NSW GOVERNMENT | Crown Solicitor's Office

ADVICE

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Dear Sarah

Summary

1. You seek my urgent advice, today, regarding the *ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill 2021*, which is proposed to be introduced, by a private member, in the Legislative Council tomorrow.

2. The Bill is, in my view, a Bill "for appropriating any part of the public revenue", within the meaning of the second paragraph of s. 5 of the *Constitution Act 1902*. The Bill could not, therefore, originate in the Legislative Council.

"Money bills", appropriations and the *Constitution Act*

3. Section 5 of the *Constitution Act* provides: (emphasis added)

> "The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever:
>
> Provided that **all Bills for appropriating** any part of the public revenue, or for imposing any new rate, tax or impost, **shall originate** in the **Legislative Assembly**."

4. Section 5 (and ss. 5A and 46) of the *Constitution Act* reflects the general principle that it is the Government of the day that initiates or moves to increase parliamentary appropriations and taxation. This constitutional and parliamentary principle has been described as embodying "the financial initiative of the Crown": see generally *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23; at 105 [294].

The Bill

5. The Bill would amend the *Government Sector Finance Act 2018* ("*GSF Act*") by inserting a proposed s. 4.6A, which applies only to the Independent Commission Against Corruption, the Law Enforcement and Conduct Commission, the New South Wales Electoral Commission and the Ombudsman's Office. The Bill provides, amongst other things, that (Sch. 2[4]):

    a. the "appropriation made by the annual Appropriation Act to an agency is taken to include, as a contingency fund for the annual reporting period, an amount equal to 25% of the appropriation made (the ***contingency fund***)"; (s. 4.6A(2)) and

    b. the Treasurer must, at the request of an agency, authorise the payment of a sum out of the contingency fund if: (s. 4.6A(4))

        i. the appropriation made by the annual Appropriation Act for the agency for the annual reporting period has been exhausted;

ii. payments authorised to be made under s. 4.6A will not exceed the contingency fund;

iii. the relevant Joint Committee (which is defined in s. 4.6A(6)) has approved the payment of the sum; and

iv. any requirements prescribed by the regulations have been met.

6. Schedules 3 to 6 of the Bill amend the *Electoral Act 2017*, the *Independent Commission Against Corruption Act 1988*, the *Law Enforcement Conduct Commission Act 2016* and the *Ombudsman Act 1974* respectively, with the effect that (amongst other things) each agency to which the proposed s. 4.6A applies must refer to the Joint Committee a request for payment of a sum out of the agency's contingency fund. The Joint Committee may approve the request if the sum is no more than is necessary in the public interest to fund expenditure to meet the purpose for which the sum is required, and any other requirements prescribed by the regulations have been met.

Further analysis and conclusions

7. The proposed s. 4.6A of the *GSF Act*, particularly subsection (2), would increase, by 25%, the amount appropriated for an agency by the annual Appropriation Act.

8. The Bill would therefore, in my view, be a Bill "for appropriating any part of the public revenue" within the meaning of the second paragraph of s. 5 of the *Constituiton Act*, which must originate in the Legislative Assembly.

9. The fact that payments could be made out of the contingency fund *only* if the various requirements specified in s. 4.6A(4) of the *GSF Act* and Schs 3-6 of the Bill are met, is not in any way inconsistent with the conclusion that s. 4.6A(2) is an appropriation provision.

10. In a frequently cited passage, Mason J said that: (*Victoria v Commonwealth* (1975) 134 CLR 338 at 392–393)

> "An Appropriation Act has a twofold purpose. It has a negative as well as a positive effect. Not only does it authorise the Crown to withdraw money from the Treasury, it 'restrict(s) the expenditure to the particular purpose'".

11. In *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40 (the Marriage Equality Vote case), the High Court considered s. 10 of the *Appropriation Act No 1 2017-2018* (Cth). Section 10(1) authorised the Finance Minister - upon being satisfied that there was an urgent need for expenditure that was not provided for, or was insufficiently provided for, because of an erroneous omission or understatement, or because the expenditure was "unforeseen" - to make a determination.

12. Section 10(2) provided that the Act had effect as if Sch 1 (which appropriated the relevant sums) was amended - in accordance with the Minister's determination - to provide for so much (if any) of the expenditure as the Finance Minister determined. Section 10(3) provided that the amounts determined under s. 10(2) could not be more than a specified amount ($295 million).

13. Section 12 of the Act provided that the Consolidated Revenue Fund was appropriated as necessary for the purposes of the Act.

14. The Court rejected an argument that s. 10 of the *Appropriation Act No 1 2017-2018* purported to confer power on the Finance Minister to alter that Act so as to supplement "by executive fiat"

the amount appropriated by Parliament in Sch. 1. That argument was based "on a fundamental misconstruction" (at [87]). Section 12 operated as an immediate appropriation of the amount of $295 million specified in s. 10(3). The power of the Finance Minister to make a determination under s. 10(2) was: (at [89])

> "not a power to supplement the total amount that has otherwise been appropriated by Parliament. The power is rather a power to allocate the whole or some part of the amount of $295 million that is already appropriated by s 12 operating on s 10(3)."

15. Similarly, in my view, the power that would be conferred on the Treasurer under s. 4.6A(4) of the *GSF Act* would be a power to allocate the whole or some part of the amount of the additional sum, described as a "contingency fund", appropriated by s. 4.6A(2).

16. I do not think there is any significance in the fact that s. 4.6A(2) provides that the appropriation made by the annual Appropriation Act "*is taken to include*", as a contingency fund, the additional 25% amount. Nor do I think it significant that there is no provision *expressly* describing the additional 25% amount as an appropriation.

17. As Professor Twomey notes, "[n]o particular words are required to make an appropriation. It is a matter of discerning the intention of the provision." (Twomey, A., *The Constitution of New South Wales*, The Federation Press, 2004, at p. 542). The effect of s. 4.6A(2) would, plainly, be to increase, by 25%, the appropriation made to the agency by the annual Appropriation Act.

18. In my view, therefore, the Bill is one for "for appropriating any part of the public revenue", within the meaning of the second paragraph of s. 5 of the *Constitution Act*. The Bill could not, as a result, originate in the Legislative Council.

If you have any further questions please contact either Tom Chisholm or me.

Karen Smith
Crown Solicitor