

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

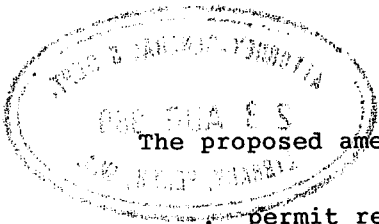
HOUSE OF REPRESENTATIVES

COMMONWEALTH AND COMMONWEALTH INSTRUMENTALITIES  
(APPLICATION OF LAWS) BILL 1989

SUPPLEMENTARY EXPLANATORY MEMORANDUM

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

OUTLINE



The proposed amendments:

- permit regulations to be made applying to Commonwealth servants and agents the provisions of laws (with or without modifications) that do not apply to the Commonwealth itself;
- provide that section 64 of the Judiciary Act 1903 does not operate in relation to rights created by or under a written law where a State is not subject to that law apart from section 64;
- make certain technical and clarifying changes to the Bill.

FINANCIAL IMPACT

The amendments will have no significant financial impact.

NOTES ON CLAUSES

Amendment 1

1. The effect of the original clause 7 would be that a person, other than a Commonwealth corporation, when acting as a servant or agent of the Commonwealth, would be subject to any written law of the Commonwealth, of a State or of a Territory to the same extent as the Commonwealth.

2. The proposed new clause preserves this result in relation to State laws - thus negating 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. The amendment does not preserve the provisions of the original clause in regard to Commonwealth and Territory laws since it is not considered appropriate, by this Bill, to alter the effect any of those laws according to their tenor.

3. The proposed new 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'.

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

5. 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.
6. Subclause 7(3) establishes that, subject to section 7(4), Commonwealth servants or agents are subject to State laws to no greater extent than the Commonwealth itself (see above). If the Commonwealth itself is not subject to a State law, its servants or agents, acting within their employment or authority, will also not be subject to it unless made subject by regulations under subsection 7(4).
7. 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.
8. 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.

Amendment 2

9. The original clause 8 deals with the application of

Commonwealth and Territory laws to 'Commonwealth corporations' as defined in clause 3. The effect of subclause 8(3) is to preserve the position of a Commonwealth corporation under Commonwealth or Territory laws existing at the commencement of section 8. 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 was made to the contrary by or under any Commonwealth Act.

10. The amendment would enable a contrary provision to be made in relation to a Territory law, for the purposes of subsection 8(3), by or under any law of the relevant Territory.

#### Amendment 3

11. The original subclauses 12(2) and (3) provide that section 8 (other than paragraphs (a) and (b)) of the Acts Interpretation Act 1901) has effect in relation to certain laws that are made inapplicable to the Commonwealth by regulations under section 5, as if the law were a Commonwealth Act repealed by another Act. For example, this would preserve any rights that may have accrued, or liabilities that may have been incurred, under a law before regulations are made to terminate the application of the law to the Commonwealth.

12. The amendment combines and simplifies subclauses 12(2) and (3) and makes similar provision in relation to laws that cease to apply to servants or agents by virtue of regulations made under section 7 (see amendment 2). It is not now considered necessary or appropriate to exclude paragraphs (a) and (b) of section 8 of the Acts Interpretation Act.

#### Amendment 4

13. The original clause 13 amends section 64 of the Judiciary Act 1903 so that it will cease to operate in relation to rights created by a written law where the Commonwealth is not subject

to that law apart from section 64. The amendment to section 64 is necessary because of the wide effect given to section 64 by the decision in The Commonwealth v. Evans Deakin Industries Ltd (1986) 161 CLR 254. The amendments contained in the original clause do not affect the operation of section 64 in relation to the States.

14. This amendment to clause 13 will amend section 64 of the Judiciary Act so as to place the States on the same footing as the Commonwealth in relation to that section. That is, section 64 will not apply to a State the provisions of any written law to which that State would not be subject apart from section 64.

15. 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, 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 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 legislation to the States (eg rules of procedure in federal courts), that Commonwealth legislation itself could be amended to overcome the problem.

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