




LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

OFFICE OF THE LEGISLATIVE ASSEMBLY

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Ms Joy Burch MLA
Speaker
Legislative Assembly for the Australian Capital Territory
Civic Square, London Circuit
CANBERRA ACT 2610

Dear Madam Speaker

I am writing to provide you advice about the Land Tax (Community Housing Exemption) Amendment Bill 2018 which was introduced in the Assembly on Wednesday, 19 September 2018 by Mr Parton MLA.

The issue is a complex one and involves the principle of the financial initiative of the Crown and one which has been grappled with since the commencement of self-government. It has considerable significance for the governance of the Territory as well as for the rights of non-executive members.

WHAT THE BILL DOES

- 1.1. As stated in the explanatory statement for the Bill, the intent of the Bill is to create an incentive for residential housing owners to provide rental properties to the ACT community housing sector by exempting them from the obligation to pay tax under the *Land Tax Act 2004*.
- 1.2. As set out in Budget Paper 3, the ACT Government expects to receive as part of its budget \$5.7 billion in revenue for the next financial year (2018-19), and the estimated outcome for land tax revenue is forecast to be \$141.1 million in 2018-19, up from \$130.1 million last financial year.
- 1.3. Simply put, the effect of the Bill presented, if enacted, and assuming landlords made their rental properties available to the ACT community services sector, would reducing, by some unknown amount,¹ revenue garnered from the imposition of land tax.

¹ Although the explanatory notes state there are no human rights implications it does not identify any financial impacts of the Bill.

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BACKGROUND TO SECTION 65 OF THE SELF-GOVERNMENT ACT AND STANDING ORDERS 200, 201 AND 201A

- 1.4. Section 65 of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) (the Self-Government Act) states:

65 Proposal of money votes

- (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.

- 1.5. Standing order 200, 201 and 201A state:

Money proposals submitted – without notice

200. 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.

Limitations on amendments

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 increase the amount of public money of the Territory to be appropriated.
- 201A. 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."

- 1.6. Advice received² from the Attorney-General's Department in 1995 set out that the purpose of section 65 of the Self-Government Act is to :

...protect the Financial Initiative of the Executive by restricting the way an appropriation bill can be amended. The Financial Initiative is a centuries old constitutional principle that operates in all Westminster-style parliaments whether large (like the Commonwealth Parliament of Australia) or small like the northern territory). It has been summarised 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.

² Andrew Barram, Director Parliamentary and Constitutional, Attorney-General's Department, Legal Opinion to the Clerk of the Legislative Assembly dated 10 November 1995.

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- The Executive Government demands money, the [parliament] grants it, but the [parliament] does not vote money unless required by the government; and it does not impose taxes unless needed for the public service as declared by Ministers of the Crown.³

1.7. Another advice stated:

However, on either view of section 65, it is agreed that the intention behind the section is to prevent government of the Territory being frustrated or made unworkable by removing the Executive's control over public money. It is an essential principle of Westminster Government.⁴

1.8. In further advices that have been obtained on the matter it has been stated that:

Standing orders 200 and 201 obviously should be interpreted and applied in accordance⁵ with the interpretation adopted in relation to section 65.

THE BACKGROUND TO THE ADOPTION OF STANDING ORDER 201A

- 1.9. Standing order 201A has the effect of importing into standing orders the Assembly's resolution of 23 November 1995 in which the 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 expenditure". The 1995 resolution was passed following a period of controversy in the early 1990s in which the Assembly debated whether it not it regarded as permissible non-executive members seeking to amend appropriation bills to variously increase appropriation for a particular item (a division within an appropriation bill as they were then drafted) or to place conditions around what an appropriation may or may not have been used for.
- 1.10. The resolution, and the subsequent standing order 201A devised in 2008, was an attempt by the Assembly to express its own view as to limits that ought to be imposed on non-executive members in relation to the financial initiative. It must be noted, however, that neither standing order 201A nor the resolution of 23 November 1995, expressly prohibit a non-executive Member from seeking to legislate by either amendment, or by the presentation of a bill, in relation to a revenue proposal. Instead, a broader principle was established around the sole right of the executive to initiate financial proposals.

³ House of Representatives Practice, 2nd Edn, p 42.

⁴ Andrew Barram, Director Parliamentary and Constitutional, Attorney-General's Department, Legal Opinion to the Clerk of the Legislative Assembly dated 1 November 1995.

⁵ Pat Brazil, AO. Opinion on operation of section 65 of the *Australian Capital Territory (Self-Government Act 1988* and Standing Orders 200 and 201 of the ACT Legislative Assembly, dated 6 November 1990.

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DOES THE LAND TAX (COMMUNITY HOUSING EXEMPTION) AMENDMENT BILL 2018 INFRINGE THE STANDING ORDERS?

1.11. Whilst most of the opinions and advices cited above are linked to proposals to amend various appropriation bills throughout the early days of self-government, there are few examples⁶ I can find where the standing orders relate to a non-budget Bill. I cannot locate any instances where a non-executive member has introduced a bill which seeks to reduce the amount of revenue that is to be collected pursuant to an existing taxation enactment.

1.12. This appears to be confirmed by paragraph 11.158 of the *Companion* where it is stated that:

It should be noted that, 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.

1.13. It is of note that the *Legislation Act 2001* at section 68 prevents a Member from moving a motion to amend a subordinate law or a disallowable instrument if it would have the effect of waiving or changing any fee, charge, penalty or other amount payable to the Territory. So it appears that the principle of the financial initiative of the Crown has been applied to delegated legislation of the Territory.

1.14. Given the lack of clarity of the 1995 resolution and standing order 201A to non-appropriation bills the better course of action is to conclude that there is not relevant precedent and no explicit rule in standing orders. Where that occurs standing order 275 provides that 'any question relating to the 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'.

1.15. The House of Representatives Practice in this regard is reasonably clear. In a 2013 paper prepared by the House of Representatives Clerk's Office—*The law making powers of the Parliament: three aspects of the financial initiative—the practice is outlined as follows:*

In relation to taxation House practice, again reflecting the principle of the financial initiative, is that only a Minister or Parliamentary Secretary may move an amendment to increase or extend the scope of the charge proposed beyond the total already existing under an existing Act.

Standing order 179 provides:

- (a) Only a Minister may initiate a proposal to impose, increase, or **decrease a** tax or duty, or change the scope of any charge.

⁶ In 2001 an Opposition member introduced the Financial Management Amendment Bill 2001 (No. 2) which provided that no payment of public money may be made for providing a new free school bus scheme. Although the Speaker did not rule the bill out of order he noted that the standing of the 1995 order was not beyond doubt. See paragraph 11.189 of the *Companion*.

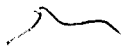
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- (b) Only a Minister may move an amendment to the proposal which increases or extends the scope of the charge proposed beyond the total already existing under any Act of Parliament.
- (c) A Member who is not a Minister may move an amendment to the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

In relation to taxation an amendment to reduce the tax imposed by a bill is in order and thus, in moving an amendment to a government bill a private Member may do what he or she cannot do by introducing a private Member's bill – that is, propose the alleviation of a tax.⁷

- 1.16. Pursuant to standing order 275 which links us to House of Representatives where we have no existing practice, it is clear from the above that Mr Parton's Bill is out of order.
- 1.17. As you are aware the Standing Committee on Administrative and Procedure has a current reference in relation to the operation of section 65 of the Self-Government Act. As part of that review the committee may wish to address the issue of what practice the Assembly wishes to adopt on this issue and whether it wishes to adopt a standing order along the lines of House of Representatives standing order 179 so that there is more clarity around this matter.
- 1.18. If you agree with this advice, standing order 170 requires that every bill not prepared according to the standing orders shall be ruled out of order by the Speaker and withdrawn from the *Notice Paper*. It would then be appropriate for you to make a statement to the Assembly informing them of your decision.

For your consideration



Tom Duncan
Clerk of the Legislative Assembly

22 October 2018

⁷ David Elder, *House of Representatives Practice*, 7th Edn, 2018, p 416.

