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1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

COMMONWEALTH AND COMMONWEALTH INSTRUMENTALITIES  
(APPLICATION OF LAWS) BILL 1989

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the  
Hon. Lionel Bowen MP)

This Memorandum takes account of amendments made by the House  
of Representatives to the Bill as introduced.



COMMONWEALTH AND COMMONWEALTH INSTRUMENTALITIES (APPLICATION OF LAWS) BILL 1989

GENERAL OUTLINE

The purpose of the Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989 is to make clear what kinds of State and Territory laws apply to the Commonwealth and Commonwealth instrumentalities.

2. The Bill addresses problems created by longstanding uncertainties as to the extent of the Commonwealth's implied constitutional immunities from State laws, and problems arising from section 64 of the Judiciary Act 1903 in the light of the High Court's decision in The Commonwealth v. Evans Deakin Industries Ltd (1986) 161 C.L.R. 254.

3. In the early years of Federation the Commonwealth Parliament addressed the problem of Commonwealth immunities from civil liability. Interim legislation was enacted in 1902 modelled on colonial legislation dealing with remedies against the Crown. This legislation was replaced, in substantially similar terms, by section 64 of the Judiciary Act 1903 which is still in force. Section 64 provides that in 'any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject'. The High Court's decision in Evans Deakin means that, in civil proceedings, section 64 of the Judiciary Act subjects the Commonwealth, and also Commonwealth instrumentalities, to a wide range of State and Territory legislation as if the Commonwealth were an ordinary person. Section 64 can even subject the Commonwealth to State legislation that does not bind the State, and in some cases to Commonwealth legislation that would not otherwise apply to the Commonwealth. Section 64 applies only to civil proceedings to which the Commonwealth is a party and not to criminal proceedings. In criminal proceedings the legal position still depends on the uncertain scope of the Commonwealth's implied

immunities. Furthermore, the expression 'as nearly as possible' in section 64 leaves scope for exceptions but their extent is very uncertain.

4. The Bill clarifies, and in some appropriate respects alters, the present legal position by setting out exhaustively (except in relation to Australian Capital Territory laws) -

- . the extent to which the Commonwealth, and its servants and agents when acting as such, are to be subject to Commonwealth, State and Territory laws; and
- . the extent to which Commonwealth corporations are to be subject to Commonwealth, State and Territory laws.

5. The Bill also makes complementary amendments to section 64 of the Judiciary Act 1903.

#### Financial impact statement

6. The Bill removes the risk of the Commonwealth incurring unforeseeable kinds of liabilities under whatever legislation the States and self-governing Territories might enact from time to time in relation to ordinary persons. Because the contents of future State and self-governing Territory laws are unpredictable, it is not possible to quantify the financial impact of the Bill.

#### NOTES ON INDIVIDUAL CLAUSES

##### Clause 1: Short title

##### Clause 2: Commencement

7. Clause 2 provides for the commencement of the various provisions of the Act.

8. Sections 1 and 2 of the Act are to commence on the date of Royal Assent.

9. Section 9 of the Act is to commence one year after the date of Royal Assent. This deferral is needed to give time to decide what regulations should be made for the purposes of subsection 9(2), and time to make the regulations. Paragraph 12(4)(a) provides that such regulations cannot be made after section 9 commences.

10. The remaining provisions of the Act commence 3 months after the date of Royal Assent. This deferral is needed in order to give time for the making of regulations under the Act (other than regulations for the purposes of subsection 9(2)).

Clause 3: Interpretation

11. Clause 3 contains definitions. Significant words or phrases used in the legislation are detailed below:

"codified tort law" has the meaning given by section 4.

"Commonwealth corporation" is defined to mean a body corporate established for a public purpose by or under a Commonwealth Act, but does not include the Repatriation Commission.

"State" is defined to include the Northern Territory and Norfolk Island.

"Territory" is defined not to include the Australian Capital Territory, the Northern Territory or Norfolk Island.

Laws of the Australian Capital Territory are excluded from the scope of the Bill since they are either laws covered by section 27 of the Australian Capital Territory (Self-Government) Act 1988 (which provides that those laws do not bind the Commonwealth except as provided by regulations under that Act) or they are Ordinances made under the Seat of Government (Administration) Act 1910 that can be amended by the

Governor-General in Council if necessary to clarify the position of the Commonwealth and Commonwealth corporations.

Clause 4: Codified tort laws

12. Clause 4 provides that a reference in the Act to a 'codified tort law' is a reference to a law that codifies, modifies, or extends the application of, the common law of tort. The clause also gives examples of various specific kinds of laws that would be 'codified tort laws' for the purposes of the Act. The list in the clause is not exhaustive.

Clause 5: Extent to which Commonwealth bound by laws

13. Clause 5 deals with the application of Commonwealth, State and Territory laws (other than Australian Capital Territory laws - see the notes on clause 3) to the Commonwealth.

14. Sub-clause 5(1) states the general rule that, except as provided in section 5, the Commonwealth is not subject to any written law of the Commonwealth, of a State or of a Territory. The expression 'written law' includes all laws deriving force from express legislative enactment but does not include judge-made law.

15. Sub-clause 5(2) sets out the classes of written laws of the Commonwealth or of a Territory to which the Commonwealth is subject. Those classes of laws are:

- (a) any law that applies to the Commonwealth of its own force, being expressed to bind the Commonwealth or the Crown in right of the Commonwealth or binding the Commonwealth by necessary implication;
- (b) a codified tort law (see the definition in clause 4), other than such a law declared by the regulations not to be applicable;

- (c) any law concerning procedure in civil litigation (examples are Rules of Court concerning discovery and interrogatories);
- (d) any law that is declared by the regulations to be applicable.

16. Sub-clause 5(3) sets out the classes of written laws of a State, the Northern Territory or Norfolk Island to which the Commonwealth is made subject as if it were that State or Territory. The laws will apply subject to any modifications made by regulations for the purposes of section 6. The classes of laws are:

- (a) a codified tort law (see the definition in clause 4), other than a law declared by the regulations not to be applicable;
- (b) any law concerning procedure in civil litigation;
- (c) any law that is declared by the regulations to be applicable.

The Act will only have the effect of applying a State, Northern Territory or Norfolk Island law to the Commonwealth if the relevant State or Territory is itself bound by that law.

Clause 6: Modification of State laws in relation to  
Commonwealth

17. Clause 6 applies to a law of a State, the Northern Territory or Norfolk Island that is declared by regulations made for the purposes of paragraph 5(3)(c) to be applicable to the Commonwealth. The effect of clause 6 is that the regulations may modify the law in its application to the Commonwealth by adding, omitting or substituting provisions. For example, the regulations may apply to the Commonwealth a

provision of a State, Northern Territory or Norfolk Island law for the purpose of making the Commonwealth subject to an action in tort for damages for breach of a statutory duty created by the law (for example, an occupational safety law) but modify the law so that offences created by the law do not apply to the Commonwealth. Where this is done, the practical result would be the same as in Strods v. The Commonwealth [1982] 2 N.S.W.L.R.182.

Clause 7: Servants and agents of the Commonwealth - Extent to which bound by State laws

18. The effect of clause 7 is that a person, other than a Commonwealth corporation, when acting as a servant or agent of the Commonwealth, is subject to any written law of a State to the same extent as the Commonwealth. The clause negates the possibility, suggested by one constitutional expert, that implied constitutional immunities from State laws not discriminating against the Commonwealth extend only to the Commonwealth itself and not to its servants or agents (Professor Colin Howard, Australian Federal Constitutional Law, 3rd ed. 1985, pp.224-225.) The practical result of that suggested possibility would be to subject the Commonwealth to State laws since the Commonwealth can only act through servants or agents.

19. The clause also authorises the making of regulations applying to Commonwealth servants or agents any written laws of a State that do not apply to the Commonwealth - for example, general criminal laws or the 'rules of the road'.

20. Subclause 7(1) contains a definition of 'modification' for the purposes of the regulation-making powers in subclauses 7(4) and (5).

21. Subclause 7(2) specifies the persons to whom the provision is to apply, i.e. persons, other than Commonwealth corporations, while acting as servants or agents of the



Commonwealth within the scope of their employment or authority. As the expression 'Commonwealth corporation' is defined in clause 3 not to include the Repatriation Commission, the Commission, when acting in the performance of its functions, is a 'person' to which clause 7 applies.

22. Subclause 7(3) establishes that, subject to section 7(4), Commonwealth servants or agents are subject to State laws to the same extent as the Commonwealth itself. If the Commonwealth itself is not subject to a State law, its servants or agents, acting within the scope of their employment or authority, will also not be subject to it unless made subject by regulations under subsection 7(5) (see below).

23. Subclause 7(4) authorises regulations modifying, in their application to all, or specified classes, of Commonwealth servants or agents, any written laws of a State to which the Commonwealth itself is subject by virtue of subsection 5(3). This power is needed since some State laws might not be effective or appropriate in relation to Commonwealth servants or agents unless modifications are made. The legislation of a State is drafted in accordance with the State Government's perception of what is appropriate in the circumstances, including the State's administrative organisation and procedures. Such legislation might sometimes not be effective or suitable if applied to Commonwealth servants or agents in accordance with its terms.

24. Subclause 7(5) authorises regulations to be made for the purpose of applying to all, or specified classes of, Commonwealth servants or agents any specified written laws of a State to which the Commonwealth is not subject. The laws may be applied with or without modifications specified in the regulations. Important examples would be regulations applying to Commonwealth servants or agents the provisions of general State criminal laws, or State laws prescribing the 'rules of the road', which do not apply to the Commonwealth itself.

Clause 8: Commonwealth corporations - application of  
Commonwealth and Territory laws

25. Clause 8 deals with the application of Commonwealth and Territory laws to 'Commonwealth corporations' as defined in clause 3.

26. The effect of sub-clause 8(1) is that, unless express or implied provision to the contrary is made by or under any Commonwealth Act, the laws of the Commonwealth, including laws to which the Commonwealth itself is not subject, apply in relation to a Commonwealth corporation as though it were an ordinary body corporate - ie. a body corporate other than a Commonwealth corporation. Sub-clause 8(3) makes express provision to the contrary in relation to existing laws (see paragraph 28 below).

27. The effect of sub-clause 8(2) is that, unless express or implied provision to the contrary is made by or under any Commonwealth Act or any law of a Territory, the laws of the Territory, including laws to which the Commonwealth itself is not subject, apply in relation to a Commonwealth corporation as though it were an ordinary body corporate. Sub-clause 8(3) makes express provision to the contrary in relation to existing laws (see paragraph 28 below).

28. The effect of sub-clause 8(3) is to preserve the position of a Commonwealth corporation in relation to the application of Commonwealth or Territory laws existing at the commencement of section 8. This is because many Commonwealth laws either expressly provide that corporations are exempt from certain laws, or are drafted on the basis that they do not apply to corporations within 'the shield of the Crown in right of the Commonwealth'. An existing Commonwealth or Territory law that did not apply in relation to the corporation at the commencement of section 8 would not thereafter apply to the corporation unless provision is made to the contrary by or

under any Commonwealth Act or any law of the Territory, as the case may be.

Clause 9: Commonwealth corporations - application of State laws

29. Clause 9 deals with the application of laws of the States, the Northern Territory and Norfolk Island to Commonwealth corporations. The general rule, stated in sub-clause 9(1), is that such a law will apply to a Commonwealth corporation as though the corporation were an ordinary body corporate unless the application of the law would be inconsistent with the laws of the Commonwealth. Hence, for the purposes of determining the application of State, Northern Territory or Norfolk Island laws, sub-clause 9(1) renders it unnecessary to consider whether a Commonwealth corporation is within the 'shield of the Crown in right of the Commonwealth'.

30. Sub-clause 9(2) states that the regulations may provide that a Commonwealth corporation is not subject to a law of a State, the Northern Territory or Norfolk Island that is in force when section 9 commences. (As to commencement see sub-clause 2(2), and see also sub-clause 12(3).)

Clause 10: State laws discriminating against Commonwealth corporations

31. Clause 10 states that, except as otherwise provided by the regulations, a law of a State, the Northern Territory, or Norfolk Island will not apply to a Commonwealth corporation or corporations if its application would discriminate against that corporation or those corporations.

Clause 11: Laws not to have retrospective operation

32. Clause 11 provides that laws applied to the Commonwealth or a Commonwealth corporation by virtue of a provision of the Act do not have retrospective effect from a time earlier than the

commencement of that provision. For example, if a State law declared by regulations made for the purposes of paragraph 5(3)(c) to be applicable to the Commonwealth has a retrospective operation, the effect of clause 11 would be that the retrospective operation of the law would not extend, in relation to the Commonwealth, to a time earlier than the commencement of paragraph 5(3)(c).

Clause 12: Regulations

33. Sub-clause 12(1) confers power to make regulations, not inconsistent with the Act, providing for all matters for which provision may, for the purposes of the Act, be made by regulations. Regulations made for the purposes of paragraphs 5(2)(b), 5(2)(d), 5(3)(a) and 5(3)(c) and subsection 9(2) may declare or prescribe particular laws or all laws included in a particular class of laws. The regulations will be subject to Parliamentary disallowance in the ordinary way as provided in section 48 of the Acts Interpretation Act 1901.

34. Sub-clause 12(2) provides that section 8 of the Acts Interpretation Act 1901 has effect, in relation to any law that is made inapplicable to the Commonwealth or to a person by regulations, as if the law were a Commonwealth Act repealed by another Commonwealth Act (see clauses 5 and 7). This has the effect, for example, of preserving any rights that may have accrued, or liabilities that may have been incurred, under the law before regulations were made to terminate the application of the law to the Commonwealth.

35. Sub-clause 12(3) means that regulations for the purposes of section 9 must be made before that section commences, and must be expressed to commence when that section commences. (The commencement provisions for section 9 are contained in sub-clause 2(2).) After section 9 commences, any further immunity from the operation of existing or future State or

self-governing Territory laws will need to be conferred on a Commonwealth corporation by or under a Commonwealth Act.

Clause 13: Amendments of Judiciary Act 1903

36. Clause 13 amends section 64 of the Judiciary Act 1903 by adding new subsections 64(2) and (3) to which subsection 64(1) is made subject. The effect of the amendments is that, in relation to the Commonwealth or a State, section 64 will cease to operate in relation to rights created by a written law where the Commonwealth or the State, as the case may be, is not subject to that law, whether in accordance with the Bill or with some other law. However, section 64 will continue to apply in relation to unwritten laws - for example, the common law of tort which, in the absence of section 64, would not apply to the Commonwealth or a State because of the maxim that the Crown 'can do no wrong'.

37. Section 64 in its application to the States was primarily designed to ensure that a State could not, when sued in federal jurisdiction, rely on procedural and substantive immunities of the Crown. However, as interpreted in the Evans Deakin case, it goes further than necessary for this purpose. In any case, that purpose can be adequately achieved by other means in relation to rights and duties under written laws. First, in so far as section 64 applies to the States the provisions of any State legislation (e.g. on joint tortfeasors), the problem will be adequately covered by section 79 of the Judiciary Act 1903 together with the various provisions of State laws - in particular, Crown Proceedings Acts and other laws concerning claims against the respective State Governments. In so far as section 64 would apply provisions of Commonwealth or Territory legislation to the States (e.g. rules of procedure in federal courts), that legislation itself could be amended to overcome the problem.

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