

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.1 Constitutional law issues

Document release 4.0

Reissued October 2012

Contents

Part 1—Preliminary	2
Part 2—Provisions addressing constitutional prohibitions.....	2
Acquisition of property	2
General precedent	2
Vesting of jurisdiction.....	3
Provisions requiring the making or production of documents.....	3
Provisions indicating that statutory rights are defeasible	4
Implied freedom of political communication	6
State banking and State insurance.....	6
Imposition of tax	6
Fees	7
Different subject matters of taxation.....	7
Discrimination and preference	7
Discrimination and preference; abridgement of water rights	8
Taxation of property belonging to a State	8
Uniformity of bounties.....	8
Freedom of interstate trade etc.....	8
Incontestable taxation	8
Part 3—Severability provisions	9
Limitations of section 15A of the Acts Interpretation Act	9
Severability provisions that may not be effective.....	9
Severability provisions that are likely to be effective.....	10
An alternative approach to severability — the “extended operation” device.....	10
Part 4—Appropriation issues	11
The constitutional prohibition on retrospective appropriations	11
Part 5—Taxation issues	11
The penalty/tax distinction: language to be used in objects clauses etc.	11
Recipients of the proceeds of taxes and of other amounts.....	12
The self-executing CRF	12
Taxes should be payable to the Commonwealth.....	13
Receipt of amounts by an agent of the Commonwealth	13
Standing appropriations of the proceeds of a tax	14
Set-off of amounts collected by, and appropriated to, agent	14
Reference of Bills to AGS	14
Part 6—Trading or financial corporations.....	14
Part 7—Conferring jurisdiction on Territory courts	15
Part 8—Section 80 issues.....	16
Part 9—Surplus revenue issues	16

Part 10—Issues arising from the Hughes case	17
Option 1—TGA style provisions	17
Option 2—Australian Crime Commission Act style provisions	18
Conclusion	18
Part 11—Issues arising from the Zentai case	18
Conclusion	19
Part 12—Responsibility for constitutional validity and use of constitutional checklist	19
SES Bill drafter’s responsibility for constitutional issues	19
Constitutional checklist.....	19

Part 1—Preliminary

1 This Drafting Direction deals with several constitutional law issues that may arise in the course of drafting legislation. It also describes the constitutional checklist that has been developed for use by drafters.

Part 2—Provisions addressing constitutional prohibitions

2 This Part sets out precedents to be used if you are uncertain whether a draft infringes a constitutional prohibition listed in this Part. The Drafting Notes contain several papers that deal with when legislation might infringe constitutional prohibitions. The precedents can be applied, with appropriate modifications, to proposed Parts/Divisions/sections etc. within a draft.

Acquisition of property

General precedent

3 The following should be used as a model of a provision protecting legislation from invalidity if the operation of any of its provisions is held to result in the acquisition of property within the meaning of paragraph 51(xxxi) of the Constitution:

Compensation for acquisition of property

- (1) If the operation of this [*legislation*] would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
- (2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in *the Federal Court [of Australia]/a court of competent jurisdiction* for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.
- (3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

Your instructors and the Access to Justice Division and Federal Courts Branch of the Attorney-General's Department should be consulted about the court(s) in which proceedings may be instituted.

Vesting of jurisdiction

4 The Australian Government Solicitor (AGS) has advised that there is no need to vest jurisdiction expressly, because the Federal Court would have jurisdiction under paragraph 39B(1A)(c) of the *Judiciary Act 1903* and State courts would have jurisdiction (within the limits of their several jurisdictions) under subsection 39(2) of the *Judiciary Act 1903*. The position of Territory courts is less clear. A Territory court would have jurisdiction if it was specifically mentioned in subclause (2), because of section 15C of the *Acts Interpretation Act 1901*. However, the phrase "court of competent jurisdiction" might not attract the operation of section 15C, although it might be possible to imply a vesting of jurisdiction in a Territory court.

5 Drafters should therefore tell their instructors that the phrase "court of competent jurisdiction" might not include Territory courts, but that the Federal Court's jurisdiction would cover the Territories. Even if the Territory courts did not have jurisdiction, the provision would be effective from a constitutional standpoint, but it is a matter of policy for the instructors, in consultation with the Access to Justice Division and Federal Courts Branch of the Attorney-General's Department, whether jurisdiction should be expressly conferred on Territory courts.

Provisions requiring the making or production of documents

6 Drafters should be aware that acquisition of property issues may arise in relation to provisions that:

- (a) require, or enable an officer etc. to require, a person to make and produce copies of documents; and
- (b) enforce the requirement by a penalty.

The issue arises from certain obiter remarks of the full Federal Court in *Perron Investments v. Deputy Federal Commissioner of Taxation* (1989) 90 ALR 1. The Court was considering section 264 of the *Income Tax Assessment Act 1936*, which empowers the Commissioner of Taxation to obtain information and require the production of documents. Lockhart J (at p.6) made remarks to the effect that if section 264 had empowered the Commissioner to require a person to make copies and produce them to the Commissioner, that requirement could have amounted to an acquisition of property requiring the payment of just terms under section 51(xxxi) of the Constitution. No reasons were given for the remarks. It is unclear whether the remarks are consistent with High Court authority. For *dicta* to the contrary see *FH Faulding v. Federal Commissioner of Taxation* (1994) 126 ALR 561 per Cooper J at p. 599.

7 AGS has advised that the remarks of Cooper J are likely to be followed in preference to those of Lockhart J, but the constitutional position could be affected by the form of the provision in question and how drastically it might interfere with the possession and use of a person's property. Drafters should advise instructors to seek AGS advice on any provisions of this kind.

Provisions indicating that statutory rights are defeasible

8 If you are drafting provisions that create a statutory right, you should ask your instructors whether the statutory right is subject to modification or extinguishment without compensation. For this purpose, **right** includes anything that is property within the meaning of paragraph 51(xxxi) of the Constitution.

9 There are 2 ways in which Parliament can indicate that a statutory right is subject to modification or extinguishment without compensation.

10 First, Parliament may, by creating a right that is subject to modification or extinguishment under provisions that come into existence, or are already in existence, when the right is created, indicate that the right is subject to modification or extinguishment under those provisions without compensation. For example, provisions relating to the cancellation, revocation, termination or variation of a statutory right can be included in the legislation that creates the right.

Note: If cancellation, revocation, termination or variation provisions come into existence, or are already in existence, when the right is created, and you are instructed, when you are drafting legislation creating the right, to indicate Parliament's intention that the right is subject to future modification or extinguishment, by or under later legislation, without compensation, then you should use model provision version 2 (set out below).

11 Secondly, the decision of the High Court in *Attorney-General for the Northern Territory v Chaffey; Santos Limited v Chaffey* [2007] HCA 34 provides support for the view that the Parliament may indicate, in the legislation creating a right, that the right is defeasible and therefore subject to future modification or extinguishment, by or under later legislation, without compensation.

12 In *Santos*, the High Court considered a quantifiable right to compensation under Part V of the *Work Health Act* (NT). The critical features were as follows:

- (a) the right was expressed to be “subject to this Part”;
- (b) the right was expressed to be determined “in accordance with this Part”;
- (c) the quantum of the right was expressed to be determined “as is prescribed”.

13 In *Santos*, the High Court observed that the statutory licensing scheme for offshore petroleum exploration, the validity of which was upheld in *Commonwealth v WMC Resources* (1998) 194 CLR 1, “was constructed so as to subject the scope and incidents of licences to the form of the legislation from time to time”. In *WMC*, the High Court considered a permit, and the relevant provisions were as follows:

- (a) the rights conferred by a permit “while it remains in force” were expressed to be “subject to this Act”;
- (b) a reference in the Act to a permit was defined to mean “a reference to the permit ... as varied for the time being under this Act”.

14 In *Santos*, the High Court said “In *WMC*, as with Part V of the *Work Health Act*, by express legislative stipulation in existence at the time of the creation of the statutory ‘right’, its continued and fixed content depended upon the will from time to time of the legislature which created that ‘right’”.

15 Even though the High Court decided in *Santos* that certain phrases were effective to indicate that certain rights were defeasible, a more transparent approach should be followed to indicate defeasibility.

16 Accordingly, if you are instructed to indicate, when you are drafting legislation creating a right, that the right is defeasible and therefore subject to future modification or extinguishment, by or under later legislation, without compensation, you should draft a provision along one of the following lines:

Model provision version 1—for use in a case where the legislation creating the right does not contain provisions indicating that the right is subject to modification or extinguishment under provisions that come into existence, or are already in existence, when the right is created

A *[right]* granted under this *[legislation]* is granted on the basis that:

- (a) the *[right]* may be cancelled, revoked, terminated or varied by or under later legislation; and
- (b) no compensation is payable if the *[right]* is so cancelled, revoked, terminated or varied.

Model provision version 2—for use in a case where the legislation creating the right contains provisions indicating that the right is subject to modification or extinguishment under provisions that come into existence, or are already in existence, when the right is created

A *[right]* granted under this *[legislation]* is granted on the basis that:

- (a) the *[right]* may be cancelled under *[insert reference to relevant provision]*; and
- (b) the *[right]* may be revoked under *[insert reference to relevant provision]*; and
- (c) the *[right]* may be terminated under *[insert reference to relevant provision]*; and
- (d) the *[right]* may be varied under *[insert reference to relevant provision]*; and
- (e) the *[right]* may be cancelled, revoked, terminated or varied by or under later legislation; and
- (f) no compensation is payable if the *[right]* is cancelled, revoked, terminated or varied as mentioned in any of the above paragraphs.

17 Each version of the model provision will need to be modified to suit the legislative scheme to which the model provision relates.

18 If:

- (a) you are inserting a new Chapter, Part or Division etc. into legislation that already contains provisions dealing with the creation of a right; and
- (b) the new Chapter, Part or Division etc. contains provisions dealing with the creation of a new right;

you should consider whether it is prudent to make it clear that the relevant model provision does not, by implication, affect the interpretation of the provisions relating to the existing right.

19 AGS advice should be sought if you are instructed to indicate, when you are drafting amendments dealing with a right granted under legislation that existed before the

commencement of the amendments, that the right is defeasible and therefore subject to future modification or extinguishment, by or under later legislation, without compensation.

Depending on the application of the amendments, such an instruction could raise a significant acquisition of property issue.

20 This Direction is not intended to cast doubt on the efficacy of the phrase “subject to this [*legislation*]”, or any other phrase, that may have been used in existing legislation to indicate that a right is defeasible and therefore subject to future modification or extinguishment, by or under later legislation, without compensation.

Implied freedom of political communication

21 The following should be used as a model of a provision that requires legislation to be read down so that it does not infringe the constitutional doctrine of implied freedom of political communication:

Implied freedom of political communication

This [*legislation*] does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

State banking and State insurance

22 The following should be used as a model of a provision protecting legislation from invalidity because of possible application to State banking and State insurance:

[*Legislation*] not to apply to State banking, or State insurance, within that State

This [*legislation*] does not apply with respect to State banking, or State insurance, that does not extend beyond the limits of the State concerned.

23 Avoid the older method of defining “financial corporation”, as in subsection 4(1) of the *Competition and Consumer Act 2010*, as this was held invalid in *Bourke v. State Bank of New South Wales* (1990) 170 CLR 276.

Imposition of tax

24 The following should be used as a model of a provision protecting legislation from invalidity because of possible imposition of taxation:

[*Legislation*] does not impose tax

This [*legislation*] does not apply so as to impose any tax.

This type of provision is typically used in provisions applying the laws of the Commonwealth to places or areas of particular kinds (eg. para 4(5)(a) of the *Commonwealth Places (Application of Laws) Act 1970*, section 85 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and subsections 46(5) and 47(5) of the *Sea Installations Act 1987*). Application provisions such as these are otherwise broad enough to cover Commonwealth laws that impose taxes.

Fees

25 There is no legal need for a provision along the lines of:

(#) The fee must not be such as to amount to taxation.

AGS has advised that it is inherent in the concept of a “fee” that the liability does not amount to taxation. However, it is quite common to put such a provision in anyway to avoid confusion and to emphasise the point that we are dealing with fees and not taxes. AGS has expressed the view that such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed. If you are unsure whether something you are drafting is a fee, you should seek AGS advice.

26 Do not include a provision to the effect that a fee must reasonably relate to the expenses incurred or to be incurred in relation to the matters to which the fee relates. AGS has advised that it could be narrower than the provision set out in paragraph 25.

Different subject matters of taxation

27 There are 2 kinds of situations that can arise. One involves a general tax that may in different circumstances involve imposition of more than one of the following: a customs duty; an excise duty; another tax that is neither a customs duty nor an excise duty. A package of 3 Imposition Bills is usually required. See for example the *A New Tax System (Goods and Services Tax Imposition—General) Act 1999*, *A New Tax System (Goods and Services Tax Imposition—Customs) Act 1999* and the *A New Tax System (Goods and Services Tax Imposition—Excise) Act 1999*. There may be cases where additional Imposition Bills are required (eg. the *Sales Tax Imposition (In Situ Pools) Act 1992*).

28 The other kind of situation is where an imposition Act that does not impose customs or excise duties nonetheless has a particular aspect that may involve a different subject matter of taxation. A separate Imposition Bill is needed dealing with one of those aspects as a separate subject matter of taxation (eg. section 3 of the *Income Tax (Fund Contributions) Act 1989*, together with subsection 5(4) of the *Income Tax Act 1986*). (This issue does not arise with Acts that impose customs or excise duties, because the one subject matter of taxation rule under section 55 of the Constitution does not apply.)

Discrimination and preference

29 The following should be used as a model of a provision protecting legislation from invalidity arising from a power being exercised in a way that would result in a breach of paragraph 51(ii) or section 99 of the Constitution:

Commonwealth not to discriminate or give preference

A power conferred by this [*legislation*] must not be exercised in such a way as to:

- (a) discriminate between States or parts of States within the meaning of subparagraph 51(ii) of the Constitution; or
- (b) give preference to one State or any part thereof within the meaning of section 99 of the Constitution.

30 For an example of a provision protecting a taxation law from invalidity if the operation of a geographical test is held to result in a contravention of section 99 of the Constitution, see subsection 140(4) of the *Fringe Benefits Tax Assessment Act 1986*.

Discrimination and preference; abridgement of water rights

31 Section 11 of the *Water Act 2007* is an example of a provision for reading down a law that contravenes section 99 or 100 of the Constitution so that the law can still operate on the basis of powers or matters not affected by that section of the Constitution.

Taxation of property belonging to a State

32 The following should be used as a model of a provision protecting an Act from imposing a tax on property of any kind belonging to a State:

Act does not impose levy on property of a State

- (1) This Act does not impose a tax on property of any kind belonging to a State.
- (2) In this section, *property of any kind belonging to a State* has the same meaning as in section 114 of the Constitution.

33 Some provisions also provide that the Australian Capital Territory and the Northern Territory are to be treated as States for the purposes of this provision. It is a matter of policy whether such a provision is included. There is no constitutional requirement to do so.

Uniformity of bounties

34 The following should be used as a model of a provision protecting a law from invalidity arising from a power being exercised in a way that would result in a breach of the requirement that bounties be uniform:

Uniformity

A power conferred on any person by this Act must not be exercised in such a manner that bounty would not be uniform throughout the Commonwealth within the meaning of paragraph 51(iii) of the Constitution.

This is the form of uniformity provision commonly included in bounty legislation.

Freedom of interstate trade etc.

35 For an example of a provision protecting a law from invalidity arising from a power being exercised in a way that would be inconsistent with section 92 of the Constitution, see section 49 of the *Interstate Road Transport Act 1985*.

Incontestable taxation

36 For an example of a provision protecting a law from invalidity arising from a power being exercised in a way that would result in an incontestable tax, see subsection 264A(13) of the *Income Tax Assessment Act 1936*.

Part 3—Severability provisions

37 This Part examines the drafting of severability provisions designed to prompt the High Court to read down operative provisions of general application which are held to exceed the available heads of legislative power.

Limitations of section 15A of the Acts Interpretation Act

38 Section 15A of the *Acts Interpretation Act 1901* provides as follows:

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

39 Section 15A does not mean that a provision drafted without regard to the extent of Commonwealth legislative power will be valid in so far as it happens to apply to the subject matter of a particular power. The High Court has held that section 15A is subject to limitations. To be effective, a severability provision must overcome those limitations.

40 The first limitation is, if there are a number of possible ways of reading down a provision of general application, it will not be so read down unless the Parliament indicates which supporting heads of legislative power it is relying on. For a discussion of this limitation, see *Pidoto v. Victoria* (1943) 68 CLR 87 at 108-110 and *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. The Concrete Pipes case concerned a severability provision which was held to be ineffective because the list of supporting heads of legislative power did not exhaust the purported operation of the operative provision in question.

41 The second limitation is that a provision of general application will not be read down unless the Parliament indicates an intention that the provision is to have a distributive operation: "... did [the Parliament] intend that the particular command or requirement expressed in the provision should apply to or be fulfilled by each and every person within the class independently of the application of the provision to the others; or were all to go free unless all were bound?" (Dixon J. in *The King v. Poole; Ex Parte Henry (No. 2)* (1939) 61 CLR 634 at 652).

Severability provisions that may not be effective

42 It is undesirable to draft severability provisions along the lines of the following because they do not indicate a clear intention to overcome the limitations of section 15A:

Example 1 (not to be used):

The Authority may perform its functions only so far as they are not in excess of the functions that may be conferred on it by virtue of any of the legislative powers of the Parliament.

[In this example, there is no indication which supporting heads of legislative power are being relied on.]

Example 2 (not to be used):

Without limiting the operation of this [*legislation*], a reference in this [*legislation*] to supply includes a reference to supply:

- (a) by a corporation to which paragraph 51(xx) of the Constitution applies; or
- (b) in the course of trade or commerce:
 - (i) with other countries; or
 - (ii) among the States; or
 - (ii) within a Territory; or
 - (iv) between a State and a Territory; or
 - (v) between 2 Territories.

[In this example, there is nothing to indicate that the legislation is to have, in relation to the listed kinds of supply, an application that is independent of its application to other kinds of supply.]

Severability provisions that are likely to be effective

43 The following are examples of severability provisions that are likely to be effective:

Example 1:

The Authority may perform its functions only:

- (a) by way of spending money appropriated by the Parliament for the purposes of the Authority; or
- (b) for purposes related to collecting statistics; or
- (c) for purposes related to external affairs; or
- (d) in relation to a Territory.

Example 2:

Without limiting its effect apart from this section, this [*legislation*] also has the effect it would have if each reference to supply were, by express provision, confined to supply:

- (a) by a corporation to which paragraph 51(xx) of the Constitution applies; or
- (b) in the course of trade or commerce:
 - (i) with other countries; or
 - (ii) among the States; or
 - (ii) within a Territory; or
 - (iv) between a State and a Territory; or
 - (v) between 2 Territories.

[In this example, it is assumed that the operation of the legislation, in its application to supply apart from the severability provision, is at least arguably valid (for example, on the basis of AGS advice).]

An alternative approach to severability — the “extended operation” device

44 The “extended operation” device involves:

- (a) core operative provisions with a narrow application clearly based on a particular head of legislative power; and

- (b) one or more special “extended operation” provisions to extend the operation of the core provisions in relation to one or more other heads of legislative power.

For example, see Division 3 of Part 1.4 of the *Radiocommunications Act 1992*.

45 This device is suited to those cases where it is undesirable to express an operative provision with a wide application because, even on an adventurous theory about the width of a Commonwealth power, the provision cannot be characterised as an exercise of that power (for example, a prohibition on mining activity in the States).

Part 4—Appropriation issues

The constitutional prohibition on retrospective appropriations

46 The first paragraph of section 83 of the Constitution provides as follows:

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

47 AGS has advised that section 83 prohibits retrospective appropriations. A breach of section 83 cannot be remedied by retrospective validating legislation.

48 The following approach is one way of avoiding a contravention of section 83 in a case involving a “back-dated” increase to payments by the Commonwealth to a person under an Act:

- (#) On the commencement of the amending Act, the person becomes entitled to receive a lump sum equal to the amount by which:
- (a) the “new” level of payment in respect of the relevant pre-commencement period; exceeds
 - (b) the “old” level of payment in respect of the relevant pre-commencement period.
- The Consolidated Revenue Fund is appropriated to the extent necessary for the lump sum payment.

49 Another option is waiver of the Commonwealth’s right to recover invalid payments. AGS has advised that waiver is possible, subject to the requirements of the *Financial Management and Accountability Act 1997*. It might be advisable for instructors to seek AGS advice on whether waiver would be possible in the particular case. The right to recover could also be waived legislatively (eg. see subitem 20(2) of Schedule 1 to the Australian Wool Research and Promotion Organisation Amendment Bill 1998).

Part 5—Taxation issues

The penalty/tax distinction: language to be used in objects clauses etc.

50 It is possible to rely on the taxation power for legislation that encourages or discourages particular conduct by imposing a tax. When drafting such legislation, it is important to remember the distinction between a tax and a penalty.

51 The two classes of liability have been described as follows:

- (a) a tax, which may be intended to encourage, or discourage, particular conduct, but falls short of prohibiting particular behaviour; and
- (b) a penalty, which describes or forbids particular conduct and imposes a monetary sanction for a failure to comply.

(See *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 13 where Kitto J said of legislation exempting superannuation funds from income tax if the funds invested in public securities:

The legislative policy ... is to provide trustees of superannuation funds with strong *inducement* to invest sufficiently in Commonwealth and other public securities. The raising of revenue may be of secondary concern. But the enactment does not *prescribe* or *forbid* conduct [*emphasis added*].)

52 An example of this is the training guarantee legislation, a tax that was imposed to encourage employers to spend a specified amount on training. The tax was imposed on any shortfall in expenditure below that amount. If employers spent the amount, they did not have to pay tax. Subsection 3(3) of the *Training Guarantee (Administration) Act 1990* provided:

- (3) The objects of this Act are to be achieved by guaranteeing a minimum level of expenditure by employers on quality employment related training.

53 In the *Northern Suburbs General Cemetery Reserve Trust v. Commonwealth* (1993) 176 CLR 555, it was argued that this Act was a coercive measure, and not a tax, and that subsection 3(3) supports this view. The High Court unanimously rejected this view and held that the law was a valid exercise of the Commonwealth's taxation power. However, the Attorney-General's Department has advised that legislation should avoid referring to a tax as a coercive measure or as having no revenue-raising purpose and that any statement of objects in tax legislation should avoid the kind of language found in the above subsection.

Recipients of the proceeds of taxes and of other amounts

The self-executing CRF

54 Under section 81 of the Constitution, all "revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund".

55 The Commonwealth used to take the view that money "raised or received" by the Commonwealth did not become part of the Consolidated Revenue Fund (the **CRF**) until it was credited to a central ledger on account of the CRF.

56 On the basis of advice of the Commonwealth Solicitor-General, Dr David Bennett QC, given in 1998, the Commonwealth now acts on the view that the CRF is "self-executing", that is, moneys automatically become part of the CRF upon being "raised or received" by the Executive Government and independently of any crediting to a central ledger on account of the CRF (Vol. 100, p. 8430). This applies both to money raised and received by the Commonwealth directly and to money raised or received by a person on behalf of the Commonwealth. In *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35, the High Court confirmed that the CRF is "self-executing".

Taxes should be payable to the Commonwealth

57 In *Australian Tape Manufacturers Association Ltd v. Commonwealth* (1993) 176 CLR 480, the High Court said that “It is essential to the validity of a law ... ‘imposing taxation’ ... that the moneys raised by such a law shall form part of the Consolidated Revenue Fund ...” (page 506).

58 Only money “raised or received” by the Commonwealth can form part of the CRF.

59 Legislation should be drafted so that the proceeds of taxes are payable to the Commonwealth (either directly or to a person on behalf of the Commonwealth). This ensures that the proceeds form part of the CRF.

Receipt of amounts by an agent of the Commonwealth

60 AGS has advised that if a person receives the proceeds of a tax as an agent of the Commonwealth, the person holds that money as an agent of the Commonwealth and the money would, on the basis of a self-executing concept of the CRF, become part of the CRF upon being received by the agent (Vol. 102, page 3335 (16/02/2000)).

61 The same principle applies to any other amount received by a person on behalf of the Commonwealth. The amount forms part of the CRF on receipt by that person (see AGS opinion 03139576, 24/02/2004).

62 If you are drafting legislation for the receipt of an amount by an agent of the Commonwealth, you should consider whether the obligations and restrictions in the *Financial Management and Accountability Act 1997* (the *FMA Act*) are applicable to, and appropriate for, the handling of the amount by the agent.

63 The FMA Act imposes obligations and restrictions on “officials” and Ministers in relation to “public money”.

64 In the FMA Act, the expression “public money” includes “money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money”.

65 For examples of FMA Act obligations that could apply to money collected by agents (even when the agents are not officials), see:

- (a) section 12 of the FMA Act (which deals with agreements for receipt or custody of public money by “outsiders”); and
- (b) section 19 of the FMA Act (which requires the Finance Minister to cause proper accounts and records to be kept in relation to the receipt of “public money”).

66 If the obligations and restrictions in the FMA Act are not appropriate, you should consider excluding the FMA Act and providing for alternative arrangements for the handling of the proceeds by agents.

67 For an example of alternative arrangements, see Part 4 of Schedule 2 to the *Dairy Produce Act 1986* (inserted by the *Dairy Industry Adjustment Act 2000*). That Part:

- (a) provides for levy to be paid to collection agents on behalf of the Commonwealth; and
- (b) requires the agents to remit the levy to the Commonwealth; and
- (c) requires the agents to issue receipts for levy; and
- (d) excludes the operation of the FMA Act in relation to levy collected by agents.

Standing appropriations of the proceeds of a tax

68 In many cases, it will be necessary to consider a scheme providing for the equivalent of the proceeds of a tax to be made available to a non-Commonwealth person on a standing basis.

69 The scheme should be structured as follows:

- (a) the tax should be made payable to the Commonwealth (provision may be made for the tax to be paid to a person on behalf of the Commonwealth);
- (b) there should be paid to the non-Commonwealth person, out of the Consolidated Revenue Fund, an amount equal to the amount of tax collected (an appropriation provision is required).

70 For an example of such an appropriation provision, see clause 83 of Schedule 2 to the *Dairy Produce Act 1986* (inserted by the *Dairy Industry Adjustment Act 2000*).

Set-off of amounts collected by, and appropriated to, agent

71 A legislative scheme may provide for a person to receive the proceeds of a tax as an agent of the Commonwealth and for a standing appropriation under which there is to be paid to the agent, out of the CRF, an amount equal to the amount of tax collected (see paragraphs 68 to 70). If you are drafting such a scheme, you should consider whether the amounts collected and appropriated can be set off against each other.

72 AGS has advised that, in these circumstances, amounts could automatically form, and be appropriated from, the CRF without Parliament or the Commonwealth ever having to know the precise amount collected and appropriated (Vol. 101, p. 6472 (7/07/1999)).

Reference of Bills to AGS

73 AGS advice should be sought if there is any doubt about the application of paragraphs 50 to 72 to a particular Bill.

Part 6—Trading or financial corporations

74 AGS has advised to the effect that the expression “financial corporation within the meaning of s.51(xx) [*of the Constitution*]” does not mean the same as “financial corporation to which s.51(xx) [*of the Constitution*] applies” (Geoffrey Kennett, Vol. 96, p. 1765 (4/03/1994)).

75 The justification for this opinion is that “financial corporation”, without the words of limitation found in paragraph 51(xx) (ie “formed within the limits of the Commonwealth”), would include foreign corporations engaged in relevant (ie financial) activities, and that the expression “within the meaning of s.51(xx)” does not pick up those words of limitation. Presumably the same arguments apply to the expression “trading corporation within the meaning of paragraph 51(xx)”.

76 The opinion points out that this view does not have any constitutional implications, since the broader interpretation of “financial corporation” only extends it to certain foreign corporations which are in any case within the scope of the Commonwealth’s legislative powers.

77 However, the opinion may have significant drafting consequences, especially where the policy intent is to deal only with local trading or financial corporations (for instance, in the context of conferring benefits or rights). You should bear this opinion in mind, and ensure that any references to corporations that are referred to in paragraph 51(xx) of the Constitution catch exactly and only the intended corporations.

78 The distinction drawn in the opinion between the *meaning* of an expression used in a provision and the *application* of the provision is, of course, a distinction of more general relevance to drafters, and you should bear it in mind in other contexts.

Part 7—Conferring jurisdiction on Territory courts

79 In relation to conferring jurisdiction on Territory courts, AGS has advised that:

“32. If the jurisdiction of Territory courts is to be equated with that of State courts, it is necessary to consider a constitutional limit on the jurisdiction of Territory courts that does not apply to State courts. Section 77(iii) allows the Parliament to invest federal jurisdiction in a State court without regard to the jurisdictional limitations of the court. However, Territory courts are invested with federal jurisdiction under s 122 of the Constitution. Section 122 gives the Parliament power to make laws for the government of any Territory. Jurisdiction can be conferred on a Territory court only for the government of the Territory, and this is likely to mean that jurisdiction can be conferred only in matters ‘in or concerning a Territory’ (see Zines, p 189).

33. For this reason, Commonwealth conferrals of jurisdiction on Territory courts in matters arising under Commonwealth laws (such as s 155 of the Patents Act 1990 and s 49 of the Sea Installations Act 1987) confer the jurisdiction to the extent that, or so far as, the Constitution permits or in similar terms.” (Jenny Burnett, Vol. 109, p. 4778 (14/06/2005)).

80 If you are drafting a provision to confer jurisdiction on Territory courts, the words “to the extent that the Constitution permits” should be used. For example:

- (1) Jurisdiction is conferred on the Supreme Courts of the States and Territories [*specify extent of jurisdiction*].
- (2) The jurisdiction conferred by subsection (1) on the Supreme Courts of the Territories is conferred to the extent that the Constitution permits.

Part 8—Section 80 issues

81 Section 68 of the *Judiciary Act 1903* deals with the application of State and Territory laws, and the jurisdiction of State and Territory courts, in relation to prosecutions for offences against the laws of the Commonwealth in like manner as it deals with the application of State and Territory laws and the jurisdiction of State and Territory courts. Section 68 applies in relation to persons charged with offences against the laws of the Commonwealth committed within the State or Territory concerned or whose trial for offences committed elsewhere may lawfully be held in that State or Territory.

82 This recognises the effect of section 80 of the Constitution under which the trial on indictment of offences against a law of the Commonwealth committed in a State must be held in that State. (Section 68 was extended to cover Territories by the *Judiciary Amendment Act 1976*.)

83 Under section 80, the trial of such an offence not committed within any State (for example an offence committed in the territorial sea) is to be held at such place or places as the Parliament prescribes. The Parliament has made general provision on this matter by section 70A of the *Judiciary Act 1903*, which allows such a trial to be held in any State or Territory, and it is not necessary to make any further provision in this respect.

84 The only other requirement to enable the trial of an offence not committed in a State or Territory to be lawfully held in a State or Territory is the existence in that State or Territory of a court of competent jurisdiction. Section 68 provides for the jurisdiction of State and Territory courts in this respect. There is vested in the several courts of each State or Territory “the like jurisdiction” as they have in respect of offences against the laws of the State or Territory. However this jurisdiction is, by subsection 68(5), freed from “any limits as to locality” that may exist under the law of the State or Territory.

85 Section 68 makes it unnecessary, when creating extra-territorial offences, to include special provisions conferring jurisdiction on State and Territory courts.

86 In the case of Territory courts, it seems probable that their jurisdiction in respect of offences committed outside the Territory is subject to a constitutional limitation requiring some sufficient nexus between the facts or circumstances of the prosecution and the government of the Territory. The case of *R. v Bull* (1974) 131 CLR 203 appears to establish that the jurisdiction of a Territory court can extend to offences against the law of the Commonwealth committed in the territorial sea adjacent to the Territory. In the past, attempts have been made in some Acts to define a nexus for this purpose. In view of the uncertain state of the law, it is proposed, until the position becomes clearer, not to attempt to do this in future legislation but to rely on a “reading down” by the courts of the jurisdiction conferred by section 68.

Part 9—Surplus revenue issues

87 Section 94 of the Constitution provides that “the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth”. AGS has advised that this provision imposes an obligation on the Commonwealth to distribute its surplus revenue to the States, and the Commonwealth Parliament has provided in the *States Grants Act 1927* for a process by which surplus revenue should be calculated and paid.

88 AGS has also advised that the *Surplus Revenue Case (New South Wales v The Commonwealth)* (1908) 7 CLR 179) stands for the proposition that amounts cease to be surplus revenue within the meaning of section 94 when they are subject to an appropriation for a Commonwealth purpose, at least for a quantifiable amount, whether or not the amounts have left the Consolidated Revenue Fund.

89 An example of a quantifiable amount would be the balance from time to time of a Special Account.

90 AGS advice should be sought if there is any doubt about whether draft legislation could create surplus revenue.

Part 10—Issues arising from the Hughes case

91 The basic decision in *R v Hughes* (2000) 171 ALR 155 has been set out in detail in numerous AGS advices. There is also an excellent paper by Graeme Hill (*R v Hughes* and the Future of Cooperative Legislative Schemes (2000) 24 MULR 478).

92 In very broad terms:

- (a) the Court appeared to affirm the Commonwealth’s ability to undertake State functions where no more than the *exercise of a power* was concerned, but there may be a “constitutional imperative” for any *duties* imposed on Commonwealth bodies or officers to be imposed by Commonwealth law. That is, it may be beyond the legislative power of a State to impose a duty on a Commonwealth body (even with the Commonwealth Parliament’s consent);
- (b) where a Commonwealth law imposes a duty on a Commonwealth body or officer to exercise a power or perform a function conferred by State law, the imposition of that duty must be supported by a head of Commonwealth power, especially where the power or function may affect the rights of individuals;
- (c) if a State law purports to grant a wider power or authority to a Commonwealth body or officer than Commonwealth law consents to, the State law will be inconsistent to that extent with the Commonwealth law and will be invalid under s 109 of the Constitution.

93 There are various options for dealing with the decision in *Hughes*. The 2 options that have been adopted in recent legislation (aside from State references of power) are set out below.

Option 1—TGA style provisions

94 The current preferred precedent for this model is sections 6AAA to 6AAC of the *Therapeutic Goods Act 1989*. This option has been favoured because it is relatively simple, does not require major structural change and does not require much, if any, legislative amendment by States.

95 Provisions of this kind are intended to overcome the decision in *Hughes* by providing the following:

- the Commonwealth authorises the imposition by State law of duties, as well as the conferral by State law of functions and powers, on Commonwealth officers and authorities;
- any duty purported to be imposed under a State law is taken to be imposed by force of State law where State legislative power is sufficient to support that duty and, where that is not the case, Commonwealth legislative power is relied upon (to the extent that it is sufficient to support the duty);
- if the imposition of a duty on a Commonwealth officer or authority by an applied State law contravenes a relevant constitutional doctrine or exceeds the legislative power of both the State and the Commonwealth, the State law is taken to confer a discretionary power rather than a duty on the Commonwealth officer or authority;
- if an applied State law purports to confer jurisdiction in relation to a matter on the Federal Court, the jurisdiction is taken to be conferred on the court by the Commonwealth Act.

Option 2—Australian Crime Commission Act style provisions

96 The approach taken in the *Australian Crime Commission Act 2002* is along similar lines to the TGA model but it identifies particular sources of Commonwealth legislative power. In particular, the *Australian Crime Commission Act 2002* utilises the concept of “federally relevant criminal offence”, which is a term limited by reference to criminal activity within constitutional reach. Provisions similar to the TGA provisions are also included, although with some differences in scope.

97 AGS has advised that the advantage of this approach is that it more explicitly reduces constitutional uncertainty.

Conclusion

98 If you need to draft provisions to deal with *Hughes*, you should familiarise yourself with the options referred to above. AGS advice should be sought on the provisions you draft.

Part 11—Issues arising from the Zentai case

99 In the case of *O’Donoghue v Ireland; Zentai v Hungary* and *Williams v USA* [2008] HCA 14, the High Court rejected a challenge to the validity of conferral of a Commonwealth function on a State magistrate under the *Extradition Act 1988*. The majority judgment found that a conferral by Commonwealth law of administrative powers on State officers without State legislative consent was valid. The Court found that the law conferred powers, rather than imposing duties, as argued by the appellants. This leaves open the question of whether there is any constitutional limitation precluding the imposition of a duty on a State officer without State legislative approval.

100 The implications from this case for drafters are:

- (a) In the absence of advice to the contrary, it is appropriate to assume that arrangements involving the conferral of powers or duties on State officers

remain valid. The Attorney-General's Department has suggested that Departments seek up-to-date advice from AGS as to the validity of any such arrangements.

- (b) Valid executive arrangements in place to allow Commonwealth legislation, which is within constitutional power, should still be adequate to enable legislation to impose duties on State officers. This is, of course, subject to the principles espoused in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31. This position may be open to change in a future challenge.

Conclusion

101 If you are drafting provisions that confer functions, powers or duties on State officers, you should seek AGS advice if there is a likelihood that a duty will be conferred on a State officer and there is no means by which the State may refuse to allow conferral of the duty. The means by which this is achieved may be any of the following:

- (a) an implication of the appointment procedures under the Commonwealth legislation (that is, the scheme is one into which the State can choose to opt-in);
- (b) that appointment under the Commonwealth legislation is subject to the agreement of the State or specified officers of the State;
- (c) formal executive agreement between the State and the Commonwealth;
- (d) State legislation.

Part 12—Responsibility for constitutional validity and use of constitutional checklist

SES Bill drafter's responsibility for constitutional issues

102 By submitting Bills for LAP, an SES Bill drafter gives an assurance that he or she is satisfied that the Bill is constitutionally valid (except to the extent to which any concerns or reservations he or she has about the constitutional validity of the Bill are set out in the LAP memo).

103 The SES Bill drafter's assurance may be based either on his or her own judgement or on AGS advice.

Constitutional checklist

104 A constitutional checklist has been developed for use by Bill drafters.

105 Bill drafters are encouraged to use the constitutional checklist as a tool for ensuring that the consideration they give to the constitutional validity of the legislation they work on is systematic and thorough. Drafters are encouraged:

- (a) to make use of the checklist from an early stage in the drafting project; and

- (b) to revisit the checklist from time to time during the course of the drafting project (especially if it is a long-term one); and
- (c) to put completed constitutional checklists on the correspondence file for the legislation concerned.

106 SES Bill drafters are expected to make use of the constitutional checklist as a training tool for the APCs working with them and to encourage those APCs to use the checklist as a matter of routine to make sure that their consideration of constitutional issues is systematic and thorough.

107 To assist in the creation of constitutional checklists, the Constitutional Checklist macro can be run from within an open Bill document, Bill insert document or Parliamentary amendment document to automatically generate a constitutional checklist with the details for the front page of the checklist already filled in.

108 The checker macro will automatically generate a prompt to ask whether a constitutional checklist has been completed. This means that the prompt will be given whenever a Bill is prepared for editorial checking.

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2 October 2012

Document History		
Release	Release date	Document number
1.0	1 May 2006	s06rd382.v01.doc
2.0	12 March 2008	s06rd382.v03.doc
2.1	27 August 2008	s06rd382.v06.doc
3.0	29 September 2008	s06rd382.v09.doc
3.1	21 February 2011	s06rd382.v15.doc
4.0	2 October 2012	s06rd382.v23.docx

Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 9 of 2005.