree of stability and predictability in the level of the tax burden;

(f) giving full, accurate and timely disclosure of financial information about the activities of the government and its agencies.

[55] Mary Harris and David Wilson (eds.), McGee Parliamentary Practice in New Zealand, Fourth Edition, Wellington, 2017, pp 514-515.

[56] Gordon Reid observes that the Westminster conception of financial initiative of the executive 'has been embraced, particularly by modern governments, as the expression of the procedural means for keeping parliamentary representatives at bay in the name of economic stability. Governments have sought successfully to gain an increasingly restrictive interpretation of it, and it now has political significance of the highest order. When we praise the 'Westminster Model' for providing strong government we, in effect, acknowledge the power that this rule [financial initiative of the executive] gives the Executive over the representative body. Although it is claimed to be a 'a major constitutional principle' it is strange that it has not yet found its historian'. See Gordon Reid, *The Politics of Financial Control: The Role of the House of Commons*, Hutchinson University Library, London, 1966, p 42.

floor of the parliament and the government believed that the proposal was fundamentally inimical to its financial management strategy, it would then be open for the government to: 1) treat the defeat as a want of confidence and resign (in effect, refusing to take responsibility for the policy arising from the proposal); or 2) consider the extent to which it was prepared to accommodate the proposal in light of the prevailing political alignments within the parliament.[57] In this view, the consequences of responsible government can be said to operate politically and democratically, rather than technically or procedurally—the parliament's confidence in the government is regarded as being tested not only where the government's own financial proposal fails but where an alternative financial proposal succeeds. Alternatively, the prospect that a rival financial proposal might gain majority support could also operate as an incentive for the government to modify its own proposals in line with the majority—democratic—opinion within the parliament.

3.8 The prerogatives of the Crown to initiate the raising of taxes and spending of money preceded the modern parliamentary form of government. Indeed, the English civil war of the 17th Century was primarily a conflict as to whether the Stuart monarchs enjoyed the authority, without reference to the parliament, to raise revenue through the imposition of taxes.[58] The ascendance of the parliament following the struggles of that period gave rise to a new compact in which it was settled that the parliament's consent was required prior to the levying of taxes or the expenditure of funds.[59] While parliament now enjoys a preeminent position insofar as the authorisation of financial proposals is

[57] It is perhaps unsurprising that executives in the Territory have not adopted the practice of treating defeats on particular legislative proposals to be matters of confidence given the ACT's long history of producing minority governments. Indeed, on 29 June 2000, the Assembly voted down the Appropriation Bill 2000-2001 with three crossbench MLAs voting with the opposition against the government (two members having objected to the inclusion of funding for a supervised injecting place giving effect to the *Supervised Injecting Place Trial Act 1999*). Rather than interpreting the failure to pass the appropriation as a matter of confidence, the government instead reached an accommodation with two members of the crossbench and the bill was later passed.

[58] Mark Elliot and Robert Thomas (eds.) *Public Law*, Oxford University Press, Oxford, 2014, p 419.

[59] Article 4 of the *Bill of Rights 1689* provides that '...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 than the same is or shall be granted is illegal'. *In Pape v Commission of Taxation* (2009) 238 CLR 1, French CJ, observed:

> Emerging from the *Bill of Rights 1689* and the common law in England were what have been described as "three fundamental constitutional principles" supporting parliamentary control of finance:
>
> (i) The imposition of taxation must be authorised by Parliament.
>
> (ii) All Crown revenue forms part of the Consolidated Revenue Fund.
>
> (iii) Only Parliament can authorise the appropriation of money from the Consolidated Revenue Fund.

These principles were imported into the Australian colonies upon their achievement of responsible government. A Consolidated Revenue Fund was established for each of them. The principles operate today in all States and Territories, albeit they are not expressly referred to in all of their Constitutions. They are central to the system of responsible ministerial government which "prior to the establishment of the Commonwealth of Australia in 1901 … had become one of the central characteristics of our polity".

concerned, as *Erskine May* notes, '… the role of Parliament in respect of State expenditure and taxation has never been one of initiation'.[60]

3.9 The financial initiative first became a feature of Commons' practice in 1706 when it resolved that it would receive money bills only from the Crown.[61] This practice was then codified seven years later in the Commons' standing orders. The order read: 'That this House will receive no Petition for any Sum of Money, relating to public service, or proceed upon any Motion for granting any Money but what is recommended from the Crown'.[62] The expression of the doctrine of the financial initiative of the Crown is currently stated in the Commons standing order 48 as follows:

> This House will receive no petition for any sum relating to public service or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund or the National Loans Fund or out of money to be provided by Parliament, or for releasing or compounding any sum of money owing to the Crown, unless recommended by the Crown.[63]

3.10 With the evolution of responsible government in which an executive council, composed of ministers from within the Parliament, took over the task of advising the Crown or a representative of the Crown, the principle of financial initiative is, in practice, now vested in ministers and the cabinet.[64] *Erskine May* reflects on the contemporary Westminster practice:

> … the government presents to the House of Commons its detailed requirements for the financing of the public services; it is for the Commons, acting on the sole initiative of Ministers, first to authorise the relevant expenditure (or 'Supply') and, second, to provide

[60] See Sir David Natzler and Mark Hutton (eds.) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Twenty-fifth edition, Lexis Nexus, United Kingdom, 2019, p 849

[61] See also, P.D.G. Thomas, *The House of Commons in the eighteenth century*, 1971, p 72 cited in Donald Winch and Patrick O'Brien (eds.), *The Political Economy of British Historical Experience, 1688-1914,* Oxford University Press, Oxford, 2002, p 272. An earlier resolution of the House of Commons in 1678 also set about reserving the financial initiative in the lower house. Quick and Garran observe that, by resolution, the Commons held 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 and sole 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 to not to be changed or altered by the House of Lords.' See John Quick and Robert Garran, *Commentaries on the Constitution of the Australian Commonwealth,* University of Sydney Library, 2000 accessed on 14 August 2019 from http://clra.info/quick-garren-annotated-commentaries-on-the-constitution-of-the-commonwealth-of-australia/

[62] Gordon Reid, *The Politics of Financial Control: The Role of the House of Commons*, Hutchinson University Library, London, 1966, p 39.

[63] Additional background on the evolution of the rule in the United Kingdom House of Commons is included as Appendix 1.

[64] As Walter Bagehot observed, following the Reform Acts of the 1800s: 'But now the real power is not in the Sovereign, it is in the Prime Minister and in the Cabinet, — that is in the hands of a committee appointed by Parliament, and of the chairman of that committee.' And 'The English Premier [is] … appointed by the selection, and being removable at the pleasure, of the preponderant Legislative Assembly, is sure to be able to rely on that assembly. If he wants legislation to aid his policy he can obtain that legislation; he can carry out that policy. The government is a removable government.' See Walter Bagehot *The English Constitution*, Second Edition, 1873, p 24 and 33. Accessed from https://core.ac.uk/download/pdf/7048862.pdf on 25 July 2019

> through taxes and other sources of public revenue the 'Ways and Means' deemed necessary to meet the Supply so granted.[65]

3.11 Under this conception of the financial initiative, the power to decide the purpose and magnitude of both expenditure and revenue proposals rests solely with the executive and, confronted with the exercise of that power, the parliament faces very much a binary proposition to either assent to, or to decline, a proposal.

3.12 Section 56 of the Australian Constitution, however, embodies a less restrictive view of the financial initiative. It provides that:

> 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 [the representative of the Crown] to the House in which the proposal originated.

3.13 Reflecting the scepticism of the Constitution's framers about the prospect of a dominant federal executive, the relevant provision does not prohibit non-executive members from the initiation of taxation proposals. Gordon Reid, in *The Politics of Financial Control*, observes that:

> When the rule was written into the Australian Constitution at the end of the nineteenth century the architects, most practicing politicians from the several colonial parliaments, were suspicious of Executive strength in the new federal body. They liberalised the rule even further. In line with Westminster Standing Order (as distinct from Westminster practice of the day), they omitted reference to taxation, so as to leave scope for private members to introduce proposals on the tariff. And, accordingly, Section 56 of the Constitution provided simply that expenditure proposals 'shall not pass' without a recommendation from the Governor-General. It is interesting that in subsequent years, both in Canada and Australia, the respective Houses, under the influence of powerful Executives, have adopted all the restrictive interpretations of the rule—and more—that have been made at Westminster. [66]

3.14 In the early 1960s, through its standing orders and practice, the House of Representatives did indeed adopt 'more restrictive interpretations', further curtailing its own powers and those of its non-executive members to initiate or amend taxation proposals or to amend appropriation bills. This is discussed in following chapters.

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[65] Sir David Natzler and Mark Hutton (eds.) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Twenty-fifth edition, Lexis Nexus, United Kingdom, 2019, p 850.

[66] Gordon Reid, *The Politics of Financial Control: The Role of the House of Commons*, Hutchinson University Library, London, 1966, pp 42-43

THE ACT

3.15 The Self-Government Act was passed in the Commonwealth Parliament in 1988. It sets out the constitutional arrangements for the ACT, describing a system of government much like those operating in the Australian states and the Northern Territory.

3.16 Uniquely, the ACT's system of government does not make provision for a vice-regal function with respect to the exercise of the prerogatives normally enjoyed by the Crown's representative. For instance, the Crown neither assents to enactments, nor exercises the executive power.[67]

3.17 The legislative power is conferred upon the Assembly by way of s 22 of the Self-Government Act, which states that 'the Assembly has power to make laws for the peace, order and good government of the Territory'[68] and the ACT Executive is given the responsibility of 'exercising all the prerogatives of the Crown' in governing the Territory.[69] Section 57 provides that 'the public money of the Territory shall be available for the expenditure of the Territory and that the receipt, spending and control of public money of the Territory shall be regulated as provided by enactment'.

3.18 Section 58 entrenches the authority of the Assembly in respect of approving revenue and expenditure proposals, providing that '… no public money of the Territory shall be issued or spent except as authorised under enactment'. In the absence of a governor or administrator representing the Crown, s 65 of the Self-Government Act vests the financial initiative in ministers. It provides that:

> (1) An enactment, vote or resolution (proposal) for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister.
>
> (2) Subsection (1) does not prevent a member other than a Minister from moving an amendment to a proposal made by a Minister unless the amendment is to increase the amount of public money of the Territory to be appropriated.[70]

3.19 It is important to note that s 65 of the Self-Government Act is drawn in much the same terms as section 56 of the Australian Constitution.[71] It prohibits the initiation of an appropriation by a non-executive member but does not prohibit the initiation of taxation proposals. Under its provisions,

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[67] Section 16 of the Self-Government Act does provide for the exercise of reserve powers by the Governor-General. The ACT Executive consists of the Chief Minister and ministers appointed by the Chief Minister (see s 39 of the Self-Government Act).

[68] The power of the Assembly to make laws extends to the powers to make laws regarding the exercise of powers by the Executive (s 22(2) of the Self-Government Act).

[69] See s 37 of the Self-Government Act

[70] Section 58(1) of the Self-Government Act provides, inter alia, that no public money of the Territory shall be issued or spent except as authorised by enactment. This provision is reflected in s 6 of the *Financial Management Act 1996* which provides that 'No payment of public money must be made otherwise that in accordance with an appropriation'.

[71] See paragraph 3.12.

non-executive members are not explicitly prevented from moving amendments to appropriations, except where an amendment is to increase the amount of the appropriation.[72]

3.20 Section 21 of the Self-Government Act provides that, subject the other provisions of the Act, the Assembly may make standing rules and orders with respect to the conduct of its business. Through its standing orders 200 and 201, the Assembly has incorporated into its rules much the same limitations as are imposed by s 65 of the Self-Government Act, thereby establishing a procedural basis for the financial initiative of the executive. As noted above, standing order 200 is an almost precise replication of s 65(1), while standing order 201 is substantially the same as s 65(2).

3.21 However, standing order 201A goes considerably beyond the restrictions imposed by s 65 of the Self-Government Act. It conditions the operation of standing order 201 by providing that any amendment moved in accordance with standing order 201 must be in accordance with the resolution agreed to on 23 November 1995, namely that:

> … this Assembly reaffirms the principles of the Westminster system embodied in the 'financial initiative of the Crown' and the limits that that initiative places on non-executive Members in moving amendments other than those to reduce items of proposed expenditure.

3.22 Importantly, standing order 201A does not restrict members' legislative initiative in relation to taxation proposals. The evolution of s 65 and related standing orders is explored in the following chapter.

FINANCIAL MANAGEMENT ACT

3.23 Under the original financial management framework established by the *Audit Ordinance 1989* (repealed),[73] provision was made for a consolidated revenue fund to which all public moneys of the Territory (except where other legislative provision had been made) were credited into a Trust Account.[74] It was against this fund that appropriations for the purposes of the Territory could be made.

3.24 With the *Financial Management Act 1996* replacing the Audit Act, provisions relating to the consolidated revenue fund were dropped. Coming into effect on 1 September 1997, the new Act provided that:

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[72] The *Companion to the Standing Orders* observes that '… during Senate consideration of the self-government legislation in November 1988, an amendment proposing that a law etc for the disposal or charge of the public moneys of the Territory may be proposed by any Member and shall not be passed unless a nominated committee of the Assembly approved the provision of the public moneys of the Territory for the purpose of the proposal. The amendment was negatived, the government viewing it as different from any provision operating in the States and the Northern Territory in relation to money bills and, as a matter of effective and sensible budget management, the initiation of money bills needed to be retained in the hands of the executive. The opposition supported the government' p 223. See *Senate Debates*, 24 November 1988, pp 2813-4.

[73] The Ordinance (which later became an Act) having been based on the *Commonwealth Audit Act 1901—s*ee Kate Carnell MLA, *Debates of the Legislative Assembly for the Australian Capital Territory*, 18 April 1996, p 1036.

[74] See s 81 of the Audit Ordinance 1989

- no payment of public money shall be made otherwise than in accordance with an appropriation (s 6);
- a Territory bank account for the purposes of the Territory must be opened and maintained by the Treasurer (s 33);
- departmental bank accounts must be established (s 34);
- all public money is the property of the Territory (s 35(1));
- all public money, except money payable into a departmental bank account (e.g. where it is money disbursed as a consequence of appropriation or a recept relating to the operations of the department), shall be paid into the Territory bank account (s 35(4)); and
- money shall not be paid out of the Territory bank account except to a departmental bank account by a warrant signed by the Treasurer in accordance with an appropriation (s 37(1)).

3.25 These provisions are largely preserved in the current version of the Financial Management Act.[75]

[75] Departments having been replaced by directorates.

4 EVOLUTION OF S 65 AND STANDING ORDERS 200 AND 201

4.1 The current wording of s 65 of the Self-Government Act arose following amendments to the Self-Government Act brought into the Commonwealth Parliament in 1994. The amendments were the result of a request to the Commonwealth Attorney-General from the Territory following controversies about the scope of financial initiative early in the life of the Assembly.

4.2 Under the original wording of s 65 (and standing orders 200 and 201, which were based on s 65 as it then stood), there was a concern that the scope of the relevant provisions could operate in such a way as to prevent a non-executive member from introducing legislation directed towards the establishment of a program, initiative or entity merely because the proposal had a potential financial impact and irrespective of whether or not the proposal purported to appropriate money.

4.3 On 6 June 1990, the Leader of the Opposition, pursuant to notice, sought to present separate bills to: 1. re-establish the Ainslie Transfer Station; and 2. retain the Royal Canberra Hospital. The purported effect of the bills, if enacted, was to halt or reverse policies of the Government's program to reduce expenditure.[76] Importantly, neither bill sought to appropriate funds for the purposes that were to be achieved by them.

4.4 A point of order was subsequently raised by the Attorney-General concerning the application of s 65 of the Self-Government Act and standing order 200 as it then was.[77] The Attorney indicated that the bills contravened standing order 200 because they '…clearly placed a charge on public money'.[78] The Speaker then undertook to seek legal advice and report back to the Assembly on the validity of the bills under the standing orders.

4.5 As it then stood, standing orders 200 and 201 were in a slightly different form, being modelled on s 65 of the Self-Government Act as it then was. Section 65 then stated that:

> (1) An enactment, vote, resolution or question (any of which is in this section called a "proposal") **the object or effect of which is to dispose of or charge any public money of the Territory [emphasis added]** shall not be proposed in the Assembly except by a Minister.
>
> (2) Subsection (1) does not prevent a member other than a Minister from moving an amendment to a proposal made by a Minister unless the object or effect of the amendment is to increase the amount of public money of the Territory to be disposed of or charged.

[76] *Standing Orders 200 and 201*, Report of the Standing Committee on Administration and Procedures, June 1994, p 2.

[77] *Minutes of Proceedings*, No. 65, 6 June 1990, p 255.

[78] Debates of the Legislative Assembly for the Australian Capital Territory, 6 June 1990, p 2136.

4.6 The original language in s 65 gave rise to an ambiguity as to the scope of the prohibition on non-executive members introducing legislation or moving amendments to legislation where possible financial implications could be anticipated.

4.7 The use of the phrase at s 65(1) 'the object or effect of which is to dispose of or charge any public money of the Territory' left the provision open to the construction that non-executive members were prevented from initiating *any* proposal entailing a potential financial impact, rather than the narrower construction which held that the prohibition only operated to prevent members from initiating 'the appropriation of revenue or moneys' as per the equivalent provision at s 56 of the Australian Constitution.

4.8 The broader view of the prohibition was adopted in legal opinions by the Government Law Office which argued that the bills in question could not be proposed by anyone other than a minister 'on the grounds that they have the effect of disposing of and charging public money of the Territory'.[79] The Law Office contended that '… wherever an obligation is imposed by law to do something which requires spending money [for instance, establishing a transfer station or continuing the provision a hospital service at a given locale], where there is an existing appropriation from which the moneys may be drawn, section 65 will apply'.[80] As is observed in the *Companion to the Standing Orders*, this led to a practice that '… could operate to virtually exclude private Members from proposing business in the Assembly'.[81]

4.9 A separate legal opinion was sought by the then Standing Committee on Administration and Procedures. That opinion, provided by Pat Brazil AO of MacPhillamy Cummins and Gibson, stated that the '… provisions in question [i.e. s 65] should be interpreted as referring principally to money votes (Appropriations) …'.[82] It was contended that s 65 would only be encroached where the executive government was required, as a matter of law, to make a payment or incur expenditure as a consequence of a bill and that as no appropriation was sought or effected in the bills in question, no such lawful obligation arose.[83]

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[79] Legal Advice, 3 August 1990, Government Law Office, p 7 (Attachment A to *Standing Orders 200 and 201 and their interpretation,* report of the Standing Committee on Administration and Procedures*,* December 1990).

[80] Legal Advice, 3 August 1990, Government Law Office, p 7 (Attachment A to *Standing Orders 200 and 201 and their interpretation,* report of the Standing Committee on Administration and Procedures*,* December 1990). The advice also noted that the bills in question purported to permit any person to enforce obligations arising under the relevant provisions (i.e. to have standing to bring an action). While the legal argument advanced in the advice did not rely on this fact alone, the prospect of an enforcement mechanism as a means by which to effectuate the expenditure towards the stated purposes outlined in the bills was nonetheless a relevant consideration.

[81] Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory, p 226.

[82] Legal Advice, 6 November 1990, MacPhillamy, Cummins & Gibson (Attachment B to *Standing Orders 200 and 201 and their interpretation,* report of the Standing Committee on Administration and Procedures*,* December 1990).

[83] Legal Advice, 6 November 1990, MacPhillamy, Cummins & Gibson (Attachment B to *Standing Orders 200 and 201 and their interpretation,* report of the Standing Committee on Administration and Procedures*,* December 1990).

4.10 On 15 August 1990, the Assembly considered a motion to amend standing orders 200 and 201 in order that the prohibition on private members' legislative initiative was confined to appropriation proposals, rather than having any broader application.[84] In debate on the amendment, the Shadow Attorney-General stated that 'We in the Opposition are putting forward an opportunity for this Assembly to assert its view of its ability to pass laws in the ordinary tradition of parliamentary government… But of fundamental importance is the question of who is to be the master in this Territory—the elected members of the Assembly or a view of the Executive Government…?'.[85] Relying, in part, on the advice of the Government Law Office, the Government opposed the motion and it was defeated.

4.11 Following a change in Government, the bills were discharged from the Notice Paper on 21 June 1991.

4.12 With the 1994 amendments arising from the Arts, Environment and Territories Legislation Amendment Bill 1993 (Clth) to s 65, the scope of the operation of s 65 of the Self-Government Act was clarified. The amendments were designed to ensure that 'the initiative of the Government in introducing legislation in the Assembly on financial matters [was] no greater or less than that of the Commonwealth Government under s 56 of the Constitution'.[86] The explanatory statement to the amendment bill stated that 'The reference in the present section 65 to the 'object or effect' of a proposed law, and the absence of a reference to 'appropriation' suggests that section 65 covers proposals to increase the Territory's **possible financial liabilities without actually appropriating public moneys. This is not intended [emphasis added]'**.

4.13 Following the amendments, s 65 has since been taken to operate in a narrow way that prevents a private member from proposing to appropriate public funds or amending appropriation proposals to increase the amount appropriated but does not prevent a private member from proposing legislation on the sole grounds that a possible financial impact may arise merely because the proposal seeks to establish or alter a scheme or entity of some kind. In his article on the legislative powers of the Senate in *Commentaries on the Constitution,* Dennis Pearce has this to say about the legislative initiative that is taken to be enjoyed by both executive or non-executive senators in respect of a bills that seek to establish a scheme:

> Most bills providing for the outlay of government money (and those that do not are comparatively few) do not themselves contain a clause appropriating the required funds. This is done in general bills appropriating funds for the ordinary annual services of the government. Accordingly the government is under no disability in introducing a bill for the first time in the Senate where its intention is that the moneys for the operation of the bill will be provided for in other legislation. **The passage of such a bill merely sets up a scheme. Of course, if funds are not subsequently provided, <u>the scheme will be rendered inoperative.</u>**

[84] *Minutes of Proceedings*, No. 69, 15 August 1990, p 283.

[85] Terry Connolly MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 15 August 1990, p 2844.

[86] Explanatory memorandum to the Arts, Environment and Territories Legislation Amendment Bill 1993

> **The same reasoning applies to the introduction into the Senate of non-government sponsored bills. Such a bill cannot provide any necessary revenue for giving effect to its proposals, but provided no clause seeking to do this is included in the bill, the bill can be dealt with in the ordinary way** [emphasis added].[87]

4.14 This view was embodied in the approach adopted by the President of the Senate in relation to questions that had been raised about the constitutionality the Social Security Amendment (Income Support for Regional Students) Bill 2010 which had been originated by a non-executive senator. Having been asked by the Leader of the Government in the Senate to draw to the Senate's attention advice that had been provided by the Attorney-General about the bill's purported non-compliance with s 53 of the Constitution (which requires, *inter alia*, that appropriations may only be initiated in the House of Representatives), the President responded as follows:

> You have sought my assistance in "drawing this matter to the attention of Senators so that steps may be taken to ensure the Bill does not proceed". While I am happy to table your correspondence and the Attorney-General's advice (and this reply) for the information of senators, it is quite inappropriate for you to ask me to take steps to ensure that a bill does not proceed on any basis, let alone on the basis that the House of Representatives has a different view of its constitutionality.
>
> Under the practices of the Senate… the bill introduced by Senator Nash is quite in accordance with the Senate's view of section 53 of the Constitution. As you know, the first paragraph of section 53 provides that "proposed laws appropriating revenue or monies, or imposing taxation, shall not originate in the Senate". The bill in question does not appropriate money. It does not need to do so because any funds required to support the measures in the bill have already been appropriated by the Parliament in the form of a special appropriation of indefinite amount in section 242 of the *Social Security (Administration) Act 1999*. It is therefore a bill which may be introduced in the Senate.[88]

4.15 Whereas in the Commonwealth Parliament both annual appropriations and special appropriations are commonly used as a means by which to appropriate public moneys, the vast majority of appropriation in the Assembly occurs by way of annual appropriation bills. Unlike annual appropriation, 'special' appropriations are *ad hoc* and may be for an amount and duration that is either specified or unspecified. According to House of Representatives Practice, drawing on the High Court's decision in *Pape v Commissioner of Taxation*, a special appropriation bill is distinguished from an ordinary bill in that it:

- contains words which appropriate the Consolidated Revenue Fund to the extent necessary to meet expenditure under the bill; or
- while not in itself containing words of appropriation, would have the effect of increasing, extending the objects or purposes of, or altering the destination of, the amount that may be

[87] Dennis Pearce, 'The Legislative Powers of the Senate', *Commentaries on the Constitution*, Leslie Zines (ed), 1977, pp 123-4.

[88] Clerk's Office, Department of the House of Representatives, *The Law Making Powers of the Houses—Three Aspects of the Financial* Initiative, Attachment 3.

> paid out of the Consolidated Revenue Fund under existing words of appropriation in an Act. The existing words of appropriation may be in a principal Act to be amended by the bill, or may be in another Act entirely.[89]

4.16 Where a special appropriation is continuing in its effect and not limited in its amount, it is a standing appropriation.[90] House of Representatives regards a private member's bill or a bill emanating from the Senate as contravening the principle of the financial initiative of the executive where the proposal has the effect of increasing expenditure under a standing appropriation. The position is summarised as follows:

> In relation to appropriations, under House practice the critical test for a proposal is the impact on expenditure authorised under a standing appropriation or whether the proposal in itself would require new appropriation. In some cases, for example where a private member wished to introduce a bill which would give new duties or responsibilities to an officeholder or an organisation, or allow new grounds or rights of appeal in relation to a matter, although enactment of the bill would have some eventual impact on the nature of the responsible agency's expenditure, if there was no impact on a standing appropriation, House practice would not prevent the member from introducing the bill. However, a bill which sought to establish a new Office or Authority to perform a new function may give rise to appropriation issues.
>
> It is noted that the normal processes of appropriation for departments and agencies is by means of annual Appropriation Acts. Therefore, even if the Parliament passes a private member's bill which gives a department additional responsibilities, although funding appropriated for the department may be expended on the additional responsibilities as a result, the Parliament has, through the Appropriation Act, authorised a specific sum to be spent, and that sum cannot be exceed without further parliamentary approval. The source of funding involved is critical (standing (existing or new appropriation) v. annual dollar limited appropriations).[91]

4.17 As a unicameral legislature, the Assembly does not, of course, have to contend with the additional complexities involved in applying constitutional principles of financial initiative across two legislative chambers. Nor does the Assembly have a large volume of special appropriations.[92]

4.18 Since at least 1994, it has been the Assembly's view that a private member's bill is not regarded as encroaching on the executive's financial initiative so long as no appropriation is sought (whether by

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[89] House of Representatives Practice, p 419.

[90] House of Representatives Practice, p 419.

[91] Clerk's Office, Department of the House of Representatives, *The Law Making Powers of the Houses—Three Aspects of the Financial* Initiative, p 21.

[92] An example of a standing appropriation appears at s 37X of the *Supreme Court Act 1933* which provides that '(1) The remuneration and allowances to which a judge is entitled accrue from day-to-day. (2) The public money of the Territory is appropriated to the extent necessary for payment of judges of remuneration and allowances'. The legal advice received by the Standing Committee on Administration and Procedure from MacPhillamy Cummins and Gibson noted that: 'the only other case that should be regarded as coming within s. 65 is the situation where there happens to be a standing appropriation that provides distinct authorisation for the expenditure proposed in the private member's Bill'.

special, standing or annual appropriation) and, accordingly, the Assembly has a well-established practice of allowing members to introduce private members' bills that would, if enacted, potentially entail (in some cases) considerable expenditure. For instance, non-executive members' bills have variously sought to establish:

- an anti-corruption and integrity commission;
- a cleaning industry long service leave board;
- a statutory authority with responsibility for occupational health and safety matters;
- a statutory authority responsible for development in Civic;
- a parliamentary budget officer; and
- a referendum in relation to euthanasia.[93]

4.19 Importantly, it remains the prerogative of the executive as to whether the requisite appropriation will be sought in relation to a given purpose or scheme that has been provided for under another enactment. In the event that no appropriation is forthcoming, the scheme is, in the words of Pearce, 'rendered inoperative'.

[93] Appendix 2 contains a more detailed list of bills introduced by non-executive members which have sought to establish a program, initiative or entity.

5 STANDING ORDER 201A

5.1 The genesis of standing order 201A can be found in a controversary surrounding an amendment that an independent member of the crossbench sought to move to the Appropriation Bill 1995-1996. On 23 November 1995, Michael Moore MLA, moved an amendment to the bill, which sought to reverse a cut to the education budget proposed by the government. The amendment sought to move funds from the 'Treasurer's advance'[94] to 'government schooling' within the appropriation for the then Department of Education and Training as set out in the relevant schedule of the appropriation bill. It was the first time that the Assembly had contended with such an amendment[95] and it was ruled out of order by the Speaker on the following grounds:

> [the amendment] proposes to increase the moneys appropriated to Division 180 [relating to Government Schooling][96]. The Assembly standing orders do not contain a prohibition on non-Executive members moving amendments that would transfer or alter the destination of moneys to be appropriated. However, they do prohibit non-Executive members moving an amendment to a money proposal, that is, "an enactment, vote or resolution for the appropriation of the public money of the Territory", if that amendment "would increase the amount of public money of the Territory to be appropriated".[97]

5.2 The Speaker's ruling was informed by several legal advices that had been sought and the advice of the Clerk of the Assembly.[98] The advices hinged on the meaning ascribed to the term 'vote' as deployed in standing order 200 and s 65(1) of the Self-Government Act. In legal advice to the Clerk of the Assembly, the Constitutional and Law Reform Branch of the Attorney-General's Department observed that 'votes' in the context of the Commons' financial procedure, are 'units of appropriation' and that in the Australian Senate, a 'vote' is also a unit or line of appropriation in an appropriation bill.[99] In this construction, for the purposes of s 65, the Assembly was to approve 'not simply the enactment being the Appropriation Bill 1995, but each of the 'votes' within that Bill… It is not possible, under s 65, for a non-Executive member to move an amendment to increase the total amount being appropriated in

[94] The Treasurer's Advance is an amount appropriated to the Treasurer to spend throughout the financial year where exigent circumstances arise, which was at the time governed by the *Audit Act 1989* (repealed). Section 18 of the Financial Management is now governed by s 18 of the *Financial Management Act 1996.*

[95] It is worth noting that an amendment moved by Mr Greg Cornwell MLA, a member of the opposition, to the Appropriation Bill 1993-1994 was passed by the Assembly that purported to prevent the executive from using the appropriation to reduce the number of teachers or the number of teaching hours in schools and colleges.

[96] See Appropriation Act 1995-96, p 10.

[97] Debates of the Legislative Assembly for the Australian Capital Territory, 23 November 1995, p 2505.

[98] The advices were incorporated in Hansard (see Appendix 6 of *Debates of the Legislative Assembly for the Australian Capital Territory*, 23 November 1995, p 2574).

[99] See advice of Andrew Barram in Appendix 6 of *Debates of the Legislative Assembly for the Australian Capital Territory*, 23 November 1995, p 2574

the enactment, nor is it possible to increase the amount of any particular appropriation unit'.[100] In advice from the time, the Deputy Law Officer observed that:

> It seems that the only way to transfer money from one vote to another is to amend one vote by decreasing the amount of public money of the Territory being appropriated, and to amend another vote by increasing the amount of public money of the Territory being appropriated. In my view, the former amendment would be allowed but not the latter as there would be an increase in the vote in question and thus a contravention of section 65(2) of the Self-Government At. This view is not inconsistent with the statement in the Explanatory Memorandum to the Self-Government Act which refers to 'transfer' of amounts. The Explanatory Memorandum envisages that certain types of transfers are permitted though these are not specified. I think 'transfer' refers to transfers within a proposal (i.e. vote) so far as that is possible.
>
> Accordingly, in my opinion, section 65(2) would permit members to move amendments to transfer funds within a vote bet not between votes. This would mean that amounts could be transferred between recurrent and capital expenditure within a vote.[101]

5.3 In his ruling, the Speaker stated that:

> … the most ready definition of "vote" in the context of Assembly consideration of the Appropriation Bill is a division as listed in Part II of the Schedule to the Bill. Any amendment to decrease the amount of proposed expenditure in a vote or division would be in order, as it would be to oppose a proposed expenditure. To propose an amendment that would increase the amount of a proposed expenditure in a particular division or vote is out of order, even if the total amount to be appropriated by the Bill would remain the same or be decreased. I therefore rule Mr Moore's amendment No. 1 out of order.[102]

5.4 Under this ruling, which has not since been displaced by more recent practice, any amendment that seeks to increase the amount of money to be appropriated to a particular division within the appropriation bill[103]—irrespective of whether another appropriation unit (e.g. the Treasurer's advance) had been proportionally reduced—contravenes the relevant provisions.

5.5 These events culminated in a motion, moved by then Attorney-General Gary Humphries MLA and supported by both government and opposition members, being passed. The resolution stated that:

> That this Assembly reaffirms the principles of the Westminster system embodied in the "financial initiative of the Crown" and the limits that that initiative places on non-executive

[100] See advice of Andrew Barram in Appendix 6 of *Debates of the Legislative Assembly for the Australian Capital Territory*, 23 November 1995, p 2574

[101] Advice of Len Sorbello, Deputy Law Officer, Attorney-General's Department, in Appendix 6 of *Debates of the Legislative Assembly for the Australian Capital Territory*, 23 November 1995 p 2594.

[102] Greg Cornwell MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 23 November 1995, p 2366

[103] Appropriation bills are no longer organised by divisions as was the practice in 1995. Instead, appropriation bills provide amounts that are to be appropriated to a 'territory entity' for 'net controlled recurrent payments', 'capital injections', and 'payments to be made on behalf of the Territory'. See, for instance, s 6 and schedule 1 of the *Appropriation Act 2018-2019*.

> Members in moving amendments other than those to reduce items of proposed expenditure.[104]

5.6 In speaking to the motion, Mr Humphries stated that:

> It has been the practice in the past that governments from both sides of the house have at various stages attempted to use either of those standing orders or section 65, or both, to eliminate certain proposals before the house, whether by way of substantive amendment or legislation or motion to achieve certain budgetary goals. It is my belief that we owe it to future Assemblies, if not to ourselves, to attempt to clear up the purview of section 65 and standing orders 200 and 201….
>
> [The financial initiative of the Crown]… is clearly a device which historically has prevented executive government from having its decision-making process in respect of budgets and budget appropriations tossed about, distorted, abused - whichever term you wish to use – by other non-Executive members of the parliament.[105]

5.7 He also cited approvingly William Hearn's *Government of England*:

> It is… a fundamental rule of the House of Commons that the House will not entertain any petition or any notice for a grant of money, or which involves the expenditure of any money, unless it be communicated by the Crown. We are so accustomed to the general practice, and the deviations from it have been so inconsiderable, that its importance is scarcely appreciated. Those, however, who have had the experience of the results which followed from its absence, of the scramble among the members of the Legislature to obtain a share of the public money for their respective constituencies, of the "log-rolling", and of the predominance of local interests to the entire neglect of the public interest, have not hesitated to declare that "good government is not attainable while the unrestricted Powers of voting public money and of managing the local expenditure of the community are lodged in the hands of an Assembly". This salutary rule has too often been evaded.[106]

5.8 However, Mr Humphries candidly reflected that the extent to which a member might come to rely on the doctrine of the financial initiative of the executive could be coloured by the member's proximity to the treasury benches:[107]

> I obviously concede that the Government, from the vantage point of government, views the protection offered by this doctrine much more favourably that it did two years ago. I readily concede that a different perspective is thrown on the way in which we approach this matter

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[104] *Minutes of Proceedings*, No. 28, 23 November 1995, pp 207-208.

[105] Debates of the Legislative Assembly for the Australian Capital Territory, 23 November 1995, p 2365.

[106] Gary Humphries MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 23 November 1995, p 2366.

[107]The change in perspective alluded to in Mr Humphries remarks related to the then opposition's support, in 1993, for an amendment, moved by Greg Cornwell MLA, to the Appropriation Bill 1993-94, which stated that: 'The Executive shall not use money appropriated to this, or any other, Act for the purposes of reducing:

(a) the number of persons employed as teachers in schools or colleges in the Territory; or

(b) the number of teaching hours provided overall in those schools and colleges taken as a whole', which was ultimately passed. See *Minutes of Proceedings*, No 85, 25 November 1993, pp 7-8.

> by virtue of our occupation of the treasury bench. It seems to me… that the Assembly stands now in the position of having to decide whether the practice which was arguably first given small rise to back in 1993 should be extended and continued.[108]

5.9 On first glance, the language in the resolution of 23 November 1995 appears as a restatement of the terms of s 65(2) of the Self-Government Act. However, whereas the terms of s 65(2) prohibits only one class of amendment from being moved by a non-executive member (i.e. amendment that increases the amount of public money to be appropriated), standing order 201A goes considerably further by providing that the Assembly regards the sole limitation under s 65(2) as being the *only* permissible class of amendment. This more expansive view of the executive's financial initiative had not been explicitly stated in a formal sense—by way of statutory provision, resolution or Assembly standing order—until that time. As noted in advice provided by the Clerk to a member, its effect was significant:

> It is clear that the intention of the Assembly… [in passing the resolution] was to restrict non-executive member amendments to only those that would reduce items of proposed expenditure contained in the Appropriation Bill. Amendments to increase units of appropriation either directly or by transfer or indeed to set conditions on the objects of expenditure, or period during which expenditure can occur would be expected to be ruled out of order.[109]

5.10 Later, Mr Moore attempted to move an additional amendment to the appropriation bill, namely that 'the Executive shall not use money appropriated by this Act for the purposes of reducing… the number of persons employed as teachers in schools or colleges in the Territory [or] the number of teaching hours provided overall in those schools and colleges taken as a whole'.[110] The amendment was ruled out of order by the Speaker on the basis that it breached the resolution that had earlier been passed (i.e. it was an amendment to an appropriation proposal other than an amendment to reduce an item of proposed expenditure).[111]

5.11 ACT Greens MLA, Ms Kerrie Tucker, then moved a similar amendment to the appropriation bill, viz 'The Executive shall not use money appropriated by this or any other Act for the purposes of reducing the

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[108] Gary Humphries MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 23 November 1995, p 2365.

[109] Clerk's advice to an MLA, 29 May 2001.

[110] This was much the same amendment that had been moved, successfully, by Mr Cornwell the preceding year.

[111] Interestingly, Mr Moore later came as a Minister to repudiate the idea that non-executive members ought to be able to tie the hands of the government of the day on particular issues of policy through legislation restricting the use of public finances to particular ends. In a debate on an amendment bill seeking to amend the *Financial Management Act 1996* to prevent the expenditure of public funds on free school buses without the approval of the Assembly, Mr Moore stated that 'We have… debated on many occasions how we handle the financial prerogative of the crown, because it is fundamental to the separation of powers. The role of the executive is to make decisions about the expenditure of money, and that is something that is appropriately debated in the Assembly and appropriately exposed in the Assembly… on 23 November 1995 we sought to resolve this issue. We sought to remove it from enthusiasm, whether it is over libraries, or free school buses, or the Labor Party seeking to cut 80 teachers and give us bigger class sizes. No matter what the issue is we ought to say, "No, the government will have to answer to the electorate over those issues. It is their role to manage the money." See *Debates of the Legislative Assembly for the Australian Capital Territory*, 20 June 2001, p 2144.

level and quality of public library services, including maintenance and renewal of library stock, number of staff, the time efficient manner in which services are available to the public or reducing total opening hours...'.[112] It too was ruled out of order by the Speaker on the grounds that it was a breach of the resolution that had earlier been passed.

5.12 In speaking on the issues raised by the application of resolution to prevent the amendment, Ms Tucker contended that the resolution was unnecessarily restrictive and not amenable to ready application in a legislature that had been characterised by non-government majorities:

> The Appropriation Bill is the most important aspect of a government's policy agenda.
>
> It outlines the government's spending priorities over the next three years. In a parliament such as ours, where the Government commands only seven votes, it is inappropriate for those spending priorities to be made without close consultation with other members. Some members of this place and members of the media may herald these few remarks by me as an attack on stable government. The Greens believe that stability of the legislature is an important responsibility of all members of this place. However, stability is not the sole responsibility of the crossbenches. The stability of this Government is affected by two related issues: Their performance as a government and the confidence that they hold of the other members of this place…
>
> There have been few, if any, parliaments in the Westminster system that have been blessed with a minority government such as ours. For this reason, little work has been done to create participative processes and systems that ensure that all members have an opportunity to be meaningfully involved. The Greens believe that it is time that this place began to create those processes... It is no longer acceptable that the four Executive members of this place are given carte blanche to do what they will without fear or hindrance.[113]

5.13 The resolution of 23 November 1995 formed the basis of subsequent rulings by the Speaker to disallow certain proposed amendments by non-executive members in relation to appropriation proposals.[114]

5.14 On 6 March 2008, on a recommendation of the Standing Committee on Administration and Procedure, the Assembly's standing orders were amended to establish standing order 201A which provided that amendments moved in accordance with standing order 201 must be in accordance with the resolution agreed to on 23 November 1995. In its report on a review of the standing orders, that committee notes that:

> … [The] resolution was adopted after proposed amendments to the Appropriation Bill had been circulated that, whilst being in accordance with standing order 201, would have allowed non-executive Members to move amendments transferring amounts within the schedule to

[112] *Minutes of Proceedings*, No. 28, 23 November 1995, p 214.

[113] Kerrie Tucker MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 23 November 1995, p 2543.

[114] In 2006, Vicki Dunne MLA sought to insert a new line in the schedule accompanying the appropriation bill in order than 'Nil' funds were to be appropriated to 'Education and Training—closure of government schools'. The amendment was ruled out of order on the grounds that it offended the resolution of 23 November 1995. See *Minutes of Proceedings*, No 73, 24 August 2006, p 802.

> the Appropriation Bill. Since 1995 various Speakers have relied upon this resolution to rule similar amendments out of order even though the resolution was not expressed to be a resolution of continuing effect. Accordingly, and in light of these precedents, it is suggested that this resolution be incorporated as a standing order to reflect the practice of the Assembly over the last 12 years.[115]

5.15 While a resolution of the Assembly is an expression of the Assembly's opinion at a particular point in time, the inclusion in the standing orders of the terms of the resolution of 23 November 1995 gave ongoing procedural effect to the restrictions imposed therein.[116] While it has been tested on occasion, that both opposition and government parties supported the resolution of 23 November 1995 and the adoption of standing order 201A in 2008 would seem to suggest that there has been broad political support for the general proposition that only a reduction in appropriation may be achieved by an amendment proposed by a non-executive member.

TWO NOTABLE PROCEDURAL RESTRICTIONS IMPOSED BY THE HOUSE OF REPRESENTATIVES

5.16 The imposition of restrictions on non-executive members' legislative capabilities, through the parliament's procedural arrangements, is not unprecedented.[117] However, it wasn't until 1963, following a recommendation of the then Standing Orders Committee, that the House of Representatives determined to curtail non-executive members' legislative initiative beyond the terms of s 56 of the Constitution. As outlined by Reid, that committee recommended, and the House ultimately accepted, a prohibition on:

a) non-executive members from amending proposed laws for the appropriation of public monies; and

b) non-executive members initiating or amending proposals relating to taxation.[118]

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[115] Standing Committee on Administration and Procedure Review of the standing orders and other orders of the Assembly—Volume1, Report 2, December 2007, p 54.

[116] Interestingly, the phrase 'standing order' was first used in 1678 and was '… originally intended to add weight to previous (and presumably ineffectual) resolutions against the abuse of certain privileges, but subsequently to clothe with special authority an entirely new rule'. See *Erskine May*, p 5.

[117] Indeed, such has been the dominance of the executive within the House of Commons that on 3 April 1950, the House passed a resolution effectively eliminating the rights of non-executive members to initiate any legislative whatsoever during the course of a sitting period. That resolution provided that, inter alia, '… government business shall have precedence at every sitting for the remainder of this Session, and no Public Bills other than Government Bills shall be introduced'. See House of Commons Hansard, 3 April 1950, Volume 473, Column 903 accessed on 13 August 2019 from https://hansard.parliament.uk/Commons/1950-04-03/debates/1e30099c-ff1f-469a-bb0d-38561ea7d06d/PrivateMembersTime

[118] See G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988 Ten Perspectives*, Melbourne University Press, Melbourne, 1989, p 159.

5.17 Following the changes, standing order 292—the forerunner to the House of Representatives' current standing order 180—was amended to read:

> No proposal for the appropriation of any public moneys shall be made unless the purpose of the appropriation has in the same session been recommended to the House by message of the Governor-General, but a bill, except a bill to grant and apply a sum for the service of a year, which requires the Governor-General's recommendation may be brought in by a Minister and proceeded with before the message is announced. No amendment of such a proposal shall be moved which would increase, or extend the objects and purposes or alter the destination of, the appropriation so recommended unless a further message is received.[119]

5.18 Given that the Governor-General acts on the advice of the government, a non-executive member would not be permitted under this arrangement to offer up amendments of the kind mentioned.[120] Reid and Forrest, in *Australia's Commonwealth Parliament 1901-1988 Ten Perspectives*, note the extended operation arising from the change:

> …s.56 of the Constitution did not prohibit members from moving amendments to 'proposed laws appropriating revenue or moneys', but merely made it mandatory that 'A vote resolution or proposed law' with such intent '*shall not be passed* unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General'. In effect, the report of the Standing Orders committee asserted that the term 'shall not be passed' in s.56 really meant 'shall not be introduced.'[121]

5.19 The House also agreed to amend standing order 293, the forerunner to today's standing order 179, to read:

> A proposal for the imposition, or for the increase of alleviation, of a tax or duty, or for the alteration of the incidence of such a charge, shall not be made except by a Minister. No Member, other than a Minister, may move an amendment, to increase, or extend the incidence of, the charge defined in that proposal unless the charge so increased or the incidence of the charge so extended shall not exceed that already existing by virtue of any Act of Parliament.[122]

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[119] See G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988 Ten Perspectives*, Melbourne University Press, Melbourne, 1989, p 159.

[120] Previously, it would have been permissible for an amendment to have been moved by a non-executive member to a government money proposal and where such an amendment passed, it would have been open to the government to then advise the Governor-General to promulgate a message recommending to the House an appropriation of funds for the purpose of the amendment.

[121] See G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988 Ten Perspectives*, Melbourne University Press, Melbourne, 1989, p 159.

[122] Reid and Forrest have noted that '… s.56 of the Constitution did not prohibit members from moving amendments to "proposed laws appropriating revenue or moneys', but merely made it mandatory that 'A vote resolution or proposed law' with such intent 'shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General'. In effect, the report of the Standing Orders Committee asserted that the term 'shall not be passed' in s.56 really meant 'shall not be introduced'.

5.20 In noting the readiness of the House to acquit itself in a 'spirit of self-denial' by diminishing its own legislative competence, Reid and Forrest report that:

> Both of these proposals were accepted by the House with only restrained questioning. One Opposition member, G.M. Bryant (ALP, Wills, Vic), saw a constant theme running through the proposals, namely 'the absolute domination of the Ministry and the Government' but he failed to take issue with the initial assurance of the Leader of the House, H. Holt, (Lib, Higgins, Vic) that the 'fundamental consideration' of the proposed standing orders was that the rights of members 'should not be reduced in any way and that wherever possible they should be broadened'.[123]

5.21 Further, Reid and Forrest observe that with the changes to the standing orders:

> … the initiation of spending and taxing legislation was vested by parliamentary rules in the Executive Government of the day. Although the Constitution provided a substantial legislative freedom for members in these areas, they were persuaded in 1963 to cede important parts of it to the Executive Government. The only freedom they retained for themselves was the freedom to move amendments to decrease the Executive Government's initiatives as expressed in its taxing and spending bills. In practice, since then, the constraints upon participation have encouraged members to surrender the whole area of financial legislation to the Executive Government. What was a clear freedom for members of the House under the Constitution was surrendered in part by standing orders (made by majority decisions), and parliamentary lethargy has surrendered what remained.[124]

5.22 That the House of Representatives chose to restrict its legislative competence, and that of its non-executive members, is relevant in the Assembly's consideration of its own procedural arrangements around financial initiative in so much as there remains, through Assembly standing order 275, a vestigial connection to the practices of the House of Representatives.[125] This link to House of Representative practice does not imply that the Assembly ought to follow in the steps of the House of Representatives. Indeed, as a predominantly minoritarian parliamentary institution, the Assembly has deviated quite considerably from the House of Representatives in its practice and procedure across a range of fronts and it is open to the Assembly to forge a path of its own within the constraints imposed by s 65.

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[123] See G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988 Ten Perspectives*, Melbourne University Press, Melbourne, 1989, p 159.

[124] See G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988 Ten Perspectives*, Melbourne University Press, Melbourne, 1989, p 160.

[125] It may be of interest that Canadian House of Commons standing order 1 states that 'In all cases not provided for hereinafter, or by other Order of the House, procedural questions shall be decided by the Speaker or Chair of Committees of the Whole, whose decisions shall be based on the usages, forms, customs and precedents of the House of Commons of Canada and on parliamentary tradition in Canada **and other jurisdictions, so far as they may be applicable to the House'** [emphasis added].

6 REVENUE AND TAXATION

6.1 As noted, there is no prohibition in the Self-Government Act on non-executive member's initiating or amending bills relating to taxation and revenue.[126] Nor has the Assembly itself yet developed an explicit procedural basis to restrict or to protect non-executive members' legislative initiative in respect of these proposals (i.e. in a manner similar to the restrictions placed on members by way of House of Representatives standing order 179 mentioned above). As noted in the *Companion to the Standing Orders*, '… unlike the House of Representatives, the Assembly has not further enhanced the hand of the executive over and above the constitutional provisions by imposing restrictions on non-executive members initiating proposals to impose taxes'.[127]

6.2 The ACT Government's budget papers show a total budgeted revenue of $5.87b for 2019-2020.[128] The total is composed from the following sources:

- Own-source (ACT) Taxation revenue—$2.1b or 35 percent of the total;
- GST (collected and distributed by the Commonwealth)— $1.4b or 24 percent of the total;
- Commonwealth grants—$995m or 17 percent of the total;
- Other revenue such as rents and fees—$846m or 14 percent of the total;
- Sales of goods and services—$568m or 10 percent of the total.[129]

6.3 The budget papers show own-source, or ACT-imposed, taxation revenue[130] as coming from a variety of different duties, general taxes, charges, levies, and fees, such as:

- payroll tax;
- commercial and general rates;
- land tax;
- license fees;
- conveyances;
- vehicle registrations and transfers;
- gambling taxes;
- the ambulance levy;
- the utilities tax; and

[126] There are, however, constitutional restraints on the ACT from the imposition of certain kinds of taxation. See, for instance, *Capital Duplicators Pty Ltd v Australian Capital Territory* [1993] HCA 67; 178 CLR 561.

[127] Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory, p 225.

[128] See Budget Paper 3: Budget Outlook, Budget 2019-2020, p 226, accessed on 14 August 2019 from https://apps.treasury.act.gov.au/__data/assets/pdf_file/0004/1369831/Budget-Paper-3-Budget-Outlook-2019-20.pdf

[129] See Budget Paper 2: Budget in Brief, Budget 2019-2020,accessed on 14 August 2019 from https://apps.treasury.act.gov.au/budget/budget-2019-20/budget-papers/budget-in-brief/where-our-money-comes-from

[130] For 2019-2020 own-source taxation revenue breaks down as follows: General duties—$298m; Payroll tax—$583m; Land tax, vehicle registration and other—$571m; and General rates—$599m.

- the lease variation charge.[131]

6.4 Each of these own source revenue measures have been effected variously by way of:

- statutory enactment (for example, *Taxation Administration Act 1999*, the *Rates Act 2004*, Taxation (*Government Business Enterprises Act 2003)*; and/or
- subordinate law such as disallowable instruments (for example, Taxation Administration (Amounts Payable—Ambulance Levy) Determination 2018; the Taxation Administration (Amounts and Rates—Payroll Tax) Determination 2016 (No 1); Rates (City Centre Marketing and Improvements Levy—Collection Areas) Determination 2014 (No 1).

6.5 As noted, there is no procedural or statutory restriction for a non-executive member to initiate or amend any bill for the purposes of taxation or any other revenue measure—the exception being where a clause in a proposal sought to hypothecate an amount raised through a revenue measure towards a particular, specified purpose, rather than to general revenue (thereby purporting to effect an appropriation). However, in the case of subordinate laws which impose a particular charge, the case is slightly different. The *Companion to the Standing Orders* points out that:

> Prior to the commencement of the Legislation Act, the *Subordinate Laws Act 1989* made provision for the disallowance by the Assembly of a subordinate law (or disallowable instrument) or 'a provision of that law'. The reference to the disallowance of a provision of a subordinate law was omitted from the new provisions that came into effect in September 2001, though, at page 21, the explanatory memorandum to the Legislation (Access and Operations) Bill 2000 stated that the new provision 'would restate' the relevant subsections of the *Subordinate Laws Act 1989*. The omission is potentially one of significance. The reason is that, given the Assembly's inability to amend subordinate laws where the amendment would have the effect of waiving or changing any fee, charge, penalty or other amount payable to the Territory and the exclusion of determinations of fees or charges by a Minister from the amendment provisions (Legislation Act, subsection 68(1)), a Member's ability to target a discrete portion of such a subordinate law in a motion of disallowance has been lost. The provision enabling the Assembly to amend subordinate laws was originally proposed in the Subordinate Laws (Amendment) Bill 1993. The restricting provisions were inserted in the bill during Assembly consideration. See Assembly Debates (23.2.1994) 149-80; (20.4.1994) 1025-6. Though not directly relevant, note that when, in April 1994, the Assembly considered the original amendment to the Subordinate Laws Act to enable it to amend subordinate laws, the proposal (as amended) specifically excluded amendments to subordinate laws that would have the effect of waiving or changing any fee, charge, penalty or other amount payable to the Territory.[132]

6.6 Whether the result of an administrative oversight or a conscious decision, the fact that the relevant provisions of the Subordinate Laws Act were not later reinstated in the Legislation Act has had the

[131] See Budget Paper 3: Budget Outlook, Budget 2019-2020, p 226, accessed on 14 August 2019 from https://apps.treasury.act.gov.au/__data/assets/pdf_file/0004/1369831/Budget-Paper-3-Budget-Outlook-2019-20.pdf

[132] Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory, footnote 185, p 225.

effect of diminishing the Assembly's legislative powers in relation to subordinate legislation. This is a matter that the committee may wish to consider in its report to the Assembly.

OPTIONS

6.7 Whether the initiation or amendment of spending and taxation legislation ought only to be the province of the executive will hinge on one's views about responsible government and the proper balance of power between the executive and legislative branches in the parliamentary system.

6.8 It is perhaps not surprising that, in parliamentary chambers where government majorities are the norm, great emphasis has been placed on the rights of the executive to initiate financial legislation and that such rights are essential to the Westminster form of responsible government.

6.9 However, in the absence of statutory provision, it is open to the Assembly to state in more categorical terms its own view as to whether non-executive members ought to be able to initiate or to amend revenue proposals.

6.10 There would appear to be three choices:

1. state as a positive right in the standing orders that revenue and taxation initiatives and amendments may be moved by non-executive members with or without certain constraints;
2. state an explicit prohibition in the standing orders, along the lines of House of Representatives standing order 179, in order that non-executive members are prevented from initiating or amending revenue and taxation proposals; or
3. remain silent on the rights of, or prohibitions on, non-executive members to initiate or amend revenue or taxation proposals.

6.11 There are potential impacts associated with each of these choices.

6.12 A right, incorporated in the standing orders, to initiate or amend taxation or revenue proposals could affect the operation responsible government as it is commonly understood. As an example, a private members' bill or amendment successfully passed in the Assembly to substantially reduce a tax would constrain the extent to which a government is able to execute spending in line with its stated policy program. A government left short on the revenue side would then be faced with the prospect of: 1) reducing expenditure; 2) selling assets; or 3) borrowing funds to cover any shortfall.

6.13 In such circumstances, the following questions would arise:

- What responsibility for the reduced public expenditure on services, increased public debt or the sale of public assets could be rightly attributed to the government?
- From what position of political authority might non-executive members of the Assembly be able to proceed in questioning the government's financial management where non-executive members are themselves architects of the very proposals that have contributed to the state of the Territory's financial position?

- To whom might electors attribute responsibility for the delivery of government services when the legislature, rather than the executive, has played such a significant part in determining the financial parameters that underwrite them?

6.14 Further to this, it is arguable that an enhancement of the legislative rights of non-executive members in this way would amount to a breach of the separation of powers doctrine with the legislature encroaching on a role that has been taken, in the Westminster tradition at least, to reside with the executive alone. While it would be open to the government to treat the passage of such a bill or amendment to a bill as a vote of no-confidence and to resign, there is an argument that such a convention, if adopted, would introduce instability and uncertainty in government.

6.15 Conversely, it is arguable that an explicit expansion of non-executive members' legislative initiative could operate in such a way as to redistribute the balance of power between the executive and legislative branches to facilitate additional democratic participation of elected representatives in the finances of the Territory. Under a more permissive arrangement, non-executive members' proposals on revenue related matters would either stand or fall according to the democratic majority in the Assembly, rather than on the basis of a procedural restriction. As noted above, where a non-executive members' proposal gained majority support, it would then be a matter for the government to assess whether it could accommodate the proposal within its broader economic and public policy framework, or whether it could not.

6.16 Pursuing the third path mentioned above—remaining silent—would continue the uncertainty as to the ambit of members' legislative initiative and the limits of the executive's financial initiative. This could lead to *ad hoc* application of relevant principles and place an onus on the Speaker to interpret the Assembly's practice in this area without sufficient guidance from the Assembly itself.

7 JURISDICTION

7.1 During the most recent controversy surrounding s 65 of the Self-Government Act, questions about jurisdiction have arisen. Paragraph 2(c) of the resolution referring relevant matters to the committee poses the question: 'who is responsible or has jurisdiction to rule on what bills or amendments are compatible with the *Australian Capital Territory (Self-Government) Act 1988*'?[133] In the course of debating the motion to suspend so much of standing orders as would have prevented Mr Parton from moving his amendment to the Betting Operations Tax Bill 2018, Mr Coe MLA, the Leader of the Opposition had this to say:

> My particular concern is: under what power are decisions being made here? Of course the standing orders are well and truly in our domain as a legislature but we are not the arbiter of the self-government act. It is up to the commonwealth, either through the parliament or through the courts, to actually be the definitive interpreter of the self-government act. This is so for everything. At any point in time somebody in the commonwealth could challenge one of our laws to see whether it is inconsistent or not.[134]

7.2 While there is no question that it is the exclusive jurisdiction of the Assembly to determine and apply its standing orders, whether it is the courts or the Assembly itself that are the proper source of authority for determining whether or not a bill or an amendment to a bill is in accordance with s 65 of the Self-Government Act raises several important considerations.

7.3 In a constitutional system such as the ACT's in which the legislative and judicial powers inhere in separate arms of government, the judicature has the function of interpreting the general law, including statute law. However, the courts have been reluctant to involve themselves in settling disputes about proposed laws such as bills or amendments to bills given such proposals are, by their very nature, 'proceedings in parliament', which are immune from impeachment or questioning. Section 16 of the *Parliamentary Privileges Act 1987* (Clth)[135] affirms this immunity which arises from Article 9 of the Bill of Rights 1689.[136] The Article 9 immunity forms part of a broader doctrine known as exclusive cognisance. Exclusive Cognisance is concisely described in the United Kingdom Parliament's Joint Committee on Parliamentary Privileges report as follows:

> Parliament enjoys sole jurisdiction—normally described by the archaic term "exclusive cognisance"—over all matters subject to parliamentary privilege. As Sir William Blackstone famously noted in his *Commentaries on the Laws of England*, the maxim underlying the law and custom of Parliament is that "whatever matter arises concerning either house of

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[133] *Minutes of Proceedings*, No 73, 20 September 2018, p 1031.

[134] Alistair Coe MLA, Debates of the Legislative Assembly for the Australian Capital Territory, 18 September 2018, p 3721.

[135] The Parliamentary Privileges Act applies to the Assembly, its committees and its members by reason of s 24 of the Self-Government Act.

[136] Article 9 of the Bills of Rights 1689 famously stated that '… freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. , which applies to the Assembly, its committees and its members,

> parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere".[137]

7.4 The parliament's exclusive cognisance in dealing with the lawfulness of its proceedings is taken to operate even where the source of a particular procedural requirement is in statute. *Esrkine May* notes that:

> Closely related to the claim to freedom of speech in and underlying the Bill of Rights is the privilege of both Houses to the exclusive cognizance of their own proceedings. Both Houses retain the right to be sole judge of the lawfulness of their own proceedings, and to settle—or depart from—their own codes of procedure. This is equally the case where the House in question is dealing with a matter which is finally decided by its sole authority, such as an order or resolution, or where (like a bill) it is the joint concern of both Houses. **The principle holds good even where the procedure of a House or the rights of its Members or officers to take part in its proceedings depends on statute [emphasis added].**[138]

7.5 While there is no specific caselaw regarding s 65 of the Self-Government Act, ss 53-54 of the Australian Constitution are useful analogues given that they deal with proposed laws, rather than enactments. Neither section is regarded by the High Court as being amendable to judicial determination. Sir Samuel Griffith, the first Chief Justice of the High Court of Australia, outlined the basis of their non-justiciability:

> Secs. 53 and 54 deal with "proposed laws" – that is, Bills or projects of law still under consideration and not assented to – and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by these sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law.[139]

7.6 In a similar vein, in *Western Australia v The Commonwealth,* the Court said that s 53 is largely a 'procedural provision governing the intra-mural activities of the Parliament. The traditional view is that this Court does not interfere in those activities'.[140]

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[137] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege,* Report of Session 2013-2014, Order Printed by the House of Lords and the House of Commons on 18 June 2013, p 7.

[138] Sir Malcolm Jack et al (eds), Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament, 24th edition, LexisNexis, 2011, p. 227.

[139] *Osborne v Commonwealth* (1911) 12 CLR 321 at 336 (Griffith CJ). It is also worth noting, as a more general matter, that the High Court is unable to determine the validity of a bill prior to enactment. Gabrielle Appleby and Adam Webster observe that: 'The original jurisdiction of the High Court, as set out in ss 75 and 76 [of the Constitution], is limited to 'matters'. In *Re Judiciary and Navigation Acts*, a majority of the High Court held that for an action before the Court to constitute 'a matter'—and therefore be within the Court's jurisdiction—there must be 'some immediate right, duty or liability to be established by the determination of the Court'. The decision prevents the High Court from considering legal questions in the abstract and before parliament has passed the legislation in question'. See Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation', *Melbourne University Law Review*, Vol 37:255, 2013, p 273.

[140] *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 140. Further at 140: 'That view was stated by Mason CJ, Deane, Toohey and Gaudron JJ in *Northern Suburbs General Cemetery Reserve Trust v. The Commonwealth* (322 (1993) 176 CLR 555 at 578.) in reference to s.54 of the Constitution:

7.7 *Odgers* is also clear on this point:

> Sections 53 and 54 refer to proposed laws, and do not impose any prohibitions on the contents of laws resulting from the enactment of those proposed laws. Nor do they impose any remedies against the two Houses for any breach of the conditions relating to dealings with proposed laws set out in the sections. It is therefore generally agreed that these sections are non-justiciable, that is, the High Court cannot enforce compliance with the sections in relation to either the proceedings followed by the Houses in dealing with bills, or the contents of bills, and in no case has the High Court done so.[141]

7.8 While there is no judicial authority on the precise operation of s 65, given its terms impose requirements in relation to *proposed* laws, there is every likelihood that the courts would regard questions arising in relation to its provisions as being non-justiciable and matters to be enforced by the Assembly. A decision, for instance, by the Speaker, pursuant to either s 65 or related standing orders, would unlikely be a matter giving rise to a justiciable controversy and any enactment passed against the backdrop of such a decision would likely remain a valid law of the ACT.[142]

7.9 However, where a constitutional or statutory provision is taken to operate in such a way as to exclude consideration by the courts, the role of the parliament in interpreting and applying the relevant provisions in a responsible and cautious manner becomes essential. Amid a debate over s 53 in the House of Representatives, advice was tendered by the Clerk to the Speaker that:

> …the House should not rely on the assumption that particular constitutional provisions are not justiciable to act in a way that would be regarded as contrary to constitutional provisions of principles. The possible absence of justiciability places, in our view, a greater obligation on the legislature to observe constitutional requirements.[143]

7.10 The prospect that a particular provision of the Self-Government Act may be non-justiciable is not, therefore, a blank cheque for the legislature to impose a view as to its operation that is plainly at odds with the underlying text. Instead, there is an obligation for the Assembly and its members to proceed from a conservative vantage, weighing the underlying principles and assessing the consequences of any deviation from accepted practice. In commenting on the House of Representatives Standing Committee on Legal and Constitutional Affairs report in which the question of the parliament's role in

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"a failure to comply with the dictates of a procedural provision, such as s.54, dealing with a 'bill' or a 'proposed law' is not contemporaneously justiciable and does not give rise to invalidity of the resulting Act when it has been passed by the two Houses of the Parliament and has received the royal assent". The traditional view accords both with the text of s.53, which speaks of "proposed laws" rather than "laws" (323 *Osborne v. The Commonwealth (1911)* 12 CLR 321 at 336, 352, 355.)and with the intention manifested in the Convention Debates (324 Official Report of the National Australasian Convention Debates, (Adelaide) 13 April 1897 at 472-473.)'.

[141] Evans H, *Odgers' Australian Senate Practice*, 14th Edition, 2016, pp 262-3.

[142] This is the view of the ACT Solicitor-General in initial advice provided to the Clerk, 6 August 2019.

[143] Letter from I C Harris to the Speaker, 22 September 2008 cited in Gabrielle Appleby and Adam Webster 'Parliament's Role in Constitutional Interpretation', Melbourne University Law Review, Vol 37:255, 2013, p 270.

confronting and determining non-justiciable constitutional questions (in particular s 53 of the Constitution) is discussed, Gabrielle Appleby and Adam Webster observe that:

> The Committee's view was that Parliament was not 'at-large' in this situation. But did this mean Parliament had to 'embark on the same kind of exercise as the High Court would undertake in order to ascertain the legal meaning of section 53', or was there more flexibility? The Committee's ultimate view was that Parliament must:
>
> > 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 … 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.
>
> The Committee identified these as the same criteria as the High Court would consider if it were to approach the construction of s 53. However, the Committee also noted that in some cases Parliament could take into account other considerations, which the Court may not, such as expanding the restrictions in s 53 to circumstances not necessarily restricted by the section, which, in the opinion of Parliament, fall within the general spirit of the provision.[144]

7.11 As noted above, the extrinsic insights offered up in the Explanatory Memorandum to the Arts, Environment and Territories Legislation Amendment Bill 1993, by which the current provisions of s 65 of the Self-Government Act came to pass, draw a direct line to the equivalent provision in the Australian Constitution, noting that 'the initiative of the Government in introducing legislation in the Assembly on financial matters [was] no greater or less than that of the Commonwealth Government under s 56 of the Constitution'. Further, it stated 'The reference in the present section 65 to the 'object or effect' of a proposed law, and the absence of a reference to 'appropriation' suggests that section 65 covers proposals to increase the Territory's possible financial liabilities without actually appropriating public moneys. This is not intended'.[145] Given this, and the drafting history which attended the development of s 56 of the Constitution, there is a case for MLAs to regard s 65 in much the same terms as s 56. That is, that the provisions leave open the possibility of the financial initiative being confined to appropriation and that revenue proposals are still within the legislative competence of non-executive members to initiate and amend.

7.12 Whether or not a given amendment or bill is consistent with either the standing orders or s 65 is, in the first instance at least, a matter for the Speaker of the Assembly to determine. Both the Commons and the House of Representatives have recognised the responsibility of the Speaker to ensure not only that the proceedings of the House are conducted in accordance with the standing orders but that proceedings are consistent with relevant constitutional requirements, including in relation to financial initiative. In the case of the House of Commons, *Erskine May* states that:

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[144] Gabrielle Appleby and Adam Webster 'Parliament's Role in Constitutional Interpretation', Melbourne University Law Review, Vol 37:255, 2013, p 271-272.

[145] Explanatory memorandum to the Arts, Environment and Territories Legislation Amendment Bill 1993

> …the rules of financial procedure, whether based on practice or upon standing orders, are strictly observed by the House of Commons. In discharging its duty to disallow any proceedings which would infringe the rules of financial procedure, the Chair relies in the last resort upon its power to propose the necessary questions.
>
> …if any such motion if offered to be moved for which the Queen's recommendation has not been signified, it is the duty of the Chair to announce that no question can be proposed on the motion.[146]

7.13 Invoking the presiding officer's obligation to apply constitutional requirements throughout parliamentary proceedings, during a 2008 debate on bills relating to the Minerals Resource Rent Tax rule in the House of Representatives, the then Speaker ruled that a motion to suspend standing order 179, so as to enable a private member to amend the bill in such a way as to extend the scope of the tax, was out of order. The ruling was predicated on the view that the Speaker must seek to guard against any action which was 'contrary to a constitutional provision' or to 'a principle reflected in the Constitution'.[147]

7.14 However, the Speaker's role in interpreting the manner in which a particular constitutional or statutory provision operates is made more difficult where: 1) there are conflicting views within the Assembly about the scope and operation of the provisions in question; and 2) there is no specific procedural guidance offered up by way of the standing orders that have been agreed to by the Assembly.

7.15 Given this, there is a strong argument for greater clarity in the relevant provisions of the Assembly's standing orders on questions of financial initiative, particularly in relation to revenue proposals.

[146] Erksine May, p 856.

[147] Clerk's Office, Department of the House of Representatives, *The Law Making Powers of the Houses—Three Aspects of the Financial* Initiative, p 23. Whether an amendment to extend the scope of a tax was 'contrary to a constitutional provision' or 'a principle reflected in the Constitution' or was merely offensive to standing order 179 is arguable (see above discussion on standing order 179).

8 CONCLUSION

8.1 While questions about the limits that apply in respect of non-executive members' legislative initiative may be surmised against the backdrop of relevant statutory provisions and the Assembly's existing procedural arrangements, 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.

8.2 Such questions may be answered differently depending the answerer's conception of the principle of responsible government within the parliamentary system and their views as to how the executive and legislative components of that system should be arranged. However, the interests of the long-term good governance of the Territory would best be served were a durable consensus to emerge across the political spectrum; one which seeks to balance the tension between the imperatives of responsible government with the inherent legislative function, collectively enjoyed by elected parliamentarians, to craft and amend laws.

APPENDIX 1—ORIGINS OF HOUSE OF COMMONS STANDING ORDER 48

FINANCIAL INITIATIVE OF THE CROWN—EVOLUTION OF THE RULE (1706-1866)

Standing order 48 of the United Kingdom House of Commons currently provides:

> This House will receive no petition for any sum relating to public service or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund or the National Loans Fund or out of money to be provided by Parliament, or for releasing or compounding any sum of money owing to the Crown, unless recommended from the Crown.

The rule, which evolved over centuries, preserves for ministers a virtual monopoly of the parliamentary initiative in proposing increases in public expenditure or in taxation. By way of background, in the UK House of Commons:

- "Bills" evolved from "petitions";[148]
- the financial procedures were regulated to a certain extent by standing orders but to a greater extent by unformulated ancient usage or practice;
- the initiation of financial proposals was and is by motion—not the introduction of a Bill;
- financial practice had developed its main features prior to the institution of cabinet government—at a time when national revenue was still in literal fact the royal revenue and the King was only partially dependant on parliamentary grants, when there was yet no Consolidated Fund, and the financial function of the Commons was not to grant a specified sum of money but to grant the right to levy a tax;[149]and
- the practice of appropriation can only be said to have begun in 1668 and did not become regular until after the Revolution of 1688 (the practice of appropriation having begun as the appropriation of a tax and only gradually attained its present form of appropriation of supply).[150]

1706

Reid sees the rule (now standing order 48 of the United Kingdom House of Commons) '…as basically as old as the House of commons itself. The Crown has always demanded finance of its Parliament, and the Commons, since winning their predominance in financial issues, have granted only in response to that demand.'[151] He comments that, at the time of the 1706 resolution (i.e. 'That this House will receive no Petition for any sum of

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[148] In many jurisdictions private bills are still accompanied by a petition. See *Companion to the Standing Orders,* p. 192.

[149] *Erskine May*, 17th ed p.715.

[150] *Erskine May*, 17th ed, p.717

[151] Gordon Reid, "The Politics of Financial Control", Hutchison University Library, 1966, p.35.

money relating to public Service, but what is recommended from the Crown') certain of the taxes granted to the Crown provided more revenue than the Commons had allocated for expenditure.[152] The Crown's use of the surplus was prohibited by the appropriation provisions attached to the grants. There were unspent balances, and, 'Lacking any executive responsibility, the Commons could find no use of their own for this money except to apply it to the satisfaction to the claims of individuals. Petitions for pecuniary relief multiplied enormously, and the House was driven to the adoption of the standing order, which, in its original form…applied only to petitions.'[153]

1713

In June 1713 this resolution was perpetuated in the form of a standing order. It thus declared a permanent prohibition in the house on private member financial initiative arising per medium of petitions – extending a practice that was evolved as a defence against the extravagance of the Monarch to become also a defence against the extravagance of the House.[154]

Reid quotes two famous Clerks (Hatsell and May) as giving the rule a substantially different interpretation from that we know today.[155] Its modern and restrictive interpretation coming with democracy. The widening bases of representation in the House brought not only new members with new values but also provoked changes in procedure that narrowed the legislative-financial freedom that elected members had hitherto claimed as theirs. [156]

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[152] There were surplus funds at the beginning of the 18th Century. As May (17th ed at p. 720-1) states, the existence of such sums was a new phenomenon, due primarily to the [then] recent establishment of the practice of appropriation. In the course of the war against France the Commons had taken the steps of voting specific sums for the military and naval services instead of the total produce of specified taxes and when the taxes proved more than sufficient to cover these sums, as the officers of the Exchequer were restrained under penalties from issuing the surplus to the Crown, any such surplus remained apparently at the disposal of Parliament.

[153] *Erskine May*, 17th edition, p.721 and Reid, p. 36.

[154] Gordon Reid, "The Politics of Financial Control", Hutchison University Library, 1966, p.37.

[155] In 1781, Hatsell recorded that the Commons' grant of finance meant much more than Commons' 'assent'. It was widely claimed that the representatives were free to determine the ultimate grant as they saw fit and in writing in *1841 Erskine May* asserted that 'On the opening of Parliament the King directs estimates of the sums required for the various departments of the public service to be laid before the House, but the amount of these may be varied by the Commons at pleasure.' Reid's view being that May's qualification was simply that 'grants of money for **objects** not included in the estimates cannot be made without the King's recommendation being signified" [emphasis added]. Through the mid-19th century there was some confusion. At times members expressed surprise at the restrictions placed on their initiating or amending taxation proposals, yet in 1851 Speaker Shaw-Lefevre ruled that a member proposing an increase in taxation did not need a recommendation of the Crown. In addition, Reid comments that May's assertion that 'The Crown has no concern in the nature and distribution of Taxes' remained in his *Parliamentary practice* until 1893 when, after his death, it was omitted without comment from the tenth edition.

[156] Gordon Reid, "The Politics of Financial Control", Hutchison University Library, 1966, p 38.

1852

In the final days of Lord Derby's minority government (Mr Disraeli was Chancellor of the Exchequer) when their was a fear of social revolution in the minds of British aristocrats[157] and the Government was on tenterhooks lest a back-bencher should embarrass it with a motion to initiate new tariff duties, following a report of a Sessional and Standing Orders Revision Committee, the House, without recorded debate, "replaced" the 1713 Order with one which read

That this House will receive no Petition for any Sum of Money relating to public Service, **or proceed upon any Motion for granting any Money** but what is recommended from the Crown.

As Reid commented, the unqualified extension of the standing order to include 'any motion…' had, of course, profound parliamentary implications. And undoubtedly the modern significance of the rule dates not, as is often claimed, from the time of Queen Anne, but from that amendment.[158]

1866

Members found simple means to evade the restrictions of the 1852 amendment. They would add a qualification to any Bill they wished to introduce or any motion they wished to move, if it sought to increase expenditure, to the effect that the charge involved would be met 'out of monies to be provided by Parliament'. They would hold, not without success, that the limitations of the standing order of 1713, as amended, did not apply immediately, but only later, when the House ultimately came to provide the money (when the relevant estimate was introduced). Then, at the later stage, if the charge was objected to, members would urge in reply 'that the faith and credit of the country had been pledged to the outlay.[159]

It was to this loophole that a Mr Ayrton, a backbench supporter of the then Chancellor of the Exchequer, Mr Gladstone, moved for a further change in 1866 it was also a time after the House had endured several weeks of confusion over financial amendments relating to compensation provisions for farmers in the Cattle diseases Protection Bill.

> That this House will receive no Petition for any Sum of Money relating to public Service, or proceed upon any Motion for ~~granting any Money but what is~~ **a grant or charge upon Public Revenue, whether payable out of the Consolidated Fund or out of monies to be provided by the Parliament, unless** recommended from the Crown.

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[157] Gordon Reid, "The Politics of Financial Control", Hutchison University Library, 1966, p 9.

[158] He also adds that, within a week of the 1852 amendment, Derby went to the electorate with a policy claiming that 'more important than the revision of the tariff laws' was 'the preservation of British institutions against the rising tide of democracy'.

[159] Gordon Reid, "The Politics of Financial Control", Hutchison University Library, 1966, p 40.

A NOTE ON FINANCIAL RESOLUTIONS

It is observed in *Erskine May* (17th Edn) that in the early 17th Century it became the practice in the House of Commons to:

> …use Committees of the whole House for the preliminary consideration of demands for supply, and to draft bills granting these supplies on the basis of resolutions reported from these committees. In 1667 this practice was turned into a rule of the House by a resolution which laid down "that if any motion be made in the House for any public aid or charge upon the people, the consideration and debate thereon ought not presently to be entered upon but adjourned to such further day as the House shall think fit to appoint; and then it ought to be referred to the Committee of the whole House and their opinion to be reported thereupon, before any resolution or vote of the House do pass therein". This resolution, amended so as to bring it into conformity with modern practice, was made a standing order (now No .87) in 1886. Before this resolution was adopted the Committee of Supply and the Committee of Ways and Means had become distinguished from other committees of the whole House, and had acquired separate identity and continuity of existence, as bodies to which any proposals dealing with matters within their order of reference were properly referred. With the establishment of the Consolidated Fund and the principle of appropriation, which resulted in dividing the response of the Commons to the royal demand for supply into two functions—the voting of estimates and the granting of taxes—the Committee of Supply was restricted to voting the ordinary expenditure of the year, and the Committee of Ways and Means to providing the revenue to cover that expenditure'.[160]

[160] Sir Barnett Cocks (Ed.) Erskine *May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Seventeenth edition, Butterworths, London, 1964, p 723.

APPENDIX 2—NON-EXECUTIVE BILLS WITH FINANCIAL IMPACTS ARISING FROM THE PROPOSED ESTABLISHMENT OF AN INITIATIVE, PROGRAM OR ENTITY

Name of Bill	**Purpose of the bill**	**Status**
Workers' Compensation (amendment) Bill 1995 (Mr Berry)	Sought to amend the *Workers' Compensation Act 1951* by inserting new sections to provide for a Workers' Compensation and Occupational Rehabilitation Council	Discharged
Euthanasia Referendum Bill 1997 (Mr Moore)	Sought to enact 'enabling legislation' to allow the conduct of a referendum on specified questions relating to euthanasia.	Negatived
Long Service Leave (Cleaning, Building and Property Services) Bill 1999 (Mr Berry)	Sought to: • establish the Cleaning Industry Long Service Leave Board as a body corporate with a common seal; and • create the positions of Long Service Leave Registrar and Deputy Long Service Leave registrar. They are to be public servants with functions identified by this Bill or the board. An office for each to carry out their duties is to be created in the government service by the chief executive	Amended
Occupational Health and Safety (Amendment) Bill (No. 2) 1999 (Mr Berry)	Sough to establish a statutory authority with responsibility for occupational health and safety matters.	Amended
Building and Construction Industry Training Levy Bill 1999 (Mr Berry)	This Bill sets up a fund, administered by a board and funded by a levy on building and-construction work.	Amended

Name of Bill	Purpose of the bill	Status
Commission for Integrity in Government Bill 1999 (Mr Kaine)	Sought to provide for: • the appointment, tenure of office and remuneration of the Commissioner and Assistant Commissioners; • the appointment of an Operations Review Committee; • the establishment of an Ethical Standard Council.	Lapsed
Land (Planning and Environment) Amendment Bill 2000 (No.3) Mr Corbell	Sought to establish the position of Chief Planner for the Australian Capital Territory and provide for the ACT Planning Authority (the Authority) to be constituted by the Chief Planner.	Negatived
Costing of Election Commitments Bill 2002 (Mr Humphries)	Sought to require the Treasurer to appoint an independent assessor (individual, company or partnership) to cost election policies of parties contesting an election who had candidates in the previous assembly.	Lapsed
Community Referendum Bill 2002 (Mr Humphries)	Sought to provide a mechanism for electors of the ACT to initiate changes to laws through a referendum process – significantly increasing the resources required by the Electoral Commission	Lapsed
Fire, Emergency Services and Ambulance Authorities Bill 2003 (Mr Pratt)	Sought to establish independent authorities to supervise bushfire fighting services (including the rural firefighting service), and ACT emergency service, the fire brigade and the ambulance service.	Agree in principle negatived
Long Service Leave (Private Sector) Bill 2003 (Mr Berry)	Sought to establish the Private Sector Long Service Board of a corporation with a common seal, which must be appointed by the Minister who will set terms and conditions. (Section 62 of the Bill also sought to provide	Lapsed

Name of Bill	Purpose of the bill	Status
	that the Minister will determine a levy which is a percentage of the ordinary remuneration paid by the employer to registered employees. It also sought to apply penalty units for the failure to do certain things in relation to the levy).	
Bushfire Reconstruction Authority Bill 2003 (Mrs Dunne)	Sought to establish a Bushfire Reconstruction Authority, which would have a board of management and a chief executive officer.	Lapsed
Commissioner for the Family Bill 2004 (Mrs Burke)	Sought to establish the Office for the Commissioner for the Family.	Agree in principle negatived
Civic Development Authority Bill 2005 (Mr Seselja)	Sought to establish the Civic Development Authority overseeing the development of a defined area of the Canberra City business district.	Agree in principle negatived
Long Service Leave (Private Sector) Bill 2007 (Mr Berry)	Sought to establish a portable and secure long service leave scheme for private sector workers in the ACT.	Lapsed
Emergencies (ESA) Amendment Bill 2009 (Mr Smyth)	Sought to amend the *Emergencies Act 2004* to provide for the establishment of a statutory authority to manage emergencies in the Territory	Lapsed
Infrastructure Canberra Bill 2010 (Mr Seselja)	Sought to: • provide for the establishment of the Canberra Infrastructure Plan which would provide an avenue for the planning, procuring and delivering infrastructure projects in the territory; and	Lapsed

Name of Bill	Purpose of the bill	Status
	• establish a commission and appoint a commissioner to monitor and report on the plan.	
Legislative Assembly (Parliamentary Budget Officer) Bill 2016 (Mr Smyth)	Sought to establish a parliamentary budget office.	Lapsed
Planning and Development (Territory Plan Variation) Amendment Bill 2017 (Ms Le Couteur)	Seeks to increase the number of planning variations that require full public consultation.	Active
Anti-Corruption and Integrity Commission Bill 2018 (Mr Coe)	Sought to establish an anti-corruption and integrity commission.	Discharged