

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.10 Bills that refer to or affect Australian governments or jurisdictions

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Drafting Direction No. 3.10

Bills that refer to or affect Australian governments or jurisdictions

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Part 1—Binding the Crown

Rules of statutory interpretation

1 Rules of statutory interpretation govern the question whether, and to what extent, a Commonwealth Act binds the Crown. In *Jacobsen v Rogers* (1995) 127 ALR 159, the High Court affirmed 2 basic principles:

- there is a presumption that a Commonwealth Act is not intended to bind the Crown in right of the various States as well as the Crown in right of the Commonwealth (*Bradken Consolidated v BHP* (1979) 145 CLR 107). Although the Court did not specifically address the point, this principle would also apply to self-governing Territories (ie. the Australian Capital Territory, the Northern Territory and Norfolk Island).
- the presumption is rebutted if, when construed in its context (including its subject matter and disclosed purpose and policy), the Act discloses a legislative intention to bind the Crown (*Bropho v Western Australia* (1990) 171 CLR 1). However, the old rule that the Crown was only bound by a statute by express mention or necessary implication had to be taken into account in construing those Acts enacted after the rule was formulated in *Province of Bombay v Municipal Corp of Bombay* [1947] AC 58 and before the decision in *Bropho*.

Express provisions—binding the Crown

2 Despite the recent relaxation of the presumption against binding the Crown in *Bropho*, all Bills in which the Crown is to be bound should clearly state this intention, and should specify the extent to which the Crown is to be bound. Wording along the following lines should be used to cover the cases indicated.

Commonwealth, States and Territories

This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island.

or

This Act binds the Crown in each of its capacities.

Commonwealth only

This Act binds the Crown in right of the Commonwealth. However, it does not bind the Crown in right of a State, of the Australian Capital Territory, of the Northern Territory or of Norfolk Island.

States and Territories only

This Act binds the Crown in right of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island. However, it does not bind the Crown in right of the Commonwealth.

States only

This Act binds the Crown in right of each of the States. However, it does not bind the Crown in right of the Commonwealth, of the Australian Capital Territory, of the Northern Territory or of Norfolk Island.

3 These examples do not cover all possible variations, but the wording of any other variations should be self-evident.

Crown not liable to prosecution

4 If it is necessary to provide expressly that the Crown in all relevant (ie. Australian capacities) is not liable to prosecution, there is no need to list all the relevant capacities, eg:

This Act does not make the Crown liable to be prosecuted for an offence.

5 If the Crown is to be protected from prosecution in some but not all capacities (unlikely but not impossible), the provision will need to be specific.

Express provision—Crown not bound

6 Given that the decision in *Bropho* will mean the Crown is likely to be bound by statutes that would not have applied to it before that decision, cases may now arise where a provision that releases the Crown from the application of an Act needs to be considered. This should not arise very often, because cases where it would not be sensible to bind the Crown should still be covered by the presumption even in its milder form. However, if such a provision is required, the precedents in paragraph 2 could easily be modified, eg:

This Act does not bind the Crown in any of its capacities.

Binding the Crown in right of Norfolk Island

7 Where a Bill is expressed to bind the Crown in right of the Northern Territory or the Australian Capital Territory, it should ordinarily be expressed also to bind the Crown in right of Norfolk Island, whether or not the Bill extends to Norfolk Island (see also Drafting Direction 4.2, Referral of Bills to other agencies).

Part 2—References to States and Territories

Distinguishing State and Federal Parliaments

8 In referring to the Federal Parliament, it is normally sufficient to refer to “the Parliament” (see paragraph 17(e) of the *Acts Interpretation Act 1901*). However, if it is necessary to distinguish the Federal Parliament from State Parliaments, the term “the Commonwealth Parliament” can be used.

No need to use “the State of”

9 It is unnecessary to refer in Bills to particular States in the form “the State of Victoria”. It is sufficient to refer to “Victoria” without definition, both in references to the State itself (eg. “There is payable to Victoria, by way of financial assistance...”) and in references to State institutions, eg:

- the Government of Victoria
- the Parliament of Victoria
- the Governor of Victoria.

Order of references to States and Territories

10 If all or some of the States are specified in a Bill, they should be ordered according to their population. The same principle applies when specifying the Australian Capital Territory and the Northern Territory. At present, the order of precedence based on population is as follows:

New South Wales
Victoria
Queensland
Western Australia
South Australia
Tasmania
Australian Capital Territory
Northern Territory

11 Premiers and Chief Ministers are specified in the same order.

References to State or Territory Acts

12 A reference to an Act of a State or Territory should give the Act’s short title in italics, followed by (in regular font) a reference to the jurisdiction the Act is from.

eg. “...the *Australian Financial Institutions Commission Act 1992* of Queensland”.

Governors

13 A reference in a Bill to the Governor of a State should generally use the expression “the Governor”, **not** “the Governor in Council” or “the Governor acting with the advice of the Executive Council”.

14 However, the position is different where power is conferred on a Governor by Commonwealth legislation, and it is intended that the Governor exercise the power with the advice of the Executive Council of the State. A Bill conferring the relevant power, or referring to its exercise, may need to include a reference to the Executive Council (compare sections 16A and 16B of the *Acts Interpretation Act 1901*). In most cases, “the Governor in

Council of [name of State]” would be adequate. In some cases, “the Governor acting with the advice of the Executive Council” may be preferable.

Ministers

15 Where you draft a reference to a Commonwealth, State, Northern Territory or Australian Capital Territory Minister in general terms (i.e. not as “the Minister for” a specified portfolio), you may use the simple expressions as follows:

- a Minister, a Minister of the Commonwealth
- a Minister of a State, a Minister of Victoria
- a Minister of the Northern Territory, a Minister of the Australian Capital Territory.

16 The even simpler expressions, “a Commonwealth Minister”, “a State Minister”, etc, should be used with care, since many Acts define these expressions to mean Ministers of the relevant jurisdictions with particular portfolio responsibilities.

Treatment of ACT and NT

17 The Australian Capital Territory and the Northern Territory should be treated on an equal footing with the States. In particular:

- their executive acts etc. can be referred to as being done “by the Territory”;
and
- the Executive of either Territory should be referred to as the “Government of the Territory” and not as the “Administration” (even though Part IV of the *Northern Territory (Self-Government) Act 1978* is headed “The Administration”, and section 36 of the *Australian Capital Territory (Self-Government) Act 1988* refers to the Australian Capital Territory Executive); and
- Ministers should be referred to as “Ministers of the Territory” (see also paragraphs 15 and 16).

Treatment of Norfolk Island

18 Norfolk Island is not able to be treated on an equal footing with the States (but see paragraph 7). In particular, a holder of executive office for Norfolk Island should not be referred to as a Minister, irrespective of his or her “local” designation as provided for by section 12 of the *Norfolk Island Act 1979*. However:

- executive acts can be referred to as being done “by the Territory”; and
- the Executive of Norfolk Island should be referred to as “the Government of Norfolk Island”.

Names of other Territories

19 The proper names of Australia's other Territories are as follows:

Norfolk Island (**not** the Territory of Norfolk Island)
Australian Antarctic Territory
Coral Sea Islands Territory
Jervis Bay Territory
Territory of Ashmore and Cartier Islands
Territory of Christmas Island
Territory of Cocos (Keeling) Islands
Territory of Heard Island and McDonald Islands

20 If you need to list the Territories, or a selection of them, by name, do so in the order set out above.

Part 3—Application of laws to a Territory (other than ACT and NT)

Application of laws to the Jervis Bay Territory

21 Now that the Australian Capital Territory is a self-governing territory, you are unlikely to receive instructions based on the misconception that a reference to the ACT would cover the Jervis Bay Territory. In any case, the ACT and the Jervis Bay Territory are unlikely to be grouped together for federal policy-making purposes.

22 However, you should be alert to the possibility that some instructors may still be operating under such a misconception, and you should be aware of the need to deal with the Jervis Bay Territory (if at all) independently of any provisions covering the Australian Capital Territory.

Application of laws to other external Territories

23 The Acts providing for the government of the external Territories (other than Christmas Island and Cocos (Keeling) Islands) generally provide that other Acts are *not* in force in the external Territories unless expressed to extend to the Territory concerned (e.g. section 18 of the *Norfolk Island Act 1979*).

24 Section 8E of the *Christmas Island Act 1958* and section 8E of the *Cocos (Keeling) Islands Act 1955* provide that other Acts extend to the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands respectively except so far as express provision is made to the contrary.

25 You should consider whether your Bill should extend to any of the external Territories other than Christmas Island and Cocos (Keeling) Islands, and seek any necessary instructions.

26 If an Act is to extend to all of the other external Territories, the following form should be used:

This Act extends to every external Territory.

27 If an Act extends to one or more of the other external Territories, you must consider whether the expression “Australia”, when used in a geographical sense, should be defined to include the external Territories concerned. An extended definition of “Australia” will override the exception in paragraph 17(a) of the *Acts Interpretation Act 1901*. An appropriate definition would be:

Australia, when used in a geographical sense, includes the external Territories.

28 The following form could be used in an Act extending to one or more (but not all) of the other external Territories:

Australia, when used in a geographical sense, includes Norfolk Island.

Part 4—States grants

Full reimbursement

29 A provision for making payments to a State, by way of full reimbursement of amounts spent by the State for a specified purpose during a specified period, should be drafted to provide for payment to the State of “the amount needed to reimburse the State for all the money spent by the State” for the specified purpose during the specified period.

30 Phrases such as “an amount equal to the amount spent by the State” should be avoided because they have been misread as providing for matching grants.

Partial reimbursement

31 If the provision is only to provide for partial reimbursement, the form set out in paragraph 29 should be modified appropriately.

32 For example, if one-half of the State’s expenditure is to be reimbursed, the provision should be drafted to provide for payment to the State of “the amount needed to reimburse the State for half the money spent by the State” for the specified purpose during the specified period.

Grant subject to condition subsequent

33 If the State’s expenditure is to be a condition subsequent of the grant, the provision should be drafted to provide for payment of the grant “subject to the condition that the State will ensure that the amount is spent” for the specified purpose.

34 Phrases such as “an amount equal to that amount is spent” should be avoided because they have been misread as requiring the State to expend a further amount in addition to the grant.

Matching grants

35 If the condition is to require expenditure of a further amount, the provision should be drafted to provide for payment of the grant “subject to the condition that the State will spend for the specified purpose:

- (a) the amount paid to the State by the Commonwealth; and
- (b) a further amount equal to that amount.”

Reimbursement arrangements preferable

36 As a matter of administrative policy, it is generally preferable to provide for grants by way of reimbursement of State expenditure rather than to make the expenditure a condition subsequent of the grant.

Part 5—State land titles functions

37 If a Bill might have an impact on State or Territory land titles law and practice, in a way set out in Attachment A, the instructing Department should be informed of this and advised to consult the ACT Registrar-General’s Office. It may be best to give the instructors a copy of Attachment A and identify the provisions concerned. However, unless and until a Commonwealth position on this matter is developed, OPC does not have any function of monitoring or enforcing the consultations requested in the letter.

Peter Quiggin
First Parliamentary Counsel
1 May 2006

Attachment A

In 1994, a letter dated 10 May 1994 from the ACT Director of Land Titles (Andrew Taylor) to Mr Bob McLellan, Legislation Liaison Officer in the Department of Defence, was passed on to First Parliamentary Counsel. The text of the letter is set out below.

Re: Impact of federal legislation initiatives upon State land titles functions

During a recent conference of Australasian Land Titles Registries I was nominated to contact you with a view to establishing and maintaining a consultative process between your office and myself, as nominated representative, regarding legislative initiatives within your Department which may impinge upon State Land Title functions.

Background

Land Registration laws were enacted in Australia on a State/Territory basis although all States/Territories register land under a loosely uniform "Torrens Title" system.

Whilst the system is uniform, the legislation from one jurisdiction to another creates problems in coming to terms with matters having a national perspective.

Over recent years there have been many examples of Federal legislative initiatives having an impact upon State Land Titles Registries.

These impacts might be grouped as follows:

- (a) legislation that provides for certification to achieve registration by a Land Titles Registry;
- (b) legislation that creates interests or remedies not previously known to land; and
- (c) legislation that seeks to claim immunity from the operation of State legislation.

(a) Legislation that provides for certification to achieve registration

Some examples of Federal legislation which provide for certification as a way of achieving registration of successor organisations are:

- *Aboriginal and Torres Strait Islander Commission Act 1989* (s.222)
- *Defence Housing Authority Act 1987* (s.60)
Defence Service Homes Amendment Act 1987 (s.6B and 6C)
- *Federal Airports Corporation Act 1986* (s.30)
- *Land Acquisition Act 1988* (s.38)
- *Bank Integration Act 1991* (s.12).

These Acts make provisions for matters inconsistent with the provisions of State Acts and in some cases place responsibilities upon State Registrars which they are unable to carry out under State law.

Early consultation with the States during the policy proposal stage would alleviate such problems.

(b) Legislation that creates interests or remedies not previously known to law

Some examples are as follows:

- *Bankruptcy (Amendment) Act 1991* (s.139ZN and 139ZR)
- *Proceeds of Crime Act 1987* (s.28, 30, 43 and 51)

In certain circumstances such Acts may affect indefeasibility of Title and in other cases the States may not be able to give effect to the exact requirements of the Act.

(c) Legislation that seeks to claim immunity from the operations of State legislation

An example might be where a federal law vests the ownership of property in an organisation other than the registered proprietor and, in doing so, specifically providing that it shall not be necessary to make any entries in the Land Title Register relating to the change.

Legislation which falls into these categories must clearly benefit from the introduction of a consultative process between States and the Commonwealth.

A number of quarters have expressed alarm at the potentially damaging effects of overriding Federal Statutes upon the indefeasibility provisions in Land Titles legislation.

There is a danger that the integrity of the Torrens System could be undermined by both State and Federal Statutes which may derogate from the completeness of the protection given by registration under the system.

It is envisaged that, where you identify provisions in a legislative proposal which impact upon land matters generally, you would contact me at a sufficiently early stage with a view to my co-ordinating the views of State Land Title Registries.

I feel certain that this approach will bring about a mutually beneficial solution to the problems identified above.

I look forward to co-operating with you to develop a mechanism by which meaningful consultation can take place to ensure a proper outcome.