NEW SOUTH WALES

SOLICITOR GENERAL

Parliament Management Bill and the

"Ordinary Annual Services of the Government"

I have been briefed with a Memorandum by Parliamentary Counsel, Mr Murphy QC dated 5 May 1992 about the Parliamentary Management Bill. This Bill is to be introduced today.

In accordance with discussion last week between Mr Murphy, Ms McKenzie and myself clause 57 of the Bill proceeds on the stated basis that an appropriation in relation to the recurrent services and capital works and services of the Legislature is part of an appropriation for the "ordinary annual services of the Government". If (as I advise below) this stated assumption is correct it will have consequences so far as concerns any subsequent "Parliamentary Appropriation Bill" having regard to s5A of the Constitution Act 1902, s5(3) of the Constitution (Fixed Term Parliament) Special Provisions Act 1991, and ss21A and 22 of the Public Finance and Audit Act 1983. These consequences will apply whether or not the clause continues to assert that the appropriation is regarded as one for the ordinary annual services of the Government.

The scope of "the ordinary annual services of the Government" has been the subject of much debate in the Federal Parliament in the light of ss53 and 54 of the Constitution. In 1952 and 1961 the Commonwealth Solicitor General Sir Kenneth Bailey gave advices to the effect that the expression included:-

> "those services provided or maintained within any year which the Government may, in the light of its powers and authority, reasonably be expected to provide or maintain as the occasion requires through the Departments of the Public Service and other Commonwealth agencies or instrumentalities. Accordingly, if the expenditure is to be incurred for an item which is itself such a service or is reasonably necessary for or incidental to the provision or maintenance of such a service, it may be regarded, without more, as proper for inclusion in an ordinary Appropriation Bill." (quoted in Pearce "The Legislative Power of the Senate" in Zines ed, Commentaries on the Australian Constitution p133)

On this basis the expression included capital and other expenditure related to the services of the government, and extended to practically any appropriation other than one relating to s96 grants.

This expansive view naturally affected the powers of the Senate. It is therefore unsurprising that a much narrower construction was urged in the Senate when the matter was debated in 1964. However, what looked like becoming an intractable stand-off in the federal arena was resolved in 1965 when the Treasurer announced that the government had given way to the Senate's wishes. Thereafter appropriation for federal expenditure was to be divided into two Bills. The first would embrace a narrower version of the "the ordinary annual services of the Government" than propounded by Sir

Kenneth Bailey. The second would be available for Senate amendment and would include appropriations for expenditure of a capital nature, for grants to the States, and for new policies not authorised by special legislation: see generally Pearce, op cit pp130-134; Odgers Australian Senate Practice 6th ed pp568-587; Brown v West (1990) 169 CLR 195 at 206-207.

To my knowledge the expression has not received any judicial exegesis. It is not found in English legislation although it reflects long-standing Parliamentary conventions about the preeminence of the Lower House in money matters. The particular expression appears to be derived from a South Australian document known as the Compact of 1857: see generally Cormack Committee Report (Parliamentary Paper No 55 of 1967) para 37ff.

The material summarised above is relevant only by way of background to the specific problem presented for my advice. It would not appear that anyone could dispute that the cost of maintaining the Legislature and paying its staff is an "ordinary annual service". The critical question is whether it is an "ordinary annual service of the Government".

Now it is obvious that the Parliament is not the tool of the Government. The most rudimentary understanding of the concept of the separation of powers reveals that the Government does not provide services through the Legislature. The Government is responsible to the Lower House and, since at least as early as

Stuart times, to the law enacted by the Legislature that is assented to by the Queen or her representative.

From this starting point it has been suggested that an appropriation relating to the expenses of Parliament could not constitute one that falls within the expression the "ordinary annual services of the Government": Pearce op cit at p134; Odgers op cit at pp581-584; Cormack Report at p29; Jessop Report (Parliamentary Paper No 151 of 1981) Chapter 2. A similar argument based on the separation of the judicial arm would have the consequence that appropriations for judicial salaries are outside the expression, although no one appears to have taken this point to date.

Whilst one cannot be dogmatic on the point, I would respectfully reject this proposition. At issue is not some question concerning the doctrine of the separation of powers but the obligation of the Executive to obtain parliamentary sanction for every appropriation, and the role of the Lower House in that process. Examination of Appropriation Acts of the Commonwealth from its inception and of New South Wales from at least 1900 reveals that specific appropriations for "the Parliament" or "the Legislature" have been treated as part of the ordinary annual services of the Government. So too have appropriations covering judicial salaries. In my view this is the strongest pointer to the meaning of that phrase in the present context, bearing in mind that it first entered the Constitution Act 1902 in 1933 when s5A was enacted. The fact that the practice changed in the Commonwealth in 1982 pursuant to the recommendation

of the Jessop Committee (Parliament Paper No 151 of 1981) does not detract from this.

It is clear that in 1933 the staffing and maintenance of the Legislature was seen, fiscally and industrially, as the responsibility of "The Executive", whatever may have been the privileges of the Parliament and the authority of its presiding officers within the precincts of Parliament House (cf SG 90/69). In the same way the Department of the Attorney General was responsible for the salaries of judges, the industrial affairs of court staff, and the upkeep of court buildings.

It is true that it could be argued that the practice of including appropriations in favour of "the Legislature" proceeded on a misconception or, alternatively, was silent as to its characterisation for the purpose of constitutional limitation upon the powers of Upper Houses with respect to money Bills. I would nevertheless regard the invariable practice that prevailed in the Commonwealth and the State from 1900 onwards (until varied voluntarily in the Commonwealth in 1982), coupled with the evidence about the Executive government's responsibility for the maintenance of the physical and staffing needs of the Legislature and the Judiciary as a strong pointer to the proper interpretation of this phrase. It has been recognised judicially that, in a broad sense, the functions of government include the legislative, judicial and executive roles: South Australia v Commonwealth (1942) 65 CLR 373 at 423; Tasmanian Dam Case (1983) 158 CLR 1 at 214; Second Fringe

Benefits Case (1987) 163 CLR 329 at 362-3; Coomber v Justices of Berks (1883) 9 App Cas 61. In Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 2] (1920) 28 CLR 436 at 454 Higgins J said:

> "But if this Court feels justified in implying any restriction as to State activities - any restriction on the power of Parliament under s51(xxxv) - I concur in the view that the restriction should be limited to strictly Governmental functions - functions such as legislative, executive and judicial functions, without which a constitutional State cannot be conceived, functions which are essential and inalienable. The limitation (if any) should follow the lines of such cases as Coomber v Justices of Berks at 74 and South Carolina v United States 199 US 437."

For these reasons I advise that an appropriation for the recurring expenditure of salaries of members of Parliament and their staff and the upkeep and maintenance of the Parliament falls within the constitutional expression "the ordinary annual services of the Government".

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