



Legislative Assembly for the
Australian Capital Territory

Select Committee on Financial
Management and Government
Procurement Legislative Compliance

Submission cover sheet

Inquiry into Financial Management and Government Procurement Legislative Compliance

Submission number: 09.1

Submitter: Mr Ed Cocks MLA

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Dear Chair,

Thank you again for taking the time to explore the issues regarding the likely breaches of the *Financial Management Act* by the Government, including during your recent hearings.

As the Committee advised I would not be permitted to ask questions as a visiting Member at the subsequent hearings with the Government, and in the context of the Government's evidence, it is important to clarify a number of issues which have become unnecessarily clouded.

Legislative Requirement under s16(b)(6)

During hearings, the Government confirmed the Treasurer did not attach the instruments signed on 10 April 2025 to the next statement presented to the Assembly on 18 May 2025 as required by the text of ss16(b)(6) of the *Financial Management Act*.

The Treasurer's defence as to why this does not constitute a breach of the law rests entirely on the government assertion that the practise is allowed by the explanatory notes text of Clause 68 of the Explanatory Statement for the 2015 Amendment. I have attached the full Explanatory Statement for the Committee's reference.

There are two key problems:

- 1) The Explanatory Statement cannot legally override the clear and specific text of the legislation enacted by the Assembly.
- 2) The part of the Explanatory Statement relied on by the Government does not relate directly to the clauses related to tabling requirements while the parts that do specify that statements must be presented 'on next financial statement presentation day'.

These issues with the Government's argument are egregious and misleading. I suspect it would be difficult to find a competent lawyer who would support the argument that the explanatory text could override clear statute. Indeed, the Auditor General indicated during hearings that explanatory text would only be referred to if the legislation itself was not clear.

The fact that the meaning of legislation cannot be overruled by an Explanatory Statement also has clear precedent in case law.

In *Bishop v Lawrence* [2016] ACTSC 384, for example, the appellant tried to rely on the Explanatory Statement for an amendment to section 208(1)(g) of the *Road Transport (General) Act* 1999 (ACT), arguing that the legislature intended to provide a right of appeal in situations where a magistrate declined to vary a period of license disqualification.

However, Justice Mossop rejected the argument, and observed that:

"The Explanatory Statement shows it may have been the intention of the author of the Explanatory Statement ... to provide appeal rights... But that is not what the statute says."

This decision also cited foundational High Court precedent, with the Court reaffirming that "*Legislative history and extrinsic materials cannot displace the meaning of the statutory text*" (*Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55).

The problem is also highlighted in Appendix 1 of the Government's own Guide to writing an Explanatory Statement (Attached) which states: "*The courts are very reluctant to determine the meaning of the words of an Act by reference to what the non-legislative material may say those words should mean.*"

The guide goes on to state: "*an Explanatory Statement should not be used to clear up some perceived ambiguity or uncertainty in the words of a provision of a bill. These matters should be fixed up by amendment of the bill in its passage through the Assembly*".

This is reflected in the introduction to Explanatory Statement itself which states (emphasis added):

*"This Explanatory Statement relates to the Financial Management Amendment Bill 2015 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. **It does not form part of the bill and has not been endorsed by the Assembly.***

*The Statement must to be read in conjunction with the bill. **It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.***"

The Government's assertion that the Explanatory Statement can override the text of the statutory requirement is not supported by evidence, and in this specific case is potentially even more egregious given the misleading references to the Explanatory Statement itself.

Specifically, the Explanatory Statement for the clauses that covered each of the appropriation adjustment provisions included a statement that the instruments must be tabled on the next financial statement presentation day.

For example, Clause 44 covering Section 16B(6) and (7) states:

Clause 44 Rollover of undisbursed appropriation – Section 16B(6) and (7)

This clause replaces the existing presentation requirements in sub section 6 in relation to the authorisation under section 16B from 'within 3 sitting days after the day the appropriation is authorised' to 'on the next financial statement presentation day'. This amendment is associated with changes to section 26, discussed under clause 68.

This clause also removes the reference to section 16B(7) for the meaning of the term 'entity' due to the replacement of the term 'entity' with the term 'territory entity' in section 16B (refer clauses 41 and 43). Refer to clause 9.

The Government has instead chosen to refer to Clause 68 of the Bill. This Clause related to a change to Section 26(2) of the Act which requires the financial statements to include a summary of instruments made under a range of subsections which have been attached to statements. It does not relate in any way to the timing of when instruments are required to be attached to those statements. Specifically, the clause stated:

68 **Periodic financial statements**
Section 26 (2)

substitute

- (2) The statements must—
- (a) be prepared in accordance with the financial management guidelines; and
 - (b) include a summary of any instruments attached to statements.

Note Instruments made under s 14, s 14A, s 14B, s 15A, s 16, s 16A, s 16B, s 17, s 17A, s 18C and s 19B may be attached to the financial statements.

It is entirely possible, consistent and appropriate for the Government to attach instruments in compliance with the text of appropriation adjustment provisions such as those specified in 16B (6), and also meet the requirements of Section 26(2) by providing a summary. They are separate but related requirements, and it does not require consideration of the Explanatory Statement to reach this conclusion.

In the context of the above evidence, the Government's submission and statements to the Committee appear to have been intentionally misleading. The Committee may wish to formally find that the Government Submission was misleading.

In the context of the Government's admission that the Treasurer did not meet the statutory deadline, I reiterate my view that the Committee should find that the Treasurer has not complied with the law in respect to the requirements of sub section 16B(6).

Breadth of Appropriations:

The Government has also conceded that payments for a range of projects were made before the instruments purporting to be required in order to make payments were signed.

As a defence for the legality of these payments, the Government seems to be asserting that it is able to treat each appropriation as a single account for which they are able to spend as much as they like so long as they do not exceed the overall appropriation line as specified in the Appropriation Act rather than the amount being appropriated for the purpose of making payments in line with the Budget. As I specified in my submission, that practice runs counter to the principles of the Act and historical precedent.

Under the Westminster tradition that our Budget process is built on, Appropriation Acts appropriate money for the purpose of making payments in line with the Budget. This is why the Financial Management Act requires presentation of the Budget immediately following presentation of the Act, and why Section 55 of the

A useful comparison for this purpose is the 1997/1998 redevelopment of the Bruce Stadium. Consistent with current practise, the Appropriation Act at that time appropriated a broad amount as a single line with further detail in the Budget.

The Auditor General's Report: Reports of the Performance Audit of the Redevelopment of Bruce Stadium – Report 11 (Attached), reinforced this position by treating the amount of the appropriation for the purpose of Section 6 as the amount specified within the Budget for the specific project. This approach was also consistently applied in the legal advice provided for both the Government and Opposition to inform the report.

Furthermore, the Act contains specific provisions requiring the appropriation to be administered in line with the Budget.

In the interest of ensuring Budgeting is The Committee reaffirm that the amount specified within the Budget is the relevant amount of appropriation for each project or program.

The Government's confirmation that the appropriation rollovers were approved after payments were made has also revealed an additional problem related to the use of 16B rollovers.

Of deep concern is the Government's evidence that *"It happens all the time that CFOs **use existing funds to manage pressures, on the understanding that they may receive either a supplementary appropriation, a Treasurer's advance or a section 16B later in that process.** Hopefully, they will talk to us first, before they do that, but it is not always the case."*

This indicates that the Government may be routinely using potentially illegal retrospective budgeting practises. Furthermore, if a 16B instrument was approved for payments that had already been made, the rollover amount could not legally be used for any other purpose than that specified in the statement of reasons.

As context, section 16B(4) requires the authorisation of appropriation adjustment instruments to meet specific criteria. The Act states:

The authorisation must identify—

(a) the territory entity to which the amount is to be disbursed; and

(b) the appropriation type; and

(c) the amount authorised to be disbursed; and

(d) the purpose for which the amount may be disbursed."

That is consistent with the Treasurer's evidence that "...*the rollover request has to be specific to a particular project.*"

Another exchange during the Government hearings emphasises that the authorisations

Mr Steel: Spending within the budgeted appropriation for the agency is up to the agency, but if they need a section 16B rollover, they would need to come to me.

MRS MORRIS: But they had a rollover before they came to you.

Mr Steel: No, because it was not authorised at that point.

The only section of the current instruments that might relate to the purpose requirement under subsection (d) is the 'statement of reasons' which sets out specific programs or projects that the amounts relate to. While the government does not explicitly state that these are the purposes for which the amount may be disbursed, it can be reasonably inferred that this is the case (otherwise the Government would be in breach of this provision also).

On that basis, the only purpose for which the appropriation could be disbursed is to make payments in the amounts specified for the specified projects. If the Government had already made the payments for those projects, the rollover amount could not be legally disbursed for any other purpose. However this is not consistent with Government Officials' testimony that "*It may be that they were cash managing at a point in time and then said, 'By the time of the financial year, we'll need the rollover to make up the difference.'*"

Thank you again for the opportunity to provide some clarification on these matters. As always I am happy to provide any additional information that would be of help to the Committee. I look forward to your final report.

Yours Sincerely,

Ed Cocks MLA.