

1990

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

GOVERNMENTS AND GOVERNMENT INSTRUMENTALITIES  
(APPLICATION OF LAWS) BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General  
the Hon. Michael Duffy M.P.)





## GOVERNMENTS AND GOVERNMENT INSTRUMENTALITIES (APPLICATION OF LAWS) BILL 1990

### GENERAL OUTLINE

The main purpose of the Governments and Government Instrumentalities (Application of Laws) Bill 1990 is to make clear what kinds of State and Territory laws apply to the Commonwealth and Commonwealth instrumentalities. It also contains provisions clarifying the position concerning the application of Commonwealth and Territory laws to State Governments.

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 or a Commonwealth instrumentality 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 constitutional immunities. Furthermore, the expression 'as nearly as possible' in section 64 leaves scope for exceptions but their extent is very uncertain. Section 64 also creates problems concerning the application of Commonwealth, State and Territory legislation to the States.

4. The Bill clarifies, and in 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 and makes it clear that, in deciding whether States and self-governing Territories are bound by Commonwealth legislation, the rule of interpretation is the same as that applying to the question whether the Commonwealth itself is bound.

#### 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 in order to give time to decide what regulations should be made for the purposes of subsection 9(2), and to give time to make the regulations. Paragraph 14(3)(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) mentioned above).

### 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 (see below).

'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, if necessary, be amended by the Governor-General in Council 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 intended to be exhaustive.

Clause 5: Extent to which the Commonwealth is bound by legislation

13. Clause 5 deals with the application to the Commonwealth of written laws of the Commonwealth, States and Territories (other than Australian Capital Territory - see the notes on clause 3). The expression 'written law' includes all laws deriving force from express legislative enactments but does not include judge-made law.

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.

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) laws expressed to bind the Commonwealth or the Crown in right of the Commonwealth or otherwise showing an intention to do so (this provision reproduces the rule of interpretation as decided by the High Court in Bropho v Western Australia (1990) 93 ALR 207);
- (b) codified tort laws (see the definition in clause 4), other than laws declared by the regulations not to be applicable;
- (c) laws concerning procedure in civil litigation (examples are Rules of Court concerning discovery and interrogatories); and
- (d) laws declared by the regulations to be applicable to the Commonwealth.

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

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

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 itself is bound by that law (see clause 5(3)).

Clause 6: Modifications 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 (such as an occupational safety law) but may 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 where the New South Wales Supreme Court held that, by virtue of section 64 of the Judiciary Act 1903, the Commonwealth is liable to an action for damages as if it had been bound by an occupational safety law.

Clause 7: Servants and agents of the Commonwealth

18. Clause 7 establishes, by sub-clauses (2) and (3), the general rule 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 the Commonwealth, a State or a Territory 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 generally since the Commonwealth can only act through servants or agents.

19. Sub-clause 7(4) authorises the making of regulations as explained below. These are needed in order to achieve appropriate results concerning the application of laws to Commonwealth servants or agents.

20. Subclause 7(1) specifies the persons to whom clause 7 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.

21. Subclause 7(2) establishes that Commonwealth servants and agents within subclause 7(1) are subject to written laws of the Commonwealth and non-self-governing Territories to the same extent as the Commonwealth itself unless the contrary intention appears in the legislation.

22. Subclause 7(3) establishes that, subject to regulations under sub-section 7(4), Commonwealth servants or agents within subclause 7(1) are subject to written laws of a State, the Northern Territory or Norfolk Island to the same extent as the Commonwealth itself. If the Commonwealth itself is not subject to such a law, its servants or agents, when acting within the scope of their employment or authority, will also not be subject to the law in question unless subjected to it by regulations under subsection 7(5) (see below).

23. Subclause 7(4) authorises regulations modifying, in their application to all Commonwealth servants or agents, or specified classes of them, any written laws of a State or Territory to which the Commonwealth itself is subject by virtue of subsection 5(3)(c). This power is needed since some State or self-governing Territory laws might not be effective or appropriate in relation to Commonwealth servants or agents unless modifications are made. The legislation of a State, for example, 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, especially if the State legislation has been prepared without any consultation with the Commonwealth.

24. Subclause 7(5) authorises regulations to be made for the purpose of applying to all Commonwealth servants or agents, or specified classes of them, any specified written laws of a State, the Northern Territory or Norfolk Island 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 the general criminal laws of a State, 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 non-self-governing Territory laws

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

26. The effect of subclause 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. This provision reverses the present rule of interpretation in the case of corporations that are so closely connected with the Commonwealth Government that they have the so-called 'shield of the Crown in right of the Commonwealth': legislation does not at present apply to those corporations unless an intention to bind them appears from the legislation (Bropho v Western Australia (1990) 93 ALR 207). Subclause 8(3) makes exceptions from subclause 8(1) in relation to existing laws (see paragraph 28 below).

27. The effect of subclause 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 non-self-governing Territory, the laws of such a 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. Subclause 8(3) makes exceptions from sub-clause (8)(2) in relation to existing laws (see paragraph 28 below).

28. The effect of subclause 8(3) is to preserve the position of a Commonwealth corporation in relation to the application of Commonwealth or non-self-governing 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 of the existing rule of interpretation that they do not apply to corporations within 'the shield of the Crown in right of the Commonwealth' unless the contrary intention appears from the legislation (see paragraph 26 above). An existing Commonwealth or non-self-governing 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 or any law of the non-self-governing Territory, as the case may be.

Clause 9: Commonwealth corporations- Application of State and self-governing Territory 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 subclause 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, subclause 9(1) removes the 'shield of the Crown' from these corporations unless they are exempted from those laws by some other Commonwealth law, and so renders it unnecessary to consider the often difficult question whether a Commonwealth corporation is within the 'shield of the Crown in right of the Commonwealth'.

30. Subclause 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 subclause 2(2), and also subclause 14(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: States and self-governing Territories - Application of Commonwealth and non-self-governing Territory Laws

32. Clause 11 will result in the question whether a State or self-governing Territory (in this case including the Australian Capital Territory) is bound by written laws of the Commonwealth or non-self-governing Territory being decided according to the same interpretative presumption that applies to the question whether the Commonwealth itself is bound (see the notes to clause 5).

Clause 12: Servants and agents of States and self-governing Territories

33. Clause 12 provides that persons acting as servants or agents of a State or a self-governing Territory (including the Australian Capital Territory) within the scope of their employment or authority are subject to written laws of the Commonwealth and other Territories to the same extent as the State or self-governing Territory itself unless the contrary intention appears in the legislation.

Clause 13: Laws not to have retrospective operation

34. Subclauses 13(1) and 13(2) provide, subject to sub-clause 13(3), that laws applied to the Commonwealth or a Commonwealth corporation by virtue of a provision of the Act or a regulation do not have retrospective effect from a time earlier than the commencement of that provision or of that regulation. Subclause 13(3) provides that a regulation made under a provision of the Act may provide that a law applies to the Commonwealth or a Commonwealth corporation from a day earlier than the commencement of the regulation, but not

earlier than the commencement of the provision. For example, if a State law is declared by regulations, made for the purposes of paragraph 5(3)(c) to be applicable to the Commonwealth clause 13 would prevent that State law from applying, in relation to the Commonwealth, to matters occurring before the commencement of the regulation unless the regulation provided for application of the law from some earlier time (not being earlier than the commencement date of sub-clause 5(3) of the Act).

#### Clause 14: Regulations

35. Subclause 14(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 such as 5(2) (b), 5(2) (d), 5(3) (a) and 5(3) (c), and subsections 7(5) and 9(2), could declare or prescribe either particular laws or 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.

36. Subclause 14(2) provides that section 8 of the Acts Interpretation Act 1901 has effect, in relation to any law that is made inapplicable by the regulations to the Commonwealth or to a person, 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 the commencement of regulations terminating the application of the law to the Commonwealth.

37. Subclause 14(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 subclause 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 15: Amendments to the Judiciary Act 1903

38. Clause 15 amends section 64 of the Judiciary Act 1903 by adding new subsections 64(2) and (3) and making subsection 64(1) subject to them. 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 provisions of that law do not apply to the Commonwealth or State (as the case may be) independently of section 64. 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'.

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