PARLIAMENTARY COUNSEL

Drafting Direction No. 3.10
Legislation that refers to or affects Australian governments or jurisdictions

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Contents

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 (i.e. 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) 171CLR 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*.

2 If a provision of an Act binds the Crown, a legislative instrument made for that provision will have the same operation.

Express provisions—binding the Crown

3 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.

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

Crown not liable to prosecution

5 If it is necessary to provide expressly that the Crown in all relevant (i.e. Australian capacities) is not liable to prosecution, there is no need to list all the relevant capacities, e.g.:

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

6 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

7 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 3 could easily be modified, e.g.:

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

Binding the Crown in right of Norfolk Island

8 Where a Bill is expressed to bind the Crown in right of the Australian Capital Territory or the Northern 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

9 In referring to the Federal Parliament, it is normally sufficient to refer to the Parliament (see section 2B 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.

References to Legislative Assemblies

10 Drafts should specify references to the following Legislative Assemblies as:

- the Legislative Assembly for the Australian Capital Territory
- the Legislative Assembly of the Northern Territory
- the Legislative Assembly of Norfolk Island.

No need to use "the State of"

11 It is unnecessary to refer in a draft 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 (e.g. "There is payable to Victoria, by way of financial assistance…") and in references to State institutions, e.g.:

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

Order of references to States and Territories

12 If all or some of the States are specified in a draft, 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

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

References to State or Territory Acts

14 A reference to an Act of a State or Territory should give the Act's short title in italics, followed by (in regular font and in brackets) the following abbreviation for the jurisdiction the Act is from:

- (NSW)—New South Wales
- (Vic.)—Victoria
- (Qld)—Queensland

- (WA)—Western Australia
- (SA)—South Australia
- (Tas.)—Tasmania
- (ACT)—Australian Capital Territory
- (NT)—Northern Territory.

An example is "…the *Australian Financial Institutions Commission Act 1992* (Qld)".

15 The same practice should be followed in those cases where legislation needs to refer to subordinate legislation of a State or Territory.

Governors

16 A reference in a draft 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".

17 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 draft 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

18 Where you draft a reference to a Commonwealth, State, Australian Capital Territory, Northern Territory or Norfolk Island 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 Australian Capital Territory, a Minister of the Northern Territory, a Minister of Norfolk Island.

19 The even simpler expressions, "a Commonwealth Minister", "a State Minister", etc., should be used with care, since legislation may define these expressions to mean Ministers of the relevant jurisdictions with particular portfolio responsibilities.

Treatment of ACT, NT and Norfolk Island

20 In drafting legislation, the Australian Capital Territory, the Northern Territory and Norfolk Island 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 any of those Territories should be referred to as the "Government of the Territory" and not as the "Administration" (even though section 36 of the *Australian Capital Territory (Self-Government) Act 1988* refers to the Australian Capital Territory Executive, Part IV of the *Northern Territory (Self-Government) Act 1978* is headed "The Administration" and Part II of the *Norfolk Island Act 1979* is headed "Administration"); and

- Ministers should be referred to as "Ministers of the Territory" (see also paragraphs 18 and 19).

Names of Territories (other than ACT and NT)

21 The proper names of Australia's Territories (other than the Australian Capital Territory and the Northern Territory) 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

22 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 legislation to a Territory (other than ACT and NT)

Application of legislation to the Jervis Bay Territory

23 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.

24 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 legislation to external Territories

25 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*).

26 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.

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

28 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.

29 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 the definition of ***Australia*** in section 2B of the *Acts Interpretation Act 1901*. An appropriate definition would be:

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

30 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

31 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.

32 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

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

34 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

35 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.

36 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

37 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

38 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

39 If legislation 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, this office does not have any function of monitoring or enforcing the consultations requested in the letter.

Peter Quiggin
First Parliamentary Counsel
2 October 2012

Document History

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 7 of 2005.

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 law; 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.