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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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Australian Capital Territory Legislation Amendment Bill
2002

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10 April 2003

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Australian Capital Territory Legislation Amendment Bill 2002

Date Introduced: 28 August 2002

House: House of Representatives

Portfolio: Transport and Regional Services

Commencement: On Royal Assent

Note: The Bill was passed by Parliament on 6 February 2003 and received Royal Assent on 24 February 2003 (Act No. 1 of 2003).

Purpose

This Bill amends the *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act), and the *Australian Capital Territory (Planning and Land Management) Act 1988* (the PALM Act), for mostly minor technical purposes, such as deleting redundant transitional provisions.

Background

This Bill is the result of the need for Commonwealth legislation to reflect the evolving nature of self-government in the Australian Capital Territory (ACT). This need is reflected in three areas:

- the existence of references in Commonwealth laws to transitional administrative arrangements that are no longer in existence
- the divergence of Commonwealth and ACT laws in relation to ACT elections, which emerged as the ACT developed its own views and laws on how ACT elections would best be run, and
- the desirability of fine tuning clauses in which problems were found to exist as the Commonwealth's laws relating to ACT self-government were first drafted.

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Defunct transitional arrangements

The Commonwealth's Self-Government Act contains a range of transitional provisions that are no longer relevant. It refers, for example, to the positions of 'Head of Administration' and 'Associate Head of Administration', which ceased to exist in 1994. It also provides for the qualification of candidates in ACT elections, the filling of casual vacancies, and the regulation of election funding, until the ACT Assembly legislates on these matters. The ACT did so in its *Electoral Amendment Act 1994*.

Changes to ACT electoral law

In its report on the 1995 ACT Assembly election, the ACT Electoral Commission suggested that the month in which elections were held might be moved from February to October.¹ A Bill to implement this change was introduced in the ACT Assembly in 1996 by one of the independents, Michael Moore.² The Bill originally contained two provisions, one to move the date of elections, and another to introduce four-year terms. The latter proposal was not, however, derived from the Electoral Commissioner's report.

There was considerable debate about the Bill, primarily in relation to the four-year term provision. This debate appeared to be at least in part because the minority liberal government could not decide whether to support the proposals. The Bill was eventually passed containing just the provision moving the date at which elections are normally held to October.³

One effect of the change in the ACT electoral laws is that it may make them inconsistent with the Self-Government Act. Section 28 of that Act provides that an ACT enactment is of no effect to the extent that it is inconsistent with a law in force in the Territory, which would include the Self-Government Act. The move to an October election date may result in such an inconsistency in relation to the timing of an election in the event that the Assembly is dissolved by the Commonwealth's Minister for Territories following an Assembly motion of no confidence in the ACT Chief Minister (what is termed an extraordinary election). This provision, currently in section 48 of the Self-Government Act, is intended to prevent two general elections being held within six months of each other if the Commonwealth Minister has to call an election under section 48 within six months of the normal general election date. The subsection which prevents this reads:

(4) An election shall not be held under subsection (2) if the election would be required to be held on any day after the third Saturday in August in a pre-election year and before the third Saturday in February in the next calendar year.

Unfortunately, as can be seen, this is achieved by having subsection 48(4) refer to particular months by name, which leads to the potential inconsistency with the Self-Government Act.

In his second reading speech, the Minister remarked that

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the provisions contained in subsection 48(4) of the self-government act are not only outdated but also redundant because of more recent ACT legislation. The subsection is therefore repealed.⁴

In fact, repeal is necessary because the federal law would *not* be redundant in a legal sense. If it is left unchanged, it could cause the ACT to be without an effective government for over a year, should subsection 48(4) ever be invoked. This is because Commonwealth law prevails over Territory law. Currently, Territory law attempts to achieve the effect of the Commonwealth's subsection 48(4) through subsection 100(3) of the ACT Electoral Act. This reads:

(3) Where an extraordinary general election⁵ has been held in the 6 months before the day on which an election in accordance with subsection (1) or (2) would, but for this subsection, have been held-

(a) the election shall not be held; and

(b) this section applies in relation to subsequent ordinary elections as if the election had been held.

This, however, will conflict with the effect of the Commonwealth's subsection 48(4). To clarify this, consider the scenario that would develop under each jurisdiction's law, if a Chief Minister were to be subject to a motion of no confidence (and a replacement not agreed upon) in July, fifteen months before a scheduled ordinary general election in October of the following year.

The Territory regime envisages that, if the Commonwealth Minister has to call an extraordinary election under section 48 in this scenario, that election will take place between 66 and 120 days after the Assembly passed the motion of no confidence in the Chief Minister. Because such an election would be late in the life of the Assembly, the intention of subsection 100(3) of the Territory's electoral law is to allow that extraordinary election to stand in place of the next scheduled ordinary election, so the next general election would take place around three and a half years later. Thus the scenario mentioned above, if the Territory's law were to operate unimpeded, would be effective and operate as intended.

The Territory's law, however, is not free to operate unimpeded. The Commonwealth regime envisages that, whereas the Commonwealth Minister would normally call an extraordinary election under section 48, in this scenario the Minister would not do so, because to call such an election would violate subsection 48(4) of the Self-Government Act. This had been drafted when ordinary elections were held in February. Now that they have been moved back to October, however, in the scenario above the Territory would potentially be governed for over a year by an Assembly that could not agree upon a Chief Minister.

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This problem could potentially be by-passed, by virtue of section 16 of the Self-Government Act, which states:

- (1) If, in the opinion of the Governor-General, the Assembly:
- (a) is incapable of effectively performing its functions; or
 - (b) is conducting its affairs in a grossly improper manner;

the Governor-General may dissolve the Assembly.

The Governor-General would be acting upon the advice of Federal Executive Council. This section could be used to avoid the ACT being paralysed by an Assembly that could not select a Chief Minister. Politically, however, this might be regarded as less than ideal, because the exercise of this power would highlight how the fate of the Assembly lies ultimately with Federal Cabinet, rather than with ACT self-governing institutions.

Far from being merely redundant, therefore, subsection 48(4) of the Self-Government Act needs to be repealed precisely because it could still have effect. It needs to be repealed so that the ACT Electoral Act can operate unimpeded with regard to the implementation of extraordinary elections.

Clarifying the wording of Acts

The PALM Act establishes rules for the operation of the National Capital Authority (NCA). It requires the full-time member of the NCA to be present for a meeting to have a quorum, however the PALM Act also requires that any person with a pecuniary interest in a matter being considered by the NCA absent themselves from deliberations on the matter. Taken together, these provisions have the potential to prevent the NCA dealing with any matter in which the full-time member of the NCA has a pecuniary interest. This Bill addresses this issue, as well as some other drafting problems.

Main Provisions

Schedule 1 item 1 removes a defunct reference in section 16(9) of the Self-Government Act, that currently prevents the Head of Administration (a position that no longer exists) from administering the executive in the event of the dissolution of the Assembly by the Governor-General. It replaces it with a provision indicating that the Chief Executive, or equivalent, of the Chief Minister's Department, cannot undertake that role.

Schedule 1 item 2 clarifies the language of the provisions of the Self-Government Act that outline the circumstances under which the Chief Minister and other Ministers vacate office. The current provision is difficult to read because it attempts to cover both Ministers and the Chief Minister.

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Schedule 1 items 3 and 4 repeal provisions of the Self-Government Act relating to elections held pursuant to the calling of an election by the Commonwealth Minister if the ACT Assembly has passed a motion of no-confidence in the Chief Minister, but has been unable to choose a new Chief Minister. These provisions are potentially inconsistent with the ACT's electoral laws since they were changed in 1997.

Schedule 2 item 2 modifies the quorum rules for the NCA in the PALM Act to ensure that a quorum can be formed in the event that the full-time member of the NCA cannot be present because they have a pecuniary interest in any item under consideration by the meeting.

Concluding Comments

This Bill in broad terms recognises the progressive devolution of law making in some areas from the Commonwealth to the ACT. This Bill would also seem desirable to avoid a number of potential difficulties from emerging from the Commonwealth's legislation for the ACT. The remaining question, raised during debate on the Bill, is whether there are other areas in which devolution of authority should be taking place, such as removing the provision of the Self-Government Act that prevents the ACT from determining the size of its own Legislative Assembly (section 8(3)).⁶

Endnotes

- 1 Mr Moore, *Legislative Assembly Debates*, 4 September 1996, p. 3006; Mr Whitecross, *Legislative Assembly Debates*, 4 December 1996, p. 4412.
- 2 Mr Moore, *Legislative Assembly Debates*, 4 September 1996, p. 3006.
- 3 *Legislative Assembly Debates*, 27 August 1997, p. 2509.
- 4 Mr Tuckey, *House of Representatives Debates*, 28 August 2002, p. 5910.
- 5 'Extraordinary election' is defined in section 101 of the ACT's Electoral Act, and includes an election required under section 48 of the Self-Government Act.
- 6 Senator Stott-Despoja, *Senate Debates*, 6 February 2003, p. 8729.

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