

Legislative Assembly of the Australian Capital Territory

STANDING ORDERS 200 & 201 and their interpretation

Interim Report of the Standing Committee on Administration and Procedures

December 1990

Resolution of appointment

On 23 May 1989 the ACT Legislative Assembly agreed to a temporary standing order which established the Standing Committee on Administration and Procedures with the following terms of reference:

- 16A(a) A Standing Committee on Administration and Procedures shall be appointed at the commencement of each Assembly to inquire into and report on, as appropriate:
- the Assembly's annual estimates of expenditure;
 - Members' entitlements including facilities and services;
 - operation of the Assembly's library;
 - operation of the transcription service (Hansard);
 - availability to the public of Assembly documents;
 - the standing orders of the Assembly;
 - the practices and procedures of the Assembly; and
 - matters relating to the privileges of the Assembly which may be referred to it by the Assembly;
- (b) The Committee shall arrange the order of Private Members Business.

Membership

Mr Speaker (Chairman)

Mr W B Berry, MLA

Mr N A Jensen, MLA

Mrs R M Nolan, MLA

Secretary to Inquiry: Ms M Weeks

INTERPRETATION OF STANDING ORDERS 200 AND 201 AND SECTION 65 OF AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988

BACKGROUND

1. On June 6 1990, following the presentation of the Ainslie Transfer Station Bill 1990 and the Royal Canberra Hospital Bill 1990 the Attorney-General (Mr Collaery) raised points of order in relation to standing order 200 and the related provision of the *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act) – section 65. Mr Collaery indicated that both bills contravened standing order 200 in that they "...clearly placed a charge on public money" (*Hansard*, 6 June 1990, p.2136). The Speaker (Mr Prowse) indicated that he would take the points of order on notice and would seek "legal opinion and report back to the Assembly on the validity of these bills under the standing order proposed" (*Hansard*, 6 June 1990, p. 2136).

2. A legal opinion was sought from the Government Law Office and this opinion was tabled at the Standing Committee on Administration and Procedures (the Committee) meeting of Tuesday, 7 August 1990 (see Minutes of Proceedings Meeting No. 32). The opinion, while addressing the general issue of applying standing order 200, focused on the application of the standing order 200 and section 65 of the Self-Government Act to the two Bills in question (see Attachment A). The Acting Speaker (Mr Stefaniak), in the Speaker's absence, spoke to the opinion at the meeting and the Committee resolved on the motion of Mrs Nolan that –

The Administration and Procedures Committee consider and report on, as a matter of urgency, standing orders 200 and 201 and their application" (Minutes of Proceedings Meeting No. 32).

3. The terms of this resolution were reported to the Assembly by the Acting Chairman on Wednesday, 8 August 1990. The Government Law Office opinion was presented to the Assembly on the same day.

BILLS SUBJECT TO STANDING ORDER 200

4. Aside from the Royal Canberra Hospital Bill 1990 and the Ainslie Transfer Station Bill 1990 a number of other Bills have, on presentation, been subject to points of order relating to standing order 200. A brief history of the Bills follows.

Royal Canberra Hospital Bill 1990 and Ainslie Transfer Station Bill 1990 were ruled by the Acting Speaker on 8 August 1990 as contravening standing order 200. The Attorney-General (Mr Collaery), pursuant to standing order 170, moved a motion to withdraw/discharge the bills. This motion requires resolution before the in principle debate can resume. Both Bills currently remain on the Notice Paper.

Schools Authority (Amendment) Bill 1990 – presented 8 August 1990, ruled by the Speaker on 15 August 1990 as contravening standing order 200. Although the Bill remains on the Notice Paper the Attorney-General's motion to withdraw the Bill must be disposed of before the in principle debate can resume.

Human Rights Bill 1990 – presented 12 September 1990, ruled by the Speaker on 13 September 1990 as infringing the provisions of standing order 200. The Attorney-General moved that the Bill be withdrawn. Following debate, the Speaker withdrew his ruling and the Attorney-General withdrew his motion.

Landlord and Tenant (Rental Bonds) Bill 1990 – presented on 12 September 1990. The Speaker is yet to make a ruling on whether the Bill contravenes standing order 200.

5. The Assembly has considered a motion which sought to **amend standing orders 200 and 201** by replacing the current phrasing of "money proposals" with one that could relate only to appropriation proposals. The motion was defeated.

WORK OF THE COMMITTEE

6. The Committee has examined the reference and related issues at a number of its meetings.

7. During its deliberations the Committee has held discussions with officers of the Government Law Office. The discussions considered the legal opinion provided by the Office and also possible options to alter standing orders 200 and 201 and section 65. (Minutes of Proceedings Meeting No. 33).

8. The Committee, after considering a background paper, also sought an additional legal opinion from Mr Pat Brazil. He was asked to prepare an opinion specifically on standing orders 200 and 201 and section 65. He was not asked to address his comments to any of the Bills. (Minutes of Proceedings Meeting No. 37).

9. The Committee, having considered the legal opinion provided by Mr Brazil (Minutes of Proceedings Meeting No. 41 and see Attachment B) and an issues paper, resolved to "approach [the] Chief Minister to seek an opinion from the Federal Attorney-General, via the responsible Federal Minister, as to the interpretation of section 65." (Minutes of Proceedings Meeting No. 43). The Chairman accordingly wrote to the Chief Minister on 23 November 1990 indicating the work the Committee had done to date and its resolution. (Letter from Chief Minister to the Speaker, dated 30 November 1990 and see Attachment C).

10. The Chief Minister responded to this letter by indicating that the Government had sought an opinion from Queens Counsel and his belief that it would be "... appropriate to review the issue of consultation with the Commonwealth, in consultation with the Committee, after the opinion of Queens Counsel had been received." (see Attachment D).

11. The Committee met again on 3 December 1990 and considered the Chief Minister's response. As a consequence the Committee passed the following resolution:

"That a message be sent to the Chief Minister:

- (a) expressing the Committee's concern that has been prevented from the full carriage of its responsibilities in the matters relating to section 65 and standing orders 200 and 201 by the delaying of its attempts to obtain an opinion from the Commonwealth Attorney-General on the operation of these provisions as they relate to the passage of private Members' legislation in the Assembly; and
- (b) requesting that the brief for the advice from the Commonwealth Attorney-General be forwarded without delay."

The terms of this resolution were forwarded by letter to the Chief Minister. (see Attachment E).

CONCLUSIONS AND RECOMMENDATION

12. The Standing Committee on Administration and Procedures believes it is examining a complex and difficult question which is central to the procedures and conduct of the Assembly. Any recommendation made by the Committee has the potential to affect individual members rights and responsibilities as well as the responsibility of executive governments, especially minority governments, to exercise control over the financial concerns of a state/territory. In examining the question the Committee has been mindful of its significance and is aware of the balance that needs to exist between the executive and private members in a legislature. It is aware that this balance as defined in section 65 of the Self-Government Act is subject to different interpretations. As this is the basis for standing orders 200 and 201, the Committee believes any question of interpretation should be resolved so that standing orders 200 and 201 may be clarified. In seeking the Commonwealth Attorney-General's opinion of a Commonwealth Act the Committee was hoping to gain some insight into the best way to interpret section 65.

13. The Committee does not view the executive's actions to seek an opinion from Queens Counsel to be part of its reference, although it believes a third opinion would be helpful. The Committee considers that it is right and proper that it pursues its reference as it wishes and therefore recommends –

- . that the Assembly calls on the Chief Minister to forward the Standing Committee on Administration and Procedures request of 23 November 1990 to the Commonwealth Attorney-General forthwith.**

David Prowse, MLA
Chairman
December 1990



OPINION: A.C.T. SELF-GOVERNMENT ACT 1988 S.65; INTRODUCTION
OF AINSLIE TRANSFER STATION BILL 1990 AND ROYAL CANBERRA
HOSPITAL BILL 1990

Introduction

I have been asked for advice on the status of the Ainslie Transfer Station Bill 1990 and the Royal Canberra Hospital Bill 1990 ("the Bills") introduced into the Assembly by the Leader of the Opposition on 6 June 1990. The Legislative Counsel has advised me that the Bills were not drafted in his Office.

2. Upon introduction of the Bills, the Attorney-General raised points of order as to whether the terms of Standing Order 200 and section 65 of the Australian Capital Territory (Self-Government) Act 1988 (Cth) ("the Self-Government Act") prevented the introduction of the Bills. The Speaker took the points on notice, allowing Ms Follett to proceed with the presentation of the Bills, and undertaking to provide a ruling after obtaining legal advice. In a letter dated 26 June 1990, the Clerk, in accordance with the Speaker's statement, sought an opinion from the Government Law Office.

Question and Short Answer

3. Q: Do the terms of s.65 of the Self-Government Act prevent the introduction into the Assembly of the Bills?

A: Yes.

Legislation

4. Section 65 of the Self-Government Act provides:

"Proposal of money votes

65.(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 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."

5. "Public money of the Territory" is defined in section 3 of the Act as meaning "revenues, loans and other money received by the Territory".

6. It should also be noted that subsection 58(1) provides, subject to an exception not relevant for present purposes, that "no public money of the Territory shall be issued or spent except as authorized by enactment".

7. Section 21 of the Self-Government Act gives the Assembly an express power to make standing orders and rules with respect to the conduct of its business. The relevant provisions of Standing Order 200 are expressed in substantially the same terms to s.65(1) of the Self-Government Act. As Standing Orders at any time may be suspended, amended or repealed by the Assembly if they create difficulties (see Standing Orders 272-4), I will confine my advice to the effect of the legislation rather than the Standing Orders. However, I note that any interpretation given to s.65(1) also seems capable also of applying to Standing Order 200 as it is presently expressed.

Background

8. The terms of subsection 65(1) can be contrasted with corresponding provisions in other legislation. For example, section 56 of the Commonwealth Constitution in relation to the Commonwealth Parliament provides:

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

9. This provision deals with the special requirements for proposals "for the appropriation of revenue or moneys". It has been interpreted to apply to Bills which appropriate money (i.e. "money bills") or amendments to such Bills which increase amounts, extend the objects and purposes or alter the destination of the appropriation (see Lane Annotated Constitution p.288; Quick and Garran Commentaries on the Constitution pp.679-681).

10. Until 1982, the Northern Territory provision contained in the Northern Territory (Self Government) Act 1978 was expressed in similar terms to the ACT provision in that it referred to the "object or effect" of a proposal:

"11. An enactment, vote, resolution or question, the object or effect of which is to dispose of or charge any revenues, loans or other moneys received by the Territory, shall not be proposed in the Legislative Assembly unless it has in the same session been recommended by message of the Administrator to the Legislative Assembly."

11. However, in 1982, s.11 was amended to bring it more into line with s.56 of the Constitution:

"Proposal of money votes

11. An enactment, vote, resolution or question, the effect of which is to dispose of or charge any revenues, loans or other moneys received by the Territory, shall not be proposed in the Legislative Assembly unless the purpose for which such revenues, loans or other moneys are to be disposed of or charged by reason of the enactment, vote, resolution or question, as the case may be, has in the same session been recommended by message of the Administrator to the Legislative Assembly."

12. The only reason given for the amendment at the time of its introduction was that it was intended that the section provide that "the Administrator's message need only recommend the purpose of an appropriation rather than the proposed law itself" (Second Reading Speech, Northern Territory (Self-Government) Amendment Bill 1982, Hansard, House of Representatives 19 August 1982 p.734 - my emphasis). It seems this statement contains an assumption that this provision is confined in its operation to proposals relating to the appropriation of moneys.

13. I am told that the current Northern Territory provision in practice is treated in this way - i.e. the Administrator's message is only required for proposals in relation to money bills (telephone conversation with Mr Markus with Ms Leanne Robertson, NT Department of Law, 9 July 1990). It seems that if the Administrator's message accompanying an Appropriation Bill identifies in general terms the purposes for which moneys may be disposed of or charged, then much legislation would escape being subject to s.11. For example, if the message recommends appropriating money for the purposes indicated in the Appropriation Bill, and one of these is the provision of "hospital services" in general terms, then arguably a private member's Bill providing for a specific type of hospital service may be said to be covered by the Administrator's message.

14. In the debate on the passage of the ACT Self-Government Bill, it was stated by both a Government and an Opposition Senator that clause 64 (the present s.65) was intended to ensure that "money bills" were initiated by the Government in accordance with what were stated to be the principles applicable elsewhere in Australia (Commonwealth Hansard, Senate, 24 November 1988 p.2812). However, the debates do not indicate a clear intention that s.65 was confined to money bills: the debate was focused on rebutting a Democrat amendment proposing non-Government initiation of financial proposals in certain circumstances.

15. The Explanatory Memorandum which accompanied the clause which is now s.65 states as follows:

"Clause 64: Proposal of money votes

Sub-clause 64(1) provides that only a Minister may propose a law, vote, resolution or question which has the object or effect of disposing of, or charging, any public money of the Territory.

Sub-clause 64(2) enables members of the Assembly to move amendments to monetary proposals made by a Minister but only to decrease or transfer the amount proposed."

16. The heading to section 65 (i.e. "proposal of money votes"), the explanatory memorandum (the reference to "monetary proposals") and the parliamentary debates referred to above (including the second reading speech on the similar Northern Territory provision) lend some support to the view that the legislators intended that s.65 operate in a similar way to s.56 of the Constitution and Parliamentary practice elsewhere - i.e. that the restrictions relate only to legislation appropriating moneys. It is necessary, however to analyse the text of the section before it can be determined what consideration, if any, should be given to these materials extrinsic to the legislation (see Acts Interpretation Act 1901 (Cth) s.15AB).

17. The scope of s.65 has been the subject of debate in the Legislative Assembly on at least two occasions. The first of these arose in relation to amendments sought by Mr Stevenson MLA to the Legislative Assembly (Members' Staff) Bill 1989 to enable members of the Assembly to employ consultants at the cost of the Territory. The details of the amendment requested by Mr Stevenson as far as I am aware have not been made public. In a letter dated 27 September 1989 to Mr Stevenson, subsequently tabled in the Assembly by Mr Collaery, an officer of the Legislative Counsel's Office indicated that the proposal would have the effect of increasing the amount of public money of the Territory to be charged and therefore was contrary to s.65.

18. This interpretation was questioned by Mr Humphries MLA in the course of debate in the Assembly (ACT Hansard, 2 November 1989). I take the effect of his remarks to be that, as the Bill was not a money bill (i.e. it made no appropriation), payments to staff, whether employees or consultants, would require money to be appropriated for that purpose and, therefore, it could not be said that such an amendment would constitute a charge on moneys of the Territory. He noted that other amendments successfully moved by private members also necessarily involve increased expenditure, referring in particular to the additional reporting requirements inserted into the Pesticides Bill.

19. The second occasion of which I am aware when the s.65 issue has been raised in the Assembly, was upon the introduction of the Bills which are the subject of this advice (see ACT Hansard 6 June 1990). Following that occasion, upon which the Speaker indicated he would take advice on this issue, he received a letter dated 7 June 1990 from Mr Connolly MLA, a copy of which has been provided to me accompanying the request for advice from the Clerk.

20. Mr Connolly expressed concern that a broad interpretation of s.65 would have the result of creating substantial restrictions on the capacity of a private member to propose a Bill. He noted, as an extreme case, that the introduction of any Bill will necessarily involve additional costs in printing etc. He also noted that the Police Offences (Amendment) Act 1989, successfully

introduced by Mr Stefaniak as a private member, could be said to have the effect of imposing a charge on the public money of the Territory to the extent that such money will be spent in enforcing the new law. Mr Connolly argues that s.65 should be interpreted in the same manner as s.56 of the Constitution. On these grounds, he contends that the Bills would not be subject to s.65 as they do not appropriate money.

Discussion

21. The extent to which an enactment, vote or resolution, can be said to have the "object" or effect" of disposing of or charging public moneys depends itself on the meaning of "dispose of or charge" in this context.

22. It seems that in order to "dispose of" public money it must be "issued or spent" under the authority of an enactment (Self-Government Act s.58(1)). What is meant to "charge" public money is less clear. "Charge" has been defined as meaning to "place liability on" (Concise Oxford Dictionary (4th ed)). It also has a technical meaning as a right to receive payment out of a specific fund to meet a debt or some other obligation (see Osborn's Concise Law Dictionary (6th ed)).

23. Even if the enactment, vote, resolution or question would give rise to a right to claim money or damages from the Territory, it is not clear that this will "charge" any public money. All expenditures of public funds must be authorised by legislation (see s.58 Self-Government Act; Auckland Harbour Board v. The King [1924] AC 318) and there is no standing appropriation to meet any judgement given against the Territory (see Crown Suits Act 1989 s.9; also see NSW v. Bardolph (1934) 52 CLR 455).

24. It should be kept in mind however that an Appropriation or Supply Bill may contain a broad category of expenditure which, in combination with an obligation to spend money for that purpose, could have the "effect" of disposing or charging of public money. A law which attempts to oblige the Government to spend money for a specific purpose on the other hand cannot have the effect of disposing of or charging money unless moneys have been appropriated for that purpose. It can't be held that a proposed enactment imposing an obligation to spend money will not "dispose of or charge" moneys on the basis that the money already appropriated would be spent for that purpose in any event: the appropriation of money in a Supply or Appropriation Bill does not of itself oblige the Government to spend it (see Audit Act 1989 Part IV).

25. I have considered whether section 65 can be read as applicable only to proposals "the object of which is to dispose of" or "the effect of which is to charge" public moneys. There is no clear intention apparent from the text that the provision is to be read in such a manner. Moreover, the use of punctuation in the explanatory memorandum suggests that it is not intended that the subsection should be read that way.

26. It follows from what I have said that section 65 cannot be read down so that it applies only to money bills. Money Bills perhaps can be said to have the object of disposing of public moneys but other types of legislation may have the object of charging, or the effect of disposing of or charging, public money of the Territory. Although the extrinsic material may suggest that the provision is confined to money bills (although they are not explicit on that point), I do not think that any analysis of the text of the provision produces a possible reading which confines its operations to money bills. If this provision was intended to be confined to money bills, it could have been expressed simply as operating on "the proposal of an enactment, the object or effect of which is to appropriate public money of the Territory" (compare s.56 of the Commonwealth Constitution).

27. The proposals which are caught by section 65 in my view appear to be those which can be characterized as being aimed at achieving increased Government expenditure on a particular matter or creating a liability to pay money; or, irrespective of whether this outcome was intended, those proposals which have such an effect. In order to decide whether a law has the effect of increasing spending or creating a liability to pay, it is necessary to decide whether the law causes the effect. This requires consideration of the relative remoteness or proximity of the law to the effect.

28. Applying this approach, before I examine the legislation under consideration here, I will deal with some general questions which arise in relation to private members' bills.

29. First, will any private member's bill have the object or effect of disposing of or charging public money on the grounds that it will require further expenditure in terms of printing costs and other charges? It seems to me that it is the introduction of the proposal which creates the cost rather than the proposal itself. Printing costs are merely an incidental effect of the introduction of a proposal.

30. Secondly, do the administrative costs involved in the enforcement of a law which regulates conduct bring it within the terms of s.65? Again I would say no. The object of a law regulating conduct in most cases is not to spend money or create a liability to pay but rather to prohibit certain acts or require people to do things in specified circumstances. Also such a law as a general rule would not seem to have the effect of disposing of or charging public money of the Territory. Note in this regard the principle that the Crown cannot be compelled to bring prosecutions except in the most extreme cases (eg see R v. Metropolitan Police Commissioner; ex parte Blackburn (No.3) [1973] 1 All ER 324). There is also the possibility that some public money would be spent in connection with a private prosecution. Both these possibilities would be merely incidental effects of the change to the law.

31. Turning to the Bills in question, it could be said that the object is to require the Government to do something - e.g. to operate Canberra Hospital or the Ainslie Transfer Station -

rather than to dispose of or charge additional public moneys. The sponsor of the Bills may assert that it is not intended to increase the total expenditure on those services in the ACT, but merely to ensure that services are provided at these specific locations.

32. However, if moneys have been appropriated which could be spent on the services which the Bills require to be provided, in my opinion the Bills if passed have the effect of disposing of and charging public moneys. In this regard I note that the Supply Act 1990-91 in divisions to its Schedule appropriates funds for a "Hospital Services" program and a "Transport and Engineering" program. I assume that the latter division would provide for expenditure on waste disposal as it bears the same title as the administrative Division in the Department of Urban Services which has responsibility for those matters. Although Part IV of the Audit Act provides mechanisms by which funds may be allocated within a subdivision of a Schedule, these administrative discretions would be subject to any obligations imposed on the Territory by legislation.

33. In many cases where legislation directly imposes on a public official a duty to do something, someone will have standing to bring an action to compel the performance of that duty. In this regard it should be noted that the two Bills under consideration here attempt to allow any person to enforce the performance of the obligations to be created by the Bills. Both Bills provide that any resident of the Territory may bring an action in a court of competent jurisdiction to enforce any right created by the Act (I note however that it is not clear what "rights" are created by the Bills apart from this right to bring an action).

34. However, I do not believe it is necessary to establish whether or not someone has standing to enforce an obligation imposed upon the Government by a law in order to establish whether or not the law has the effect of charging public money. In my view, wherever an obligation is imposed by law to do something which requires spending money, where there is an existing appropriation from which the moneys may be drawn, section 65 will apply.

Conclusion

35. In my opinion, the two Bills may not be proposed in the Assembly by anyone other than a Minister on the grounds that they have the effect of disposing of and charging public money of the Territory.

36. While the expression of s.65 is obscure in some areas, reference to extrinsic materials cannot assist so as to give the provision an interpretation consistent with that of s.56 of the Commonwealth Constitution. I do not think that it can be said that the interpretation given here is manifestly absurd or unreasonable (see Acts Interpretation Act s.15AB(1)(b)(ii)). It could be seen to be an extension of the principle of the financial initiative of the Crown - ie "that no public charge may

be incurred except on the initiative of the Crown" (Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament (20th edition), London 1983 p.691). It could be said that, as responsibility for initiation of the Budget is given to the Executive, the Assembly should not be given the capacity to make major spending commitments independently of the Government's budgetary process. The Government still cannot spend money or impose taxes without legislative authority and the Assembly has the ultimate control over the Budget in its power to reject the Government's money bills or to bring about the formation of a new Government.

37. I recognise, however, that the provision may be difficult to apply in practice in that it requires each proposal to be analysed in terms of its object or effect before its introduction and may require reference to appropriation legislation in some cases to resolve the question of its effect. However, while it limits the range of formal proposals which may be advanced by private members in the Assembly, it does not prevent the advocacy of spending in the course of debate.



Len Sorbello
Deputy Law Officer (Constitutional & Law Reform)
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3 August 1990

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November 6, 1990

Mr M J McRae
Clerk of the Legislative Assembly
1 Constitution Avenue
CANBERRA ACT 2601

Dear Mr McRae

RE: LEGAL OPINION - OPERATION OF SECTION 65 OF THE AUSTRALIAN
CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988 AND STANDING ORDERS
200 AND 201

I forward herewith my opinion (two copies) that the provisions
in question should be interpreted as referring principally to
money votes (appropriations) and 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.

Your letter of 4 October asked whether in my view further advice
should be sought from a Queens Counsel on the matter. I think
that would be an appropriate course in the circumstances, but
the final decision on that matter is one for the Committee.

Yours sincerely



Pat Brazil
PAB:41.8(lw)

MEMBER OF THE AUSTRALIAN LEGAL GROUP COMPRISING:

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GROUP OVERSEAS OFFICES: LONDON · SINGAPORE · NEW YORK · HONG KONG

GROUP ASSOCIATED OFFICE: JAKARTA

ATTACHMENT B

MACPHILLAMY
CUMMINS
&
GIBSON

MCG

OPINION

RE: OPERATION OF SECTION 65 OF THE
AUSTRALIAN CAPITAL TERRITORY (SELF GOVERNMENT) ACT 1988
AND STANDING ORDERS 200 AND 201
OF THE ACT LEGISLATIVE ASSEMBLY

MR PATRICK BRAZIL AO

6 NOVEMBER 1990

PAB:13.1(1w)

OPINION

RE: OPERATION OF SECTION 65 OF THE AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988 AND STANDING ORDERS 200 AND 201 OF THE ACT LEGISLATIVE ASSEMBLY

1. Advice is sought on the operation of s.65 of the *Australian Capital Territory (Self-Government) Act 1988* ("ACT Self-Government Act") and Standing Orders 200 and 201 of the ACT Legislative Assembly.

2. Section 65 reads:

"Proposal of money votes

65.(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 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."*

3. The wording of s.65 may be compared with the corresponding provision in the Australian Constitution, s.56.:

"Recommendation of Money Votes

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

In essence, the issue is whether the difference in wording in s.65 requires a wider interpretation of s.65 than applies to s.56 of the Australian Constitution, which clearly applies only to measures for the appropriation of revenue or moneys ("money votes").

4. Standing Order 200 which follows the wording of s.65, reads:

"Money proposals submitted - without notice

200. *An enactment, vote, resolution or question, the object or effect of which is to dispose of or charge any public money of the Territory shall not be proposed in the Assembly except by a Minister. Money proposals may be introduced by a Minister without notice.*

5. Standing Order 201 reads:

Limitation on amendment

201. 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 have the effect of increasing or altering the destination of the amount of public money of the Territory to be dispersed of or charged."

Parliamentary and Constitutional Context

6. All these provisions are obviously designed to give effect to the basic parliamentary and constitutional principle of the financial initiative of the Executive Government under the Westminster model of parliamentary government.

7. Three features of Territory government deriving from that model are relevant to the question raised. First, the only lawful way in which public moneys of the Territory can be issued or spent is pursuant to the authority of an enactment made by the Assembly (s.58 of the *ACT Self-Government Act*). Section 58 is an entrenched provision to which all actions to dispose of or charge any public money of the Territory are subject. The High Court has recently said of the analogous provisions in the Australian Constitution (*Brown v West* (1990) 91 ALR 197, at 202):

"An appropriation made by a valid law is the necessary authority for the Executive Government to take moneys out of the Consolidated Revenue Fund: Attorney-General (Vic); Ex rel Dale v Commonwealth (1945) 71 CLR 237, at 271. The constitutional principle "that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself" (Auckland Harbour Board v R (1924) AC 318, at 326) is entrenched in our Constitution by ss.81 and 83."

8. Secondly, an ordinary appropriation of money in an Appropriation or Supply Bill does not mean that the Government is obliged to spend it. Such an appropriation neither confers rights or privileges nor imposes duties or obligations: *Victoria v Commonwealth* (1975) 134 CLR 338, at 387. Under s.37 of the *Audit Act 1989* it is for the Minister for Finance to decide to authorise the withdrawal of amounts from the Territory Public Account in respect of services or purposes for which they are lawfully available under an appropriation. A recognised part of the PAB:13.2(1w)

budgetary process is the ordering of priorities in making decisions as to which services or projects will in fact be funded and at what level. Where an exception needs to be made, this is done by standing or special appropriations, used eg when it is necessary or desirable to create a legal entitlement to a benefit (see on this the *Legislation Handbook*, July 1988, published by the Department of the Prime Minister and Cabinet, para 5.29).

9. Thirdly and consistently with the entrenched requirement of an appropriation, subs.9(1) of the *Crown Suits Act 1989* of the Territory provides that no execution or attachment, or process in the nature of execution or attachment, shall be issued against the property or revenues of the Territory. Subsection 9(2) requires the relevant Minister to satisfy judgments given against the Territory but only "out of moneys lawfully available". There is no standing appropriation in the Territory for the satisfaction of Crown judgment debts.

Preliminary Issue

10. The question raised for advice can only be answered after taking a position, one way or the other, on whether a private member's Bill which does not contain an appropriation but which nevertheless contemplates, or requires, the payment or expenditure of public moneys, has the effect of disposing or charging public money of the Territory, if there happens to be in existence an appropriation within whose purposes the enactment comes.

11. It will only have this effect if in this situation the Executive Government would be required by law to make the payment or incur the expenditure.

12. That kind of question was raised eg in *Awatare Road Board v Colonial Treasurer* (1887) 5 NZLR 372, in relation to an enactment that stated that a specified amount "shall be paid" to the Road Board. The Court held that *mandamus* would not lie to compel the Treasurer to pay over the moneys as *mandamus* did not lie against a public officer to compel him to pay moneys of the Crown if payment had not been sanctioned by warrant for expenditure by the Governor.

The warrant procedure has been described as designed to ensure that the spending discretion involved in appropriations is examined through responsible Ministers of the Crown and with the Treasurer's approval of the Treasurer or the Minister for Finance: see "Private Claims on Public Funds" by Professor Enid Campbell, (1969) 3 *U of Tas L Rev* 138, at 140. The Minister's authority referred to in s.37 of the *Audit Act* of the ACT has the same purpose.

13. It seems to me that any attempt to require payments to be made out of ordinary appropriations in the Territory by resort to proceedings under the *Administrative Decisions (Judicial Review) Act 1988 (ACT)* or other review proceedings would similarly fail. That Act, I note, excludes decisions under s.37 and s.47 of the *Audit Act 1989* from the requirement to give reasons for a decision. Section 47 deals with payments out of the Minister's advance.

14. A recent discussion paper released by the Administrative Review Council on the *Administrative Decisions (Judicial Review) Act 1977* of the Commonwealth states in relation to the similar exclusion in that Act:

"133. Some may think it odd that Schedule 2 to the AD(JR) Act should go to the extent of excluding from the ambit of the reasons requirement a decision of the Minister for Finance to issue out of the Consolidated Revenue Fund the sum provided for in an Appropriation Act when there is nothing on the face of the AD(JR) Act that would prevent an application for judicial review of such a decision from being made. It might be expected that, since the ability of the administration to continue to function depends upon the Minister for Finance exercising his power under Appropriation Acts to issue sums out of the Consolidated Revenue Fund, any exclusion in the judicial review context relating to the Minister's decision would be an exclusion from the ambit of the AD(JR) Act as a whole.

134. The position is not entirely as it appears, however, since the availability of review would depend on whether the Federal Court considered such a decision to be justiciable. It is certainly arguable that it is not justiciable. The Budget allocations are determined in an exhaustive process of consideration by the Cabinet and Committees of the Cabinet and are finally approved by the Parliament when passage is given to the Appropriation Act."

16. I think that such decisions relating to Budget allocations are not justiciable. I have already referred above to Stephen J's view in *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR, at 387, that an annual appropriation neither confers rights or privileges nor imposes duties or obligations.

17. Summing up, in my opinion, a private member's bill that seeks to require particular expenditure (eg the proposed Bill to re-establish the Ainslie Transfer Station) or to establish a legal liability to pay moneys will not have the effect of disposing or charging public money of the Territory even if there happens to be in existence an appropriation within whose purposes the enactment comes. The only possible exception seems to me to be where there is a standing appropriation providing distinct authorisation for the payment or expenditure in the private member's Bill. I would think very few such cases would arise in practice.

Operation of s.65

18. I turn then to the interpretation of s.65. It seems clear to me that s.65 of the *ACT Self-Government Act* is ambiguous and obscure when read in its parliamentary and constitutional context, and therefore resort to extrinsic materials that are capable of assisting in the ascertainment of the meaning of the provision is permissible (*Acts Interpretation Act 1901*, s.15AB).

19. The heading of s.65 is "Proposal for Money Votes". The phrase "money vote" would be understood by members of the Federal Parliament to refer to provisions appropriating public monies, even though in common parlance it is more usual to refer to such provisions as "money bills" (see Browning, *House of Representatives Practice*, 2 ed, p.407, and Odgers, *Australian Senate Practice*, 5 ed, p.369). That the provision was generally understood in this sense is confirmed by the debate on a Democrat amendment proposed in the Senate to s.65. The amendment provided that a private member's proposal could proceed where a committee of the Assembly certified that public moneys could be provided or could be made available for the measure. The Government speaker, Senator McMullen, in defending the terms of s.65, said (*Senate Hansard*, 24 November 1988, p.2814):

"The Australian Democrats' proposal is quite contrary to the operation of the Westminster system as it has developed in Australia, with the Executive's responsibility for initiating money Bills and the role of the legislature in effective scrutiny. It is different from any provision that operates in this Parliament, in any State Parliament or in the Parliament of the Northern Territory in relation to money Bills, in all of which instances the initiation of money Bills is restricted to the Executive. As a matter of effective and sensible Budget management for any government, this is a matter that needs to be retained in the hands of the Executive."

20. The Opposition speaker in the debate agreed, saying that "money bills" should be introduced by a Minister (at p.2814). There was no suggestion at all by any of the speakers that s.65 was more restrictive on the introduction of private bills than was the practice in the Federal Parliament.

21. Next, the explanatory memorandum on the *Self-Government Act*, in paraphrasing s.65, described the proposals to which it refers as "monetary proposals".

22. The legislative origins of s.65 derive from s.11 of the *Northern Territory (Self-Government) Act 1978*, which was amended in 1982. That amendment was explained in the Second Reading speech (*House of Representatives Hansard*, 19 August 1982, p.734) as providing that the Administration's message need only recommend the purpose of an "appropriation" rather than the proposed law itself.

23. Section 11 of the *Northern Territory (Self-Government) Act 1978* itself had as its predecessor s.4S contained in the 1947 amendments to the *Northern Territory Administration Act* setting up a Legislative Council for that Territory. The Council had a majority of members appointed by the Federal Government and no Treasury of its own, the Territory's finances being an item in the budget of the Commonwealth Department responsible for the Territory. Whether in those circumstances s.4S was strictly necessary may be a question (the proposition that the Legislative Council could have charged the Commonwealth Consolidated Revenue Fund is not only bizarre but unconstitutional), but those circumstances may explain the special wording of s.4S which, perhaps a little inaptly, has survived to now appear in s.65 of the *ACT Self-Government Act 1988*.

24. Overall these materials indicate that s.65 of the *ACT Self-Government Act 1988* was generally understood as referring to the practice applying in the Federal Parliament relating to money votes. Turning then to the actual words of the section, there is no difficulty in reading the reference in s.65 to proposals that have the effect of disposing of or charging public moneys as referring principally to "money votes". This leaves the question of what meaning is to be given to the word "object" in s.65. One view that

has been expressed is that it can only be read as bringing in any proposal by a private member that can be characterised as aimed at achieving increased government expenditure on a particular matter or creating a liability to pay money. The scope for dispute that this would involve has already become apparent. The difficulties involved have been acknowledged, and it may legitimately be doubted whether such a position was intended. I think that "object" can, and should, be read as referring to the object that is discoverable on the face of the proposal, as eg "An Act to re-establish the Ainslie Transfer Station", "An Act to Provide Human Rights in the ACT". So read, it would principally be money votes that would have the object referred to in s.65 and I think the provision should be so interpreted.

25. The only other case that seems to me to need to be considered is where there happens to be a standing appropriation that provides distinct authorisation for the expenditure proposed in the private members bill. Such a bill could have an effect that would bring it within s.65. As indicated, I think such cases would be rare, but if they were to arise my view is that the bill should be regarded as caught by s.65.

Operation of Standing Orders

26. Standing Orders 200 and 201 obviously should be interpreted and applied in accordance with the interpretation adopted in relation to s.65.



Pat Brazil

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

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Mr Trevor Kaine MLA
Chief Minister
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Kaine

As you are aware, the Standing Committee on Administration and Procedures is currently inquiring into the provisions of standing orders 200 and 201 and their application.

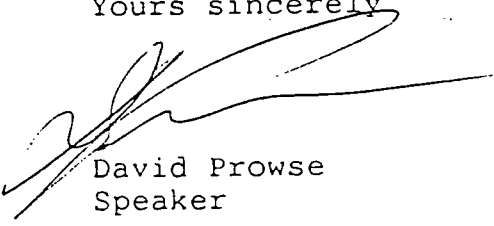
As part of its deliberations the Committee has considered two major legal opinions on the matter and on the operation of Section 65 of the Australian Capital Territory (Self-Government) Act 1988. The opinions received differ significantly and it is clear that the provisions of section 65 of the Self-Government Act are open to interpretation. The Committee was advised by the author of the second opinion, Mr Pat Brazil, that it would be appropriate to seek further advice from a Queens Counsel.

Having considered this advice and the issues raised by the inquiry the Committee on 20 November, resolved that, as the Commonwealth has the responsibility for the administration of the Act, a further opinion be sought on the matter from the Commonwealth Attorney-General and that the Chief Minister be asked to transmit the Committee's request to the Commonwealth Minister responsible for administering the Self-Government Act.

Accordingly would you, on behalf of the Administration and Procedures Committee, seek the opinion of the Commonwealth Attorney-General through the appropriate Minister as to (1) whether the effect of section 65 of the Australian Capital Territory (Self-Government) Act 1988 is the same as section 56 of the Commonwealth Constitution and (2) whether the matter is justiciable.

Supporting documentation is attached.

Yours sincerely



David Prowse
Speaker

23 November 1990



Australian Capital Territory
CHIEF MINISTER

ATTACHMENT D

1 Constitution Ave
Canberra ACT 2601

30 NOV 1990

Mr David Prowse MLA
Speaker
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Speaker

I refer to your letter of 23 November 1990 requesting me to write to the Commonwealth Attorney-General in relation to the Standing Committee on Administration and Procedures' current inquiry into the provisions of standing orders 200 and 201 and their application.

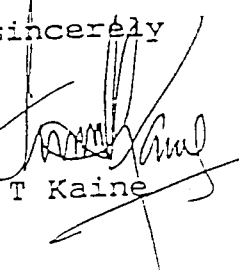
As you would be aware, prior to the Committee's resolution of 20 November 1990 asking me to seek the advice of the Commonwealth Attorney-General, the Executive had decided to seek the advice of Queens Counsel on the following questions:

- (a) Do the private member's Bills dealing with the Ainslie transfer station and the school closures infringe Section 65?
- (b) If so, were those Bills passed by the Assembly and become enactments, could the validity of those enactments be legally challenged?
- (c) In any event, is there sufficient doubt as to the operation of Section 65 and its justiciability to make it prudent for the ACT Government to seek to have Section 65 amended to more closely reflect Section 56 of the Australian Constitution?

The Executive's decision was made in the belief that there is sufficient doubt about the operation of Section 65 of the Self Government Act 1988 to warrant a third opinion. It is also consistent with the advice of the author of one of the differing legal opinions, Mr Pat Brazil.

Given that a third legal opinion from Queens Counsel has now been sought, I believe that it would be appropriate to review the issue of consultation with the Commonwealth, in consultation with the Committee, after the opinion of Queens Counsel has been received.

Yours sincerely


Trevor T Kaine

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Mr Trevor Kaine MLA
Chief Minister
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Kaine

I refer to your 30 November letter in response to the Administration and Procedures Committee's request that you seek the Commonwealth Attorney-General's opinion on certain matters relating to section 65 of the Self-Government Act.

At its meeting on Monday the committee considered your letter and strong concern was expressed at the delay in passing on its request for advice.

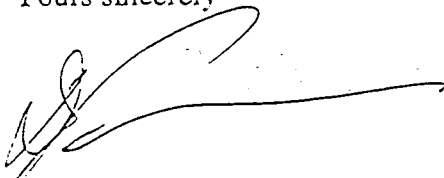
Having deliberated on the matter the Committee resolved – That a message be sent to you:

(a) expressing the Committee's concern that it has been prevented from the full carriage of its responsibilities in the matters relating to section 65 and standing orders 200 and 201 by the delaying of its attempts to obtain an opinion from the Commonwealth Attorney-General on the operation of these provisions as they relate to the passage of private Members' legislation in the Assembly; and

(b) requesting that the brief for the advice from the Commonwealth Attorney-General be forwarded without delay.

The Committee further resolved that I seek your early response to this request, plus advice on when the Committee will have access to the third opinion sought by the executive. Your communication will assist the Committee in making a report to the Assembly at its next sitting.

Yours sincerely



David Prowse
Speaker

5 December 1990

