Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989

Date Introduced: 31 May 1989
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

Digest of Bill

Purpose
To exempt the Commonwealth and Commonwealth corporations from the operation of certain State and Territory laws.

Background
At common law the Crown is immune from all civil actions because the Queen cannot be forced as a defendant into her own courts. However, the Crown, both in right of the Commonwealth and in right of each State, has been made liable to civil actions in contract and in tort (i.e. negligence) by legislation. For example, section 56 of the Judiciary Act 1903 provides that a person making a claim against the Commonwealth, whether in contract or tort, may bring a suit against the Commonwealth.

Section 64 of the Judiciary Act 1903 provides that in any suit to which the Commonwealth or a State is a party, the rights of parties should as nearly as possible be the same as in a suit between subject and subject. For many years their was disagreement as to whether this provision was limited to procedural law (i.e. the formal steps to be taken in an action). In Maguire v Simpson (1977) CLR 362, the High Court held that in every suit to which the Commonwealth was a party, section 64 required the rights of the parties to be ascertained, as nearly as possible, by the same rules of law, substantive and procedural, as would apply if the Commonwealth were a subject instead of being the Crown, and that section 64 was not to be confined suits in which a State was a party. In Commonwealth v Evans Deakin Industries Ltd (1986) 66 ALR 412, the High Court affirmed its earlier view.

Basically, these decisions mean that in civil proceedings the Commonwealth and its instrumentalities may be subject to State and Territory laws as if the Commonwealth were an ordinary person. In addition, the Commonwealth under section 64 may even be made liable by a State law which does not bind the State or which expressly declares that the Commonwealth is not bound (the latter case may arise through the operation of section 64 and section 109 of the Constitution).
Main Provisions

Clause 2 provides that clause 9 will commence one year after the date of Royal Assent, and clauses 3 – 8 and 10 – 13 three months after the date of Royal Assent.

Clause 5 provides that the Commonwealth will not be subject to any legislation of the Commonwealth, a State, or a Territory except: Commonwealth or Territory legislation that expressly or by necessary implication binds the Commonwealth, or the Crown in right of the Commonwealth; a codified tort law (i.e. a law that codifies, modifies, or extends the application of the common law of tort) other than a prescribed law; any law dealing with procedure in civil actions; and any prescribed laws.

The regulations may modify, in their application to the Commonwealth, prescribed State laws (clause 6).

Clause 7 provides that a person, other than a Commonwealth corporation, acting as a servant or agent of the Commonwealth will be subject, to the same extent as the Commonwealth, to Commonwealth, State, or Territory legislation.

Clause 8 provides that, except as otherwise provided by any Commonwealth or Territory Act, Commonwealth and Territory laws (including those to which the Commonwealth is not subject) will apply to Commonwealth corporations as if it were an ordinary corporation. However, if the corporation was not bound by the law prior to the commencement of this provision, the corporation will continue to be exempt from that law.

Clause 9 provides that, except where State laws are inconsistent with Commonwealth laws, State laws will apply to a Commonwealth corporation as if it were an ordinary corporation. In addition, the regulations may provide that a Commonwealth corporation is not subject to a State law that is in force at the commencement of this clause.

Except where the regulations otherwise provide, State laws that discriminate against Commonwealth corporations will not apply to those corporations (clause 10).

Amendments to the Judiciary Act 1903

Clause 13 provides that where the Commonwealth is a party to a suit, section 64 will not operate in relation to any rights of a party created by legislation to which the Commonwealth is not subject.

References
