



NEW SOUTH WALES

SOLICITOR GENERAL

QUESTION OF MEANING OF TERM “ORDINARY ANNUAL SERVICES OF THE GOVERNMENT” IN SECTION 5A(1) OF CONSTITUTION ACT 1902

I have been asked by the Crown Solicitor, who acts for the Secretary of the Department of Premier and Cabinet, to advise whether the Appropriation (Parliament) Bill 2020 is a “Bill appropriating revenue or moneys for the ordinary annual services of the Government” within the meaning of s 5A(1) of the Constitution Act 1902.

Appropriation (Parliament) Bill 2020

The Explanatory Note for this Bill, which was introduced into the Parliament on 18 November 2020, states that the object of the Bill is to “appropriate from the Consolidated Fund a sum for the services of the Legislature during the 2020-21 financial year, including recurrent services, capital works and services and debt repayment”.

Section 5A(1) of the Constitution Act

Section 5A(1) of the Constitution provides as follows:

If the Legislative Assembly passes any Bill appropriating revenue or moneys for the ordinary annual services of the Government and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the

Legislative Council, be presented to the Governor for the signification of His Majesty's pleasure thereon, and shall become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill.

Advice of Mr Mason QC

In an advice dated 7 May 1992 (SG92/50) the then Solicitor General, Mr Mason QC expressed the following opinion:

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 s 5A was enacted.

Mr Mason then added:

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.

Mr Mason's conclusion was in the following terms:

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".

Is the advice of Mr Mason still applicable?

I agree with the advice of Mr Mason and I note particularly, as he did, the comment of Higgins J in Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 2] (1920) 28 CLR 436 (at 454) where his Honour referred to what he called "strictly

Governmental functions” which he described as “functions such as legislative, executive and judicial functions, without which a constitutional State cannot be conceived, functions which are essential and inalienable”. This description, in my view, underlines the proposition that the funding of the legislature is one of the responsibilities of any government so that such funding is for the “ordinary annual services of the Government”.

Please do not hesitate to contact me in relation to any of the matters raised in this advice.

A handwritten signature in black ink, appearing to read 'M G Sexton SC'. The signature is stylized and cursive.

M G Sexton SC

20 November 2020

Acting Deputy Secretary, Law Reform and Legal Services

General Counsel (Ms Lida Kaban)

Crown Solicitor (Ms Karen Smith)