Speech By

Michael Berkman

MEMBER FOR MAIWAR

Record of Proceedings, 1 December 2021

MOTION

Dissent from Speaker's Ruling

Mr BERKMAN (Maiwar—Grn) (6.53 pm): I rise to make a contribution on the motion dissenting from the ruling of the Speaker on 17 November 2021 that the Big Bank Levy (COVID-19 Health Response) Bill 2021 is out of order because it is a revenue bill. With the greatest of respect for the Speaker, I believe the ruling is wrong at law and is undemocratic in its outcome. I want to make clear that this dissent motion is not moved lightly and I want to make crystal clear that we took the Clerk's advice before the introduction of the bill and that advice is that there is no clear position.

We base our dissent on our own interpretation of the Constitution of Queensland Act 2001 and the standing orders, but also on the advice of three pre-eminent experts in Queensland constitutional law. I am quite shocked at the dismissive and disdainful way government members have approached that advice from three such pre-eminent experts. There has been no response to the points of law raised in those advices. They have been described as incompetent, a tantrum and ignorant of parliamentary practice. It is shocking. The experts that we have referred to whose advice we have provided are the Hon. Alan Wilson QC, a former justice of the Supreme Court of Queensland, Professor Gerard Carney, one of Australia's foremost experts on state constitutional law and a person intimately involved in the drafting of the Constitution of Queensland Act 2001, and, finally, Professor Graeme Orr, arguably the authority on the law of parliaments in Queensland. I table the letter from Professor Orr.

Tabled paper: Letter, dated 29 November 2021, from the University of Queensland Law School, Professor Graeme Orr, to the Speaker of the Legislative Assembly, Hon. Curtis Pitt, and the Clerk of the Parliament, Mr Neil Laurie, titled 'Status of non-government bills on taxation measures' 2036.

On Monday of this week we shared our advice from Professor Orr and the joint advice from Justice Wilson and Professor Carney with the Speaker, the Clerk, the government, the opposition and all crossbench MPs, and I repeat that I am shocked at how little attention has been given to the detail of that advice in this debate. Everyone seems to agree that neither the Constitution of Queensland Act nor the standing orders, nor any other statute or law prevents non-government members from introducing tax bills. Section 68 of the Queensland Constitution explicitly prohibits non-government appropriations or budget bills, but does not mention tax bills. Beneath that, standing order 174 goes only as far as the Constitution. Again, there is an explicit prohibition on non-government budget bills, but no mention of non-government tax bills like our big bank levy. As Professor Orr notes in his letter—

The old statutory interpretation principle that the express mention of one thing implies the exclusion of another, is barely needed to conclude that the intended—and literal—meaning of the 2001 Constitution is to permit non-government measures dealing with taxation.

Supporting that interpretation is the fact that the current version of the standing orders dates from 16 June 2011, but before this time former standing order 165 did directly prohibit non-government tax bills. That explicit prohibition was removed by the Assembly when it adopted the new standing orders in 2011. The Committee of the Legislative Assembly formulated those new standing orders, but this

week the secretariat has declined my request that they release the committee's documents, so we cannot confirm whether this issue was considered in detail. As Justice Wilson and Professor Carney put it in their letter—

The Speaker's ruling might, again with respect, have more force if it sought to apply only to legislation dealing with supply. When it seeks to extend to taxation bills, however, it runs up against the fact that s.65 plainly invests the taxation power in the Legislative Assembly, but s.68 only applies, on its face, to appropriation Bills. So far as we are aware there is nothing in the Standing Orders which overrides that relatively plain, black-letter construction. In that analysis, the Speaker's ruling appears to be incorrect.

Mr Speaker relies on what he calls in the ruling the 'well accepted constitutional convention'—the 'financial initiative of the Executive', drawing on commentary, as we have heard from others, in Erskine May in relation to the UK parliament and *House of Representatives Practice* in relation to the federal Australian parliament. In drawing on those outside traditions, the Speaker has referred to standing order 2, which clearly allows the Speaker to rely on practices of other Westminster parliaments where the standing and sessional orders do not provide guidance. That would be quite proper if the law in Queensland did not provide guidance on this question, but the available expert opinion and our own interpretation finds that it does. As Professor Orr says of the rule in the Commonwealth *House of Representatives Practice* prohibiting non-government tax bills—

The Commonwealth rule is reasonable. But it is not the law in Queensland. And its instructive value is limited since it is just a Standing Order, nestled within a constitutional framework that otherwise permits non-government taxation bills in the lower house, a framework itself a federalist compromise concerned with the powers of a strong Senate, a hybrid grafted onto a Westminster base.

He says—

Similarly, the UK provisions, whilst more liberal than the Commonwealth, are at most indications of evolving practice at Westminster.

He goes on to say—and in my view this is at the core of the Speaker's error—

Conventions, whether from Westminster or in Australia, rest on precedents and evolve. They give way to black-letter rules.

The black-letter rule in Queensland—section 68—does not mention tax bills, so the question is what does that mean for the scope and content of the convention of the financial initiative of the executive? The people responsible for drafting the new Constitution Act in the 1990s, the Constitutional Review Commission, and the parliament which then adopted the new Constitution did actually describe their understanding of the convention. The commission, in its July 1999 issues paper, described what would become section 68 as affirming a monopoly on initiation of appropriations—with no mention of tax bills. As Professor Orr notes—

Neither the Parliament nor the Commission could have been unaware of the option to provide for executive control over the initiation of taxation measures, given (i) the Commonwealth position, (ii) historical debates and, above all, (iii) that s.18 of the old Constitution Act 1867, included 'any ... tax or impost' in the class of bills reserved solely to government initiative.

Indeed, that narrower definition of the convention was consistent throughout the whole process of drafting and consolidating the Constitution from 1993 until 2001. Thanks to the diligence of the Parliamentary Library, I have had the chance to review every single report and issues paper produced by the Electoral and Administrative Review Commission, or EARC as it was called, the relevant parliamentary committees and the later Queensland Constitutional Review Commission. There were seven reports in total. All of them describe the convention as applying only to budget bills, not to tax bills.

In addition to the black-letter interpretation that quite plainly distinguishes between appropriations and revenue bills, Professor Orr's opinion very helpfully sets out some of the important differences that warrant this distinction and make the case against a blanket application of the anachronistic convention to both. Most important is the relationship between appropriation bills, or supply, and the confidence of the parliament in the government of the day. He refers to the importance of this convention in both the formation and dissolution of governments. He cites the well-known 1975 constitutional crisis, which stemmed from a failure of the Whitlam government to secure supply, and the formation of minority governments—including this government in 2015—depending on agreements of confidence and supply. Conversely, revenue bills have no such bearing on the fundamental underpinnings of responsible government.

Again I quote from Professor Orr's opinion—

If a taxation measure is blocked, governments can borrow any shortfall. In public finances, taxation revenues are not predictable anyway, so complete government control of taxation measures is not critical. 'Money in' fluctuates, depending on economic conditions. In contrast, expenditure—supply bills—are not only vital under the rule of law, they are more predictable and controllable.

Another key distinction is that taxes or levies are increasingly used as policy tools to change behaviours rather than to simply raise revenue. We see taxes being routinely used to discourage undesirable or harmful behaviours—so-called 'vice taxes'—or as incentives to drive positive behavioural changes through tax breaks.

What is more, our parliament is unusual in that it is a unicameral legislature. I do not think anyone here can honestly deny that this creates a democratic deficit, and our view is that your ruling, Mr Speaker, on this issue more deeply entrenches this deficit. The government might prefer it this way, but denying non-government members access to basic procedures like this weakens our already strained democracy.

Our hospitals and schools are underfunded and struggling to keep up. This is a wealthy state, but successive Labor and LNP governments have not raised the revenue we need. In concrete terms that means that wealthy and powerful companies and people are hoarding the resources that we all need. There are plenty of ideas sitting around to fix it, starting with our bill which is under discussion here. A state based levy on the five biggest banks—

Mrs D'ATH: Mr Speaker, I rise to a point of order on relevance. The member himself has continually sought to have members on this side brought back to what we are debating, that is, the dissent motion and not the alternatives that there can be to their bill.

Mr SPEAKER: I appreciate the point of order. I will continue to listen carefully to the member. Member, you have one minute and 14 seconds remaining.

Mr BERKMAN: There are plenty of other ideas that the Greens are proposing, including increasing mining royalties on coal and gas to pay for good jobs in a new economy—

Mr BAILEY: Mr Speaker, I rise to a point of order.

Mr SPEAKER: Member for Miller, I gave some guidance to the member for Maiwar who was seeking to rise to points of order. I have just ruled on the point of order raised by the Leader of the House. I will continue to listen to the points being raised. What is your point of order?

Mr BAILEY: Mr Speaker, I respect your ruling and, in fact, the very first sentence from the member for Maiwar I believe went absolutely against your ruling. That is why I was seeking relevance.

Mr SPEAKER: Thank you, member. I have the situation under control.

Mr BERKMAN: Other options include a tax on windfall profits enjoyed by big property developers and a vacancy tax on empty homes. The government does not want to hear about these options, but if the government continues to avoid them then none of those proposals, or any others, can be properly debated in this parliament unless non-government members of parliament are allowed to introduce legislation such as the bill that this ruling would rule out.

The wealthy and powerful in Queensland will be very happy if the government refuses to support this motion tonight and if your ruling is allowed to prevent the Big Bank Levy (COVID-19 Health Response) Bill from being debated. Powerful people across Queensland like this arrangement just fine. They like it that non-government and crossbench members of parliament, including the Greens, might not be able to propose a bill to make them pay their fair share. They would be thrilled if we are not allowed to introduce legislation to raise royalties on mining or tax property developers on their windfall super profits because, yes, the status quo suits them just fine.

When both major parties are looking out for big corporations and millionaire CEOs rather than regular Queenslanders, our job as crossbench members of parliament is to talk about ideas that they will not touch. The Greens do not take corporate donations so we work for regular people and not billionaires.

(Time expired)